IN THE SUPREME COURT OF JUDICATURE — QBCMI 97/0644/B
IN THE COURT OF APPEAL (CIVIL DIVISION) — QBCMI 97/0645/B
ON APPEAL FROM THE HIGH COURT OF JUSTICE — QBCMI 97/0646/B
QUEEN'S BENCH DIVISION — QBENI 97/0657/E
COMMERCIAL COURT — QBCMI 97/0648/B
(MR JUSTICE COLMAN)

Royal Courts of Justice
Strand, London WC2

Thursday, 31 July 1997

B e f o r e:

LORD JUSTICE SAVILLE
LORD JUSTICE WARD
LORD JUSTICE PHILLIPS

- - - - - -

THE SOCIETY OF LLOYD'S

Plaintiff/Respondent

- v -

(1) DENNIS HUGH REGINALD LEIGHS
(2) GEOFFREY HERBERT LYON
(3) DAVID WALTER WILKINSON

Defendants/Appellants

and

CANADIAN NAMES

Intervenors

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
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Official Shorthand Writers to the Court)

MR SIMON GOLDBLATT QC & MR VINCENT NELSON (Instructed by Epstein Grower & Michael Freeman, London, W1H 8DQ) appeared on behalf of the Appellants
MR ANTHONY GRABINER QC & RICHARD JACOBS (Instructed by Messrs Freshfields, 65 Fleet St, London, EC4Y 1HS) appeared on behalf of the Respondent
MR CRAIG ORR (Instructed by Warner Cranston, Pickfords Wharf, Clink St, London, SE1 9DG) appeared on behalf of the Intervenors

J U D G M E N T
(As approved by the Court)

This is the judgment of the Court to which all members have contributed. It is the latest of a series of judgments in which the Courts have had to consider challenges to the legitimacy of acts of the Society

of Lloyd's. In a number of them, including the two appealed against in this case, the history, structure and manner of operating of the Society and the Lloyd's market have been described in detail. In this judgment we have not found it necessary or desirable to repeat the exercise that has been so adequately undertaken in earlier decisions.

These appeals raise fundamental questions as to the efficacy of the complex scheme under which the Society of Lloyds ("the Society") has set out to resolve the avalanche of litigation that was threatening to destroy the Lloyd's market and many who traded in it. This scheme, described as the Reconstruction and Renewal Plan ("R & R"), involves a voluntary global settlement of claims of various descriptions made by and against Names in respect of business written in or before 1992 coupled with a Reinsurance and Run-Off Contract, in the nature of a global reinsurance to close, with a group of companies ("Equitas") formed specifically for this purpose. We shall call this "the Equitas Contract". The Society has, by a mechanism which we shall shortly describe, purported to procure that all Names with actual or potential liabilities in respect of non-life business written in or before 1992 are party to the Equitas Contract. If the Society has succeeded in this, Names who have declined to take part in the R & R settlement are, nonetheless, liable to pay premiums for the reinsurance cover provided by Equitas. Equitas has assigned the right to such premiums to the Society. In these three Actions, which are test cases, the Society has sued three such Names for premiums assigned to the Society by Equitas. The Names have pleaded a number of defences to these claims. In two separate trials Colman J. has rejected these defences, giving declaratory relief in favour of the Society under O.14 A RSC and summary judgment for the premiums under O.14. Against those decisions the Names now appeal. 215 Canadian Names, who have also rejected the R & R settlement offer, have been permitted to appear by Counsel by way of intervention both on the first hearing before Colman J. and before us.

By no means all the arguments that were advanced before Colman J. have been advanced before us. Those we have heard have been both refined and elaborated. In order to explain the defences raised, it

is first necessary to outline the nature of the Equitas Contract and the manner in which the Society has purported to procure that Names who have not agreed to the R & R settlement are nonetheless party to that Contract.

The Equitas Contract

Under the Equitas Contract Equitas has undertaken to reinsure Names' liabilities arising out of business written in and before 1992 and to run-off these reinsured liabilities. The reserve necessary to enable Equitas to perform these obligations has been calculated as has the premium to be paid by each Name in order to produce this reserve. For those Names who have accepted the R & R settlement offer, settlement funds of £3.2 billion have provided a source of the premiums to be paid to Equitas. The minority of Names who have rejected the settlement are liable to pay their Equitas premiums out of their own funds - always provided that the Society has successfully compelled them to be party to the Equitas Contract. The Society purports to have done so in the following manner.

