COURT OF APPEAL (CIVIL DIVISION)

[2001] EWCA Civ 1503, (Transcript: Smith Bernal)

HEARING-DATES: 8 OCTOBER 2001

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CATCHWORDS:
Practice - Disclosure - Confidential information - Confidentiality order - Order subject to measures designed to ensure information remaining confidential - Application to set aside order and to join parties to action as first and second defendants to counterclaim so as to obtain discovery - Whether order should be set aside - Whether appropriate to join parties as substantive parties to litigation

COUNSEL:
S Goldblatt QC and V Nelson QC for the Applicants; C Aldous QC and D Foxton for the Respondents; C Edelman QC for the Equitas Companies; Mr Harrison, Ms Strong, Mr Butler and Mr Adams appeared in person; Mr Charity for Sir William Jaffray and others

PANEL: THE MASTER OF THE ROLLS, WALLER, CLARKE LJJ

JUDGMENTBY-1: THE MASTER OF THE ROLLS

JUDGMENT-1:
THE MASTER OF THE ROLLS: [1] By an application dated 24 July 2001, Sir William Jaffray sought an order, (1), joining London Market Claims Services Limited (LMCS) and Equitas Holdings Limited, Equitas Reinsurance Limited and all Equitas subsidies (Equitas) to the action as first and second defendants to the counterclaim and, (2), setting aside confidentiality orders made by Cresswell J on 10 December 1999 and 16 June 2000.

[2] LMCS is a service company which provides various claims-related services to its subscribers concerning asbestos pollution health hazard claims (APH claims). These services include distribution of APH Attorneys' Reports to interested underwriters subscribing to the relevant insurance or reinsurance policies. Subscribers of services given by LMCS are certain active Lloyd's syndicates, Equitas Limited and various insurance/reinsurance companies. There are no formal written contracts between LMCS and its subscribers. LMCS has no contractual relationship with 1992 and prior Lloyd's Names, including the applicants.

[3] The Equitas group was formed as part of the Lloyd's reconstruction and renewal plan (R & R) to reinsure the liabilities of the members of Lloyd's non-life syndicates allocated to the 1992 and prior years of account other than life syndicates and to perform the run-off of these liabilities.

[4] Equitas Reinsurance Limited completed the reinsurance of the non-life 1992 and prior years business except business previously reinsured by Lion Cover Insurance Company Limited (Lion Cover business) with effect from 3 September 1996 and reinsured the Lion Cover business with effect from 18 December 1997. It retroceded these businesses to Equitas Limited which is the main operating company of the Equitas Group. Equitas Reinsurance Limited and Equitas Limited are regulated under the Insurance Companies Act 1982 by the Financial Services Authority on behalf of HM Treasury.

[5] Eight unrepresented Names have allied themselves to Sir William Jaffray's application. We permitted Mr Charity, a solicitor, to make representations on their behalf on a de bono basis. Had the purpose of joining LMCS and Equitas been solely so that they could respond to the applications to set aside the confidentiality orders, we do not understand that there would have been any objection. That has however proved not to be the case. I propose to deal first of all with the confidentiality orders.

[6] The application to set aside the order of 10 December 1999 is not pursued. Had it been, LMCS would have been concerned to resist that application.

[7] I turn to the order of 16 June 2000. On its face, it is an unusual order. It required the partners in the solicitors' firms and the counsel acting for the parties in this litigation to enter into the following

undertaking:

"1. I hereby represent, warrant and irrevocably and unconditionally undertake without limit as to time to the Court and to Equitas that:

'(i) I will strictly comply with all the obligations imposed on me by the terms of the Order of the Hon. Mr Justice Cresswell made on Friday 16 June 2000 in the proceedings Lloyd's and Jaffray;

'(ii) When I am not using the Document and any copies of written submissions referred to in paragraph 7 of the Order, I will place any such documents provided to me in a sealed envelope in a locked safe and other secure place. The envelope shall be marked on its outside: 'The documents contained in this envelope are subject to a Court Order which restricts their access to [my name]'.

