The Society of Lloyd's v Noel
COURT OF APPEAL (CIVIL DIVISION)
[2001] EWCA Civ 521, (Transcript: Smith Bernal)
HEARING-DATES: 30 MARCH 2001
30 MARCH 2001

COUNSEL:
The Applicant appeared in person; R Jacobs QC and C Smith for the Respondent
PANEL: SIMON BROWN (VP), BROOKE, ROBERT WALKER LJJ
JUDGMENTBY-1: ROBERT WALKER LJ
JUDGMENT-1:

ROBERT WALKER LJ: [1] This is an appeal with the permission of this court (Evans and Turner LJJ) given on 31 March 2000, that is, almost exactly a year ago. Mrs Sally Noel, who has appeared in person, appeals from an order of Cresswell J made in the Commercial Court on 12 May 1999. By that order Cresswell J gave summary judgment against Mrs Noel in favour of the Society of Lloyd's ('Lloyd's'), the claimant below and the respondent to this appeal, in the sum of £13,047 with interest and costs.

[2] The judge held that that sum was due from Mrs Noel to Lloyd's in respect of a premium for reinsurance under clause 5.3 of the Equitas contract, to which I shall refer below. The judge said, near the end of his judgment:

'In the light of the two decisions of the Court of Appeal to which I have referred there can be no defence to the sums claimed. I emphasise again for the benefit of Mrs Noel that the essential question under the summary judgment procedure is whether the court considers there is a triable defence. If a particular argument is already covered by an adverse decision of the Court of Appeal, that decision is binding upon this court, and it is conclusive for all purposes and not merely for the parties who were before the Court on that occasion. That is the position in relation to this application.'

[3] The two decisions of this court were the decision in Lloyd's v Leighs & others [1997] CLC 1398 and Lloyd's v Fraser & Others [1999] Lloyd's Rep IR 156. It will therefore be apparent that this is another part of the painfully protracted Lloyd's litigation arising out of the well-publicised problems which affected Lloyd's in the 1980s and 1990s. Those problems, and the litigation arising out of them, have been described many times, both in this court and in lower courts. Probably the clearest summary is in ss B, C, D and E of the introduction to the judgment of Hobhouse LJ in Lloyd's v Fraser & Others at pp 160 and following. I will not attempt a full summary here; to do so would occupy a great deal of time.

[4] Section B of Hobhouse LJ's judgment describes the under-capacity which emerged in the insurance market in the early 1980s, the recruitment of new candidates to become Names (that is, underwriting members of Lloyd's) and the severe losses suffered by many new Names from a variety of causes, including what Hobhouse LJ (with a measure of understatement) described as 'bad practices which had grown up among the professionals operating in the market'.

[5] This section of his judgment describes successful actions by Names against certain underwriting agents and also claims (often by way of counterclaim) made by Names against Lloyd's itself. The best-publicised of those claims was the action led by Sir William Jaffray (which has now failed, at least at first instance). Section B of Hobhouse LJ's judgment ends with a reference to clause 5.5 of the contract with Equitas Reinsurance Ltd ('Equitas'). Clause 5.5 is the well-known (or, as some new Names would no doubt say, infamous) 'pay now, sue later' clause. The early 1980s saw the enactment of the Lloyd's Act 1982 ('the 1982 Act'). That was a public Act of Parliament which made important changes to the constitution and legal status of Lloyd's, transferring the power to make byelaws from the members to the new Council.

[6] It is of central importance to Mrs Noel's appeal that she became a Name in 1978 or 1979, before the enactment of the 1982 Act, and that she did not sign the new form of general undertaking (referring specifically to the 1982 Act and to byelaws made under it) which Names were asked to sign in 1986 (and which almost all Names do seem to have signed, however reluctantly). Her case is that instead she ceased to be a Name.

[7] Mr Richard Jacobs QC (who has appeared with Mr Christopher Smith for Lloyd's in this court) accepts that Mrs Noel ceased to be an underwriting member and that if 1985 and 1986 had not proved to be 'open years', she would in due course have ceased to be any sort of member of Lloyd's by 1989. But 1985 and 1986 were very bad years for the syndicate of which Mrs Noel was a member. It is not entirely clear to me whether someone in her position would naturally have been referred to after 1989 simply as a Name, or as a non-underwriting member, with or without some further explanation of her particular circumstances. However, plainly she did not, and could not, choose simply to walk away from obligations in respect of past open years, and I do not understand that to be her case.

[8] Apart from an agreement with her underwriting agents, which she entered into in 1978, the only written agreement signed by Mrs Noel seems to have been a printed general undertaking date-stamped 1 January 1979. Mrs Noel referred the court to clause 7 and clause 11 of that undertaking. However, to my mind the most important point about it for present purposes is that it contained nothing similar, or even comparable, to the express provision in the later undertaking to be bound by the 1982 Act and byelaws made under it.