Each of the Names entered into a standard form agreement with the Society, known as the 1986 General Undertaking, whose provisions include an undertaking by the Name to comply during the:

> "period of membership with the provisions of Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of any agreement or other instruments as may be prescribed and notified to the Member or his underwriting agent by or under the authority of the Council."

The Society contends that this General Undertaking has enabled the Council of Lloyd's, by the use of its statutory powers, to procure that all Names are party to the Equitas Contract.

Section 6(2) of the Lloyd's Act 1982 gives the Council the power to:

> "make such byelaws as from time to time seem requisite or expedient to the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society".

Pursuant this power, the Council made Byelaw No 20 of 1983 which empowers the Council to appoint a substitute agent to take over the whole or any part of a member's underwriting business and to give directions to both the substitute agent and the member in relation to the underwriting business taken over.

Pursuant to this Byelaw, on the 3rd September 1996, the Council appointed a substitute agent, "AUA 9", a company owned and indirectly controlled by Lloyds, to take over all non-life business written in or before 1992 for all Names. AUA 9 was directed to give effect to the R & R plan. Provision for that plan had been made in the previous year by Byelaw No. 22 of 1995 ("the R & R Byelaw"). More particularly, AUA 9 was directed to enter into the Reinsurance and Run-off Contract with Equitas on behalf of each Name. This AUA 9 purported to do.

The Defendants' Challenges

Before us the Defendants mounted three challenges, each of which they contended provided an independent defence to the Society's claim:

1) R & R was outside the "scope of the venture" that the Lloyds Acts authorised the Society to undertake. The R & R Byelaw and the directions given by the Council to implement the R & R plan were beyond the Council's powers. Thus no valid authority was conferred upon AUA 9 to bind the Defendants to the Equitas Contract.

2) Each of the Defendants was induced to enter into his agreement with the Society on terms of the General Undertaking by fraudulent misrepresentations made by the Society. Each of the Defendants has rescinded that agreement on the ground of this fraud, with retroactive effect, so

that at no time was any Defendant a Name over whom the Society had any authority. Hence none of the Defendants was party to the Reinsurance Contract with Equitas, concluded on behalf of those Names over whom the Society had authority.

3) Each Defendant is entitled to set off by way of defence to the Society's claim the precise amount of the premium alleged to be due to the Society, notwithstanding the "No set-off" provision in Clause 5.5 of the Reinsurance Contract with Equitas.

The Names have further contended that, having regard to the fact that they have cross-claims against Lloyds for fraud, there should in principle be a stay of execution in respect of any judgment entered against them until their cross-claims have been determined.

The Scope of the Venture

Before Colman J. the Names advanced a number of grounds upon which they contended that the Society's actions in setting up the R & R, including the Equitas reinsurance, were beyond the Society's powers. Before us they have relied on only one of these arguments. They contend that the scheme offends against a fundamental principle of underwriting at Lloyd's, which is that it shall be carried on without what has been described as "mutualisation". They contend that this principle is recognised and imposed by Section 8(1) of the Lloyd's Act 1982, which provides:

> "An underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not for one another, and if the liability of each underwriting member is accepted solely for his own account."

Broadly, the point made by the Names is that the Equitas Reinsurance and Run-off Contract involves the pooling of reserves held by or on behalf of individual Names to meet their individual liabilities, and of premiums levied on individual Names, and the use of the pool to discharge the liabilities of all the Names. At the end of the day a surplus may be shared out between the Names, or some Names may

find themselves under residual liability to policy holders, but in neither case will the end result reflect each Name's individual liability to policy holders in respect of the business written on behalf of each Name. This, it is contended, offends against the prohibition of mutualisation enshrined in Section 8(1) of the 1982 Act.

The Names contend that the fact that the R & R scheme involves mutualisation has been recognised both by the Society's legal advisers and by Brooke L.J. in R. v. The Council of the Society of Lloyd's ex parte Susan Rachel Johnson (Transcript 16th August 1996). The Names contend that Brooke L.J. wrongly concluded that the mutualisation involved in the R & R scheme was acceptable in the wider interests of Lloyd's when he should have held that it violated a "fundamental principle of underwriting at Lloyd's" see Saville J. in The Society of Lloyd's v. Clementson [1993] CLC 71.