'2. I hereby acknowledge that:

'(i) No failure or delay by Equitas in exercising any remedy, right, power or privilege under or in relation to this Undertaking shall operate as a waiver of the same nor shall any single or partial exercise of any remedy, right, power or privilege preclude any further exercise of the same or the exercise of any other right, power or privilege.

'(ii) A breach or threatened breach by me of this Undertaking would be likely to cause irreparable injury to Equitas."

[8] Subject to these undertakings being given, the order provided that Equitas would provide to those giving the undertakings a document, that is 'the Document' referred to in the undertakings. The document would include 'the Percentages' defined to be 'the individual percentage figures for asbestos pollution and health hazard claims reserves which together constitute the total net discounted Equitas opening reserve figure for APH as at 31 December 1994.'.

[9] It may be (in the limited time available I have not had time to form a final view on this) that it was also implicit that the Document would include 'the Figures' which were defined as 'the individual figures for asbestos pollution and health hazard claims reserves which result from the application of the percentages to a net discounted Equitas open reserve figure for APH as at 31 December 1994.'.

[10] The order further provided:

"4. Subject to Equitas responding to the requests made in the parties' letters dated 24 May 2000 ('the Requests'), and any supplementary requests relating to information provided in response to the Requests, following the provision of the Percentages by Equitas in accordance with paragraph 2 of this Order, Equitas will not be required to provide, during the course of the Proceedings, any further reserve information held by Equitas.

"5. Subject to their use by the Judge, and the judges in any appellate Court hearing any appeals in such actions, and by the Solicitors and Counsel under the following terms of this Order, the Percentages and the Figures shall be kept strictly private and confidential by any person to whom they are provided under the terms of this Order and shall not be disclosed to any other person, including but not limited to, any of the parties or any partners, assistants, or employees of the Solicitors.

"6. Counsel will not make any reference to or disclose any of the Percentages and/or the Figures, either orally or in writing, during the examination-in-chief, cross-examination or re-examination of any of the witnesses called to give evidence in the Proceedings.

"7. Neither Counsel nor the Solicitors shall refer to the Percentages and/or the Figures in any Oral Submissions, as defined in this paragraph, unless the court is sitting for that part of the Oral Submissions in camera. For the purpose of this Order 'Oral Submissions' shall mean (1) any Oral Submissions made to the judge in the Proceedings or (2) any Oral Submissions on the hearing of any appeal in such actions. Neither Counsel nor the Solicitors shall refer to the Percentages and/or the Figures in any written submissions to the Judge in the Proceedings or on the hearing of appeal in such actions unless such reference is made in a separate document from the rest of their written submissions which document is to be delivered to the Court as a document stated to be strictly private

and confidential and to be read by the Judge or judges alone.

"8. If the judge decides to refer in his judgment in the Proceedings to either the Percentages or the Figures, such a reference shall be contained in a strictly private and confidential schedule to his judgment which, subject to any other Order in the meantime, may only be read by the Solicitors, Counsel and by Equitas, and in the event of an appeal from such judgment, by the judges hearing any such appeal, and not by the parties to the Proceedings nor the parties to the Proceedings themselves.

"9. . .

"10. None of the parties to the Proceedings will use the terms on which the Percentages and/or the Figures have been provided in the Proceedings as set out in this Order as grounds for appealing to the Court of Appeal or the House of Lords against the judgment of the Judge in the proceedings."

[11] There were additional provisions, which I have not read, designed further to protect the confidentiality of the information.

[12] The very unusual terms of this order are explained by the fact that it was the product of agreement between the lawyers representing the parties. Equitas made it plain that it would not provide the information save subject to these conditions. They also made it plain that if a subpoena was sought in an attempt to obtain sight of the underlying documents, that subpoena would be strenuously resisted.

[13] The object of the strict confidentiality was, as I understand is common ground, to prevent information being disclosed which would be potentially damaging to Lloyd's and the whole Lloyd's market including Names party to this litigation.