It is important in this context to recognise the distinction between the underwriting transactions concluded with policy holders by Lloyd's Names as insurers or reinsurers, and the contracts and other arrangements that they make which are ancillary to that business. It is the former to which Section 8(1) of the 1982 Act applies and it was in relation to the former that Saville J. commented in Clementson at p.72 that:

> "It has always been a fundamental principle of underwriting at Lloyd's that each member is a sole trader and thus only liable for the specified share of any risk underwritten"

Mr Goldblatt Q.C. for the Names founded his argument on mutualisation upon the contention that the Equitas Contract was in direct conflict with Section 8(1). That argument is misconceived. Section 8(1) is directed solely to the writing of insurance business at Lloyd's, not to contracts which the Names may conclude thereafter which are ancillary to such business. The Equitas Contract is such a contract. It has been concluded to make provision for the discharge of the insurance liabilities undertaken by Names in and before 1992 in due conformity with the requirements of Section 8(1). The Equitas scheme does not derogate from the principle that each Name remains directly liable to policy holders in

respect of the business written by that Name and in respect of that business alone.

It is true, however, that under the Equitas contract assets of the Names are being pooled in order to provide a fund to discharge their individual liabilities. This can be said to derogate from a similar principle that each Name should be responsible for his own liabilities and for those alone. Thus Counsel advising the Society on the proposed R & R plan commented:

> "If the R & R proposals had been put forward for the principal purpose of achieving this quasi-mutualisation, there would be much concern as to whether it would be possible to defend them as a reasonable exercise of the powers of Lloyd's and the Council."

Similarly, in Johnson Brooke L.J. commented at p.90 that:

> "individual features of the plan might in a different context amount to unacceptable mutualisation."

We would agree with both these comments. What we cannot accept is the submission made in the skeleton argument submitted on behalf of the Names that:

> "the question whether there is mutualisation has to be considered in isolation: if the element of mutualisation is found, the underwriting business does not become legitimate simply because Lloyd's had good reason for organising the transaction in that way, or was otherwise acting reasonably."

It would be unlikely to be acceptable to regulatory authorities if those who insured with Lloyd's were exposed, pro tanto, to the risk of default or insolvency on the part of individual Names. It has, accordingly, long been necessary for Lloyd's to have had in place arrangements whereby the Names as a whole have provided funds to provide cover against the risk of individual defaults. This was one of the functions of the Central Fund, which thus involved a degree of mutualisation. The same is true of the Mutual Guarantee Policies that formed part of the security provided at Lloyd's between 1909 and 1982. In the United States, which is the source of over half Lloyd's business, and in other foreign jurisdictions, trust funds have had to be set up to secure the liabilities of Lloyd's Names. We cannot

see that agreements or arrangements which involve Names in making mutual provision against the risk of individual default are in conflict with or outside the scope of the venture of an insurance business in which each Name accepts liability solely for his own account.

R & R, and in particular the Equitas scheme is not, of course, simply designed to provide cover against the risk of individual defaults. It has a much more fundamental object - to settle intractable litigation and to avoid the need to put the whole of Lloyd's into run-off. In short, a primary object of the scheme, if not the primary object, has been to save Lloyd's itself, for the benefit of its members. We find it hard to see how it can be argued that the scheme has not been "requisite or expedient to the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society."

We are in no doubt that the R & R Byelaw falls fairly and squarely within the Society's powers and that the directions given to implement it were validly given. We agree with Colman J. that the defence based upon the scope of the venture is not arguable.

Rescission

The Names allege that they were induced to join Lloyd's by misrepresentations fraudulently made by the Society. The Society challenges this allegation, but accepts that its claim to summary judgment must be advanced on the premise that the allegation of fraud is valid. The Names claim that they have rescinded the Contract under which they entered into the General Undertaking. The Society contends that rescission is not possible and that the only remedy open to the Names is to claim damages for deceit.

Some of the Names who rely on rescission have purported to rescind their membership of the Society after the Equitas Contract was concluded. Others purported to do so before that Contract was concluded. For reasons that we shall explain we do not consider that any distinction falls to be made

between the two categories, but we propose first to consider those who have purported to rescind after the Equitas Contract was concluded.

Before the Judicature Act both law and equity recognised that, in certain circumstances, a person who had been induced to enter into a contract by a misrepresentation could rescind the contract. The rules governing rescission differed, however, in law and in equity. This renders difficult a precise analysis of the remedy which has become generalised since the Judicature Act.

Thus, in Spence v. Crawford [1939] 3 All E.R.271 at p.288 Lord Wright observed :

> On the basis that the fraud is established, I think that this is a case where the remedy of rescission, accompanied by *restitutio in integrum*, is proper to be given. The principles governing that form of relief are the same in Scotland as in England. The remedy is equitable. Its application is discretionary, and, where the remedy is applied, it must be moulded in accordance with the exigencies of the particular case.

This statement is to be contrasted with the statement of the law reflecting more recent authority in Chitty on Contracts, 27th Ed., at paragraph 6-067:

> Although it is common to speak of a court "setting aside" or rescinding a contract for misrepresentation, it seems clear from this and other cases that the remedy is not necessarily a judicial one. A representee is entitled to rescind for misrepresentation without invoking the assistance of the court at all, although the court now has a discretion to refuse to allow rescission in some cases. It may well be, as a purely practical matter, that the representee will require the assistance of the court in some cases, e.g. where rescission of an executed conveyance is sought; but (as has recently been affirmed) "the process of rescission is essentially the act of the party rescinding, and not of the court". *Horsler v Zorro* [1975] Ch.302 310.

The remedy of rescission is open to those induced to enter into contracts by misrepresentation and is now governed by the Misrepresentation Act 1967. The act of rescission avoids the contract retroactively ab initio - see Chitty 6-064 - and can only take place provided:

(1) that it is possible to restore the parties to substantially the same position that they were in before the

contract was concluded and

(2) that rescission will not harm the rights of third parties.

A good example of the latter proposition is Tennent v. The City of Glasgow Bank (1879) 4 App. Cas. 615. In that case the plaintiff sought to rescind a contract under which he had agreed to purchase stock in a bank on the ground that he had been induced to enter into the contract by the fraud of the directors. When he sought to rescind the bank had suspended payments on account of insolvency and was about to be placed into winding up. It was held that, in these circumstances, rescission was no longer open to the plaintiff, for it would be to the prejudice of the creditors of the bank.

The rights of third parties pose a particular problem to the contention that the Names have rescinded their General Undertakings in the present case. They contend that the effect of rescission has been to annul their membership of Lloyd's ab initio. Yet in the course of that membership, and by reason of it, the Names have entered into a host of contracts with third parties. They have concluded contracts with Members Agents and Managing Agents. The Managing Agents in their turn have concluded, on their behalf, contracts with policy holders, and contracts of reinsurance. Finally AUA 9 has purported to enter into the Equitas Contract on behalf of each of them.

In argument Mr Goldblatt was somewhat ambivalent as to the effect of rescission on these contracts. He was clear in his submission that the rescission avoided, retroactively, the Council's authority to appoint AUA 9 as a substitute agent on their behalf, and with it AUA 9's authority to make the Names party to the Equitas Contract. He also submitted, at least at one stage of his argument, that the effect of rescission was, retroactively, to withdraw authority from the Managing Agents. So far as concerns the contracts of insurance with policy holders concluded on behalf of the Names by the Managing Agents, he submitted that these remained binding. He drew an analogy with the position where a partner rescinds membership of a partnership. The partner's relationship with the other members of the

partnership has to be unscrambled so as to produce restitutio in integrum, but he remains liable for the partnership debts incurred while he was, "de facto" a member of the partnership - see Adam v. Newbigging (1888) 13 App. Cas. 308.

The scenario depicted by Mr Goldblatt, if correct, has the following consequences. Equitas has neither the obligation nor the right to settle the liabilities of those Names who have rescinded. Policy holders with claims against those Names should, in theory, pursue those claims directly against the Names in question. Were this the position in practice, the effect of rescission on policy holders would be seriously detrimental. It would be wholly impractical for policy holders to trace and bring claims against individual names for their proportions of the relevant risks.

Mr Goldblatt submits that these difficulties are theoretical. In practice, Equitas will meet in full claims made by policy holders. The Society has provided Equitas with funds to cover the premiums that should have been paid by the dissenting Names. The only practical effect of the rescission is that the Society will not be able to recover these sums in the present litigation. Third parties will not be prejudiced.

We are not persuaded that if Equitas meets the liabilities of the dissenting names without the recovery of premiums from them, this will solely prejudice the Society, rather than its present and past members. The Society did not provide full funding to Equitas to cover the premiums of dissenting Names. It is apparent from the affidavit sworn by Mr Sandler, the Chief Executive of Lloyd's on the 18th December 1996, that recoveries of premiums from dissenting Names will be for the benefit in part of the Society and in part of Equitas.