[14] The purpose for which Sir William Jaffray and those who ally themselves to him seek to have this order set aside appears from the following paragraph from a witness statement dated 1 October which he has filed with the court:

"The reserving information will show the calculations used to ensure Equitas was adequately capitalised in 1996, and the discussions which took place with the DTI. The DTI's initial estimates of capital required for Equitas were substantially reduced to get Equitas approved by the accepting Names in the R & R scheme. We contend the Equitas reserving figures will establish three things. (1) That Lloyd's and Lloyd's syndicates had been consistently under-reserving for APH claims year in and year out for approximately 30 years and (2) that with connivance with the DTI and Lloyd's, Equitas was deliberately under-capitalised to bring in the accepting Names and (3) that progressive deterioration of APH claims through to the present day will show Equitas is insolvent and unable to meet its liabilities, thereby proving that claims on old policies written on 1967 and post years of account continue to bleed into the future."

[15] Mr Charity confirmed that these were indeed the reasons why this application was being made.

[16] Mr Charity initially sought to bolster the application by stating on instructions that the unrepresented Names had been unaware of this order for about a year until they discovered it in the documents. Subsequently he corrected that statement to state that they had not seen the order until that stage, although when the court asked whether they had asked for the order the answer was that they had not. That correction was very proper because the transcript of the hearing at which the order was made shows that Sir William Jaffray and other unrepresented Names were present at the hearing.

[17] In the course of that hearing the following exchange took place between Mr Jonathan Hirst QC, who was appearing for Equitas, and Cresswell J:

"Mr Hirst: Might I just stress one thing? I know that some of the litigants-in-person would like or might want access to these documents. I think I should just make it plain: if that were one of the possibilities, then my instructions would be to withdraw all cooperation in relation to this order, altogether; it is either on these terms or not at all.

Mr Justice Cresswell: There is provision for lead counsel and lead solicitors in this case; the important

thing, as it seems to me, Mr Goldblatt as lead counsel should have access to this information, and I'm sure that the litigants-in-person will realise that it is much better that this material should come in and that Mr Goldblatt should have access to it and be able to deploy it as he thinks appropriate, subject to the restrictions, than that it should not be available to the Court at all."

[18] That then, as it seems to me, is the material material to this application. I consider that the application should be refused for the following reasons:

[19] First, it comes too late. Equitas has provided confidential information in reliance on the order and the undertakings given pursuant to it to which no objection was raised at the time. I think it would be quite wrong to accede to an order designed to enable the litigants in person to have access to information that was provided on that basis. I say that, although it is by no means certain that if the order was set aside that result would follow.

[20] Second, this was an order made in group litigation. Group litigation proceeds on the basis that legal representatives will have the conduct of the litigation and that litigants in person will play only a limited role relying upon the professionals to protect their interests.

[21] Third, the reasons for seeking to obtain this information are, for the most part, not relevant to the litigation. The fact that there was under-reserving is relevant but that, as I understand it, is not in issue. For myself, I do not see how attempting to show that Equitas was under-capitalised or is insolvent could properly further the Names' case on the issues raised by this litigation.

[22] Finally, it does not seem to me that the Names have been prejudiced by this order. The lawyers with conduct of the litigation can make use of the information provided by Equitas, albeit subject to the measures in the order designed to ensure that it remains confidential.

[23] I should indicate that Mr Goldblatt has intimated to the Court that he will in due course urge that the constraints imposed upon him by the order were prejudicial, but he did not feel it right to support the attack being made on the order, the order being one to which he agreed, on this application. As I see the matter at present I do not see the basis upon which the Names can say they were prejudiced. So, for those reasons, I would dismiss that part of the application.

[24] As to the application to join LMCS and Equitas, Mr Charity has made it plain this morning that there is a further objective behind that application which is that those two entities should be joined in order to enable applications to be made for discovery in these proceedings. No notice was given to anybody that the application was being made upon that basis and it is, in any event, a basis which is misconceived. It is not appropriate to join parties as substantive parties to litigation simply to obtain discovery. The appropriate course is to issue a subpoena for that purpose. So for those reasons I would dismiss that part of the application which is to join LMCS and Equitas.

JUDGMENTBY-2: WALLER LJ
JUDGMENT-2:
WALLER LJ: [25] I agree.

JUDGMENTBY-3: CLARKE LJ
JUDGMENT-3:
CLARKE LJ: [26] I also agree.

DISPOSITION:
Judgment accordingly.

SOLICITORS:
Grower Freeman & Goldberg; Freshfields; Barlow, Lyde Gilbert