If those premiums are not paid, those Names who have contracted with Equitas are likely to suffer - either because the surplus to be distributed at the end of the day will be smaller, or because the deficit

will be larger. Thus, if rescission were to have the effect contended for by the Names it would prejudice third parties.

It is not merely the fact that third parties would be adversely affected, but the manner in which this would come about that we are unable to reconcile with the principles governing rescission. The Names contend that the effect of rescission was to withdraw, retroactively, the authority of AUA 9 to contract for the Names so that contracts concluded by AUA 9 with Equitas at a time when AUA 9 had authority are retroactively invalidated. We know of no case where rescission has invalidated a contract with a third party in this way and we do not believe that such a result can be accommodated within established legal principles.

We believe that there is a more general and equally fundamental reason why it was not open to Names to rescind their General Undertakings. Membership of Lloyd's is the foundation of the insurance business that has been carried on by Names, and must necessarily be carried on by them until all their liabilities to policy holders are discharged. As a matter of law, membership of Lloyd's is essential if the Names are not to infringe the provisions of Section 2(1) of the Insurance Companies Act 1982. These forbid unauthorised persons to carry on insurance business in the United Kingdom. Authorisation has only been granted to individuals who are members of Lloyd's. In practice, the Names have only been able to conduct insurance business and will only be able to run-off that business by taking advantage of the complex structure of the Lloyd's market which enables policy holders to transact business as if with a corporate entity rather than with a large number of individuals. The rules and regulations of Lloyd's have enabled this business to be transacted on behalf of and with the authority of the Names. It is fundamentally incompatible with the business that has been carried on for Names to withdraw, retroactively, from membership of Lloyd's. It is impossible to sever the contracts under which the Names became members of Lloyd's from the business that has been carried on, and

the contracts that have been concluded, by virtue of that membership. Restitutio in integrum is impossible.

So far as rescission ab initio is concerned, these considerations apply just as much to Names who purported to rescind before the Equitas Contract was concluded as to those who did so after that event. We have considered whether it is arguable that Names who purported to rescind their General Undertakings before the Equitas Contract was concluded thereby terminated their membership of Lloyd's so that the Council had no authority over or on behalf of them thereafter. This possibility was considered by Colman J. at p.23 of his second Judgment and rejected. In a passage dealing with a contract for services, Chitty at paragraph 6-073 comments:

> "The suggestion that a partly performed contract may be rescinded is attractive but raises difficulties. One view might be that the contract is rescinded for the future, leaving the services already rendered unaffected, but this would be inconsistent with the normal view that rescission for misrepresentation is rescission ab initio."

We would endorse that comment. At paragraph 6-064 Chitty draws the distinction between rescission of a contract ab initio and termination of the contract for a subsequent breach. We are not aware of any principle of law which permits a party to terminate a partly performed contract on the ground that the conclusion of the contract was induced by fraud in circumstances where rescission of the contract is impossible.

For these reasons we concur with the Judge's conclusion that the Names have not validly rescinded their General Undertakings and thereby avoided the contracts with Equitas concluded on their behalf by AUA 9.

Set-Off etc

We now turn to consider the meaning and effect of Clause 5.5 of the Equitas Contract. This Clause

provides as follows:

> No set-off
>
> 5.5 Each name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL, the Substitute Agent, any Managing Agent, his Members' Agent, Lloyd's or any other person whatsoever and:
>
> (a) in connection with any proceedings which may be brought to enforce the Name's obligation to pay his Name's Premium, the Name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;
>
> (b) the Name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his Name's Premium unless the liability for his Name's Premium has been discharged in full; and
>
> (c) the Name shall not seek injunctive or any other relief for the purpose, or which would have the result, of preventing ERL, or any assignee of ERL, from enforcing the Name's obligation to pay his Name's Premium."

It is common ground that at the date of the Equitas Contract it was intended that the right to the Name's Premium would be assigned to the Society; and indeed this happened on the same day as the agreement was made, though the assignment under seal was not executed until some four weeks later. Clause 5.8 contains the express agreement of the Names that Equitas could assign the right to the Name's Premium. It is also common ground that at the date of the Equitas Contract it was known that some Names were making allegations that they had been fraudulently induced by Lloyd's to join the Society or to continue their membership.

The question which arises is whether this Clause has the effect of preventing the non-accepting Names from resisting payment to the Society, as assignee, of the premium due from them, on the grounds that (on the assumption made) the Society is liable to them in damages for fraud.

In their skeleton written submissions the Appellants put forward an argument to the effect that Clause 5.5 was itself a fraudulent device, inserted in bad faith by the Society for the purpose of shielding itself from claims for damages for fraud. In the course of the hearing we ruled that this argument was not open to the Appellants or the Intervenors. Such an argument had not been advanced at the hearing before Colman J, and there was no evidence whatever to support it.

The Appellants and Intervenors also submitted that since they had, as they put it, been forced into the Equitas Contract against their will, since Clause 5.5 was in the nature of an exceptions clause, and since it was now sought to be used by an assumed fraudulent assignee, the Court should strive to construe it in a way most favourable to the non-accepting Names.

We are not persuaded that the first of these considerations has any real substance. True it is that at the time the non-accepting Names refused to give their assent to the Equitas Contract when it was proposed to them, but they are bound to it because of the agreement that they did voluntarily make with the Society when they became Names, at which time they agreed to be bound by the legislative and regulatory regime of the Society. In this regard the Equitas Contract is no different from the other agreements which the Names have had to make in consequence of becoming members of the Society. Since we have rejected the mutualisation and rescission arguments advanced by the non-accepting Names, there is no question as to the validity of the Equitas Contract; and the meaning and effect of Clause 5.5 is to be ascertained on ordinary principles.

We are also far from persuaded that Clause 5.5 should be treated as an exceptions clause. It does not purport to exclude or limit liability for claims of the Names, but merely to regulate their effect on a claim for the premium made on the Names. It is in truth a provision which, in the words of Neill L.J. in Coca-Cola Financial Corporation v Finsat Ltd [1996] 3 WLR 849 at 855 defines the extent of the obligation to pay, in the present case the obligation to pay the Name's Premium. Furthermore, the

Clause does not in fact deprive the non-accepting Names of a right that they would otherwise have enjoyed, since without the Equitas Contract they would have been faced with demands from their Agents to pay their underwriting liabilities, in respect of which they would not have been able to set-off claims against the Society.

As to the assumed fact that the Society is liable to the non-accepting Names for damages for fraud, this seems to us to raise no more than the question whether the true meaning and effect of the Clause, read in its context, is such as to prevent Names from setting up a fraud damages claim in answer to a claim for the premium made by the Society as assignee.

In these circumstances we turn to consider the specific arguments advanced by the Appellants and the Intervenors.

The first suggestion is that the Clause should be read and understood as only applying to matters that could otherwise be raised in answer to a claim by Equitas for the Name's Premium; and is not available to an assignee of the right to recover that premium in respect of rights of the Name against that assignee.

In our judgment this submission is ill-founded.

In the first place, as we have already observed, the Clause defines the extent of the obligation to pay the Name's Premium. It follows from this that the right to the premium is defined as a right which is to be unaffected by any set-off, counterclaim or other deduction on any account whatsoever. It is that right which is assigned.

In the second place, it is clear from the Clause itself that it is not confined to claims against the assignor

Equitas, since the Clause expressly includes not only such claims, but also claims against, among others, Lloyd's.

In the third place, it must be borne in mind that the Equitas Contract has the Society as a party. Thus the Names have not only agreed Clause 5.5 with Equitas, but also with the Society.

In the fourth place, apart from the express consent to assignment to be found in Clause 5.8, the Clause in question itself, in sub-paragraph (c), expressly contemplates the assignment of the right to the premium.

In these circumstances and bearing in mind the context in which the agreement was made, we agree with Colman J. that it is absolutely clear Clause 5.5 does operate so as to prevent the non-accepting Names from raising claims against the Society in answer to a claim by the Society (as assignee) for the Name's Premium. We should add that since Lloyd's were themselves party to the R & R Agreement, the question to what extent a contracting party can confer a benefit on an assignee which would not be available to the contracting party itself, which was raised during the course of the oral argument, does not fall to be considered.

Next is the fact that the claims of the non-accepting Names against the Society are in fraud. To our minds this does not assist the Appellants' and Intervenors' argument. As we have already observed, the agreement was made in circumstances in which allegations of fraud were being made against the Society. In addition, of course, is the fact that under Section 14 of the Lloyd's Act 1982 the Society is (with irrelevant exceptions) immune from liability at the suit of Names unless the act or omission complained of was done in bad faith. To our minds, given the all-embracing language used in the Clause, the fact that (to all intents and purposes) the only claims of any relevance against the Society by Names that could fall outside the statutory immunity would be claims of acting in bad faith and the

fact that allegations of bad faith were being made by Names before and at the time the agreement was made, everything points to the conclusion that the Clause was intended to cover such claims. We should re-emphasize that the Clause does not seek to exclude or limit liability for fraud. Its purpose, as Colman J. pointed out, is to insulate recovery of the premium from claims by those who owe the premium. We know of no principle of law that should lead us to construe the words of the Clause so as to exclude from its ambit any claim based or allegedly based on fraud.

We now turn to the second way the matter was advanced by the Appellants and the Intervenors, which was that the claims for damages for fraud should properly be categorised as a "pure" defence to the claim for the premium, so that the words "set-off, counterclaim or other deduction on any account whatsoever" in Clause 5.5 did not prevent the non-accepting Names from defending the claim for the premium on this ground. The submission was that since the amount of the Name's Premium would, if paid, match and immediately be recoverable as damages for fraud, the latter did not merely amount to a set-off or cross-claim, but to something which actually reduced or extinguished the debt itself, just as breaches of warranty by the seller or provider of services reduce or extinguish the price that would otherwise be due for the goods sold or services provided. In this regard, out attention was drawn to, amongst other cases, The Brede [1973] 1 QB 233.

Again, we are quite unpersuaded by this argument. The debt in question is one which under the Equitas Contract, was owed to Equitas in consideration of the provision of reinsurance cover. The claim for damages for fraud (unlike the sale of goods and service contract cases) cannot be put on the basis that those owing the money have not got what they should have got in return for that money, quite apart from the fact that the claim for damages for fraud is against the Society, not Equitas. Thus as between the non-accepting Names and Equitas, there can be no question of the right to receive and the obligation to pay the premium being reduced in the manner suggested. We find great difficulty in following how, once the debt has been assigned, things somehow change. The premium, albeit

assigned, remains payable in return for the reinsurance. The value of that reinsurance remains wholly unaffected. Thus the suggested analogy with the sale of goods and service provision cases is simply misconceived and to our minds, there can be no question but that the claims for damages for fraud fall fair and square within the words of Clause 5.5. We should add that even if we were wrong about this, we consider that the words "or other deduction on any account whatsoever" would probably be wide enough to encompass the reduction or extinction of the premium by way of "pure" defence. We should further add that we remain unconvinced of the premise upon which the whole argument was based, namely that the damages for fraud "matched" the amount of the Name's Premium. Assuming that the Names were fraudulently induced to become or remain Members of Lloyd's, the premium due under the Equitas Contract would, at best, form only one item in an account which would have both debit and credit items, and which would have to be struck before the recoverable loss sustained through the assumed fraud could be calculated.

Finally, the Appellants and Intervenors suggested that the Society did not need the premiums in order to provide Equitas with the funds to provide the reinsurance, in view of the fact that the Society has provided a non-recourse loan to Equitas. We cannot see how this can make any difference to the clear words of the Clause, or to the conclusion that we have reached on its effect.

For these reasons we conclude that Clause 5.5 prevents non-accepting Names from setting up their claim in fraud against the Society in answer to a claim by the Society, as assignee, of the premium due under the Equitas Contract.

Stay of Execution

It is common ground that the Court has jurisdiction to order a stay of execution:-

(1) pursuant to R.S.C. Order 47 r.1(1)(a) if 'there are special circumstances which render it

inexpedient to enforce the judgment';

(2) pursuant to R.S.C. Order 14, r.3(2) pending the trial of any counterclaim.

The following matters have arisen with regard to the exercise of that discretion:-

1. The effect of Clause 5(5) of the Equitas Contract: by Clause 5.5(a) the Names waived any claim to a stay of execution and consented to the immediate enforcement of any judgment obtained and by Clause 5.5(c) the Names agreed not to seek any other relief for the purpose, or which would have the result, of preventing Equitas, or any assignee of Equitas, from enforcing the Names' obligation to pay their premiums. Whilst it is agreed that the clause cannot oust the Court's jurisdiction, it has potent effect. The insulation of the set-off and counterclaim was intended to achieve the speedy discharge of the indebtedness, which intention would be avoided and the whole function of the clause subverted by a stay of execution. As Parker L.J. held in Continental Illinois National Bank and Trust Company of Chicago v John Paul Papanicolaou (The Fedora) [l986] 2 Lloyd's Rep. 441, 445:

> "It would defeat the whole commercial purpose of the transaction, would be out of touch with the business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaim were litigated. We do not doubt that the court has a discretion to grant a stay but it should in our view be 'rarely if ever' exercised, as Lord Dilhorne said in relation to claims on bills of exchange (in Nova (Jersey) Knit Ltd. v Kammgarn Spinnerei G.m.b.H [l977] 1 WLR 713, 722)."

2. Assisting the fraudster: the submission is that if the contractual obligation would never have arisen but for the fraud alleged against the Society then the court should not allow the Society the benefits of the protection afforded by Clause 5.5. It seems to us, however, that as allegations of fraud had been made by the time of the Equitas Contract, the intention of the

clause was that it should be wide enough to cover even such a claim. The concession that the Society had to proceed with the Order 14 application as if the fraud had been established, is no admission of fraud for the purpose of the counterclaim. Consequently, Clause 5.5 should serve its commercial purpose and the court should not deprive the Society of the fruits of the judgment free and clear of any set-off by staying execution until such time as this counterclaim will have been resolved.

3. Lack of Vires: it is submitted that pursuant to Section 7 of the Lloyd's Act 1911, as amended by Section 15 of the l982 Act, the Society is bound to hold its funds and property only for the expressed permitted purposes including the defraying of the costs, charges and expenses incurred by the Society. It is submitted that it cannot be a proper purpose to engage in fraud and that consequently it would be ultra vires for the Society to pay damages for fraud. The suggestion is that this raises a real prospect that if monies are paid now by the Names, they will never be recovered. This submission is without foundation. That the 'Objects Clause' of the Society should be framed in terms of lawful acts is no bar whatever to the judgment of the court being enforced against it to recover damages for any unlawful act. It was not suggested in the Court below that the Society would not have the means of satisfying any judgment made against it.

4. International Comity: here the submission is that if this court both upholds a 'pay now, sue later' clause and allows the judgment to be enforced immediately, then courts in a foreign jurisdiction will be so disenchanted with our assisting the fraudster that this jurisdiction will no longer be regarded as the forum conveniens to which the determination of these issues can be entrusted. We reject that submission. This Court is bound to proceed in accordance with settled principle and is not to be fettered by speculative regard as to how its judgment may be received abroad.

5. The Society's need for the money: the submission is that since the scheme is now fully funded, there is no demonstrable need for the fruits of the judgment. That is not a sustainable submission. Full funding has been achieved in part by the Society borrowing or otherwise providing the share of those who have not accepted the scheme and paid their premium. The Society should not be expected in fairness both to the Society itself and to the 94% of the Names who have paid up to provide reinsurance cover for the defaulting Names for nothing.

6. The Practicalities: on behalf of the Defendants it is submitted that if their already depleted funds are reduced even further by meeting the judgment debt, then their ability to raise sufficient monies to fund the pursuit of their counterclaim will have been imperilled. Thus they may never have the real chance to seek redress from the courts for the grievous wrong allegedly inflicted upon them. On behalf of the Society it is submitted that their position would have been no different if the R & R scheme had never come into being since they would have been required to meet the calls upon them, and may indeed perhaps have been in even more parlous a position in that event. There is force in that submission. Moreover, the financial pressure on the defaulting Names serves only to emphasise another reality. The allegation of fraud against the Society is based on facts known by 1991 and the claims are or soon will be statute barred. There is no evidence that the defaulting Names have so far managed to organise a group capable of funding the very expensive litigation which would be involved in the trial of an issue of fraud. The bleak reality for this unhappy group is that time is running out and the pursuit of the counterclaim is becoming more and more impracticable.

7. Personal Hardship: in the cases of Mr Lyon and Mr Wilkinson, the Society has offered an undertaking (pending the outcome of the appeal) not to enforce the judgment if it would have the consequence that they would lose their homes or any business or have their household furniture taken from them. In the Court below the Society indicated that it would not seek such

ruination of a Defendant. Personal hardship is, therefore, always a factor a Defendant may urge upon the Court in seeking a stay and nothing that we have said in 1. to 6. above is intended to deprive any individual Defendant of the right to apply for a stay of execution on grounds of personal hardship.

Conclusion

The result, which will come as a bitter blow to these defendants and those in their position, is that the appeal must be dismissed.

Order: Appeals dismissed with costs; respondent to be paid by the appellants and intervenors jointly and severally on a numerical basis, such costs to be taxed; direction that there be liberty to apply to all parties as to supplemental orders for costs (applications for orders against persons not party to the actions); leave to appeal to the House of Lords refused.