[9] Mr Jacobs has submitted that in fact the new form of general undertaking was unnecessary, since all members of Lloyd's were at all times bound by the Lloyd's regime, as enacted by Parliament in the 1982 Act and as extended by all byelaws made under the 1982 Acts. Mr Jacobs may well be right in that submission. The fact is, however, that Lloyd's seems to have gone to some trouble to get almost all members to sign up to the new general undertaking, and Lloyd's subsequent proceedings against members were launched on that basis.

[10] I return to the judgment of Hobhouse LJ. The next two sections (ss C and D) described the state of crisis which faced the market by 1991 or 1992, and the measures which the Society took, using its byelaw making powers, to introduce a compulsory reinsurance and run-off scheme, the 'R&R' scheme. This was put to the Names in July 1996 and about 85 % of the Names accepted it. Mrs Noel did not accept it. Hobhouse LJ said of the non-accepting names:

'Those who did not accept the proposal, the non-accepting Names, were nevertheless required to run-off their outstanding liabilities in accordance with the reconstruction scheme and reinsure them as provided for in the 'Equitas' reinsurance contract which was an essential part of the scheme. This contract provided a method whereby a single legal entity of assured ability and willingness to discharge the insurance liability of Names to those who had placed insurances in the Lloyd's market from outside (as well as from inside the market) could do so in an orderly and assured fashion. Part of this reinsurance scheme, which was effectively a reinsurance to close, required the individual Names to pay a reinsurance premium to Equitas which corresponded to an assessment of each Name's outstanding liabilities, accrued and future, down to the end of 1992.'

[11] Since then there has been much bitter litigation between Lloyd's and many of the non-accepting Names. Eventually Lloyd's took action against many of them, issuing writs and points of claim in a standardised form. These points of claim pleaded Lloyd's powers under the Lloyd's Acts 1871 to 1982, and in particular under ss 6 and 16 of and Sch 2 to the Lloyd's Act 1982; that is, powers to make such byelaws as might seem requisite or expedient to the Council of Lloyd's for the proper and better execution of the Lloyd's Acts 1871 to 1982, and for other purposes as mentioned in the pleading. The points of claim also pleaded (without particularising any documents) that the defendant had been elected as an underwriting member of Lloyd's, with effect from a specified date, and that, in consideration of his or her election and/or continued membership, the defendant had expressly and in writing agreed to be bound by the Lloyd's Acts 1971 to 1982. It pleaded various courses of action (including the appointment of substitute agents for Names) taken pursuant to the new byelaws, leading to the Society's claim for the amount of a premium claimed by Equitas (and assigned by Equitas to Lloyd's).

[12] Section E of the judgment of Hobhouse LJ described the course of the litigation during 1996 and 1997. Colman J was assigned to take charge of the litigation and he gave directions, at a series of hearings between November 1996 and April 1997, for its orderly conduct. Lloyd's had issued numerous summonses for summary judgment under Order 14 of the Rules of the Supreme Court as they then stood. Various points needed to be determined under Order 14A of the Rules of the Supreme Court. Different Names or groups of Names were selected to argue different points. Mrs Noel herself was not a party to any of the chosen test cases. She says that at one stage she did attempt to intervene in a case which was being heard by Tuckey J, but that she was not allowed to intervene.

[13] By March 1997 Colman J had decided a number of points, including (and this is para 1 of a complex order containing numerous declarations):

‘Subject only to the determination of the Defendants’ application that they were not Names of Lloyd’s at the relevant time or in any relevant context, the Defendants are bound by the terms of the Reinsurance and Run-Off Contract dated 3rd September 1996.’

[14] In para 2 of the same order, Colman J held that the byelaws were intra vires (that is, enacted within Lloyd’s powers) and could not be impugned by the defendants if they were Names at any relevant time. In para 3 he rejected as unarguable eight specified contentions which had been put forward as possible defences. He identified other defences as being arguable, apart from what was referred to as ‘the fraud defence’, as to which he gave separate directions on 21 March 1997.

[15] Some of the Names appealed from Colman J to this court, which dismissed their appeals on 31 July 1997. Hobhouse LJ described that appeal hearing and judgments, and summarised the conclusion as follows:

‘The outcome of the 1996/7 hearings before Colman J and the Court of Appeal was that it was intended and believed that they had determined all the issues of liability which the Names sought to raise in answer to the claim for the reinsurance premium save for the ‘securities legislation’ point raised by certain overseas Names and, possibly, an EEC law point. Subject to those two exceptions, all the points on liability had been answered in favour of the Society. But one argument, the ‘bad faith’ argument, had been ruled inadmissible by the Court of Appeal on the two grounds to which we have referred. It was intended and believed that, again subject to the two exceptions, the only remaining points to be dealt with before the Order 14 summonses could be concluded would be questions of quantum.’

[16] Plainly that was the intention and the belief, but in this appeal Mrs Noel has, in effect, challenged the correctness of that belief.

[17] In September 1997 Tuckey J took over the responsibilities previously discharged by Colman J He had to consider numerous points, including whether it would be an abuse of process for defendants (some represented by professional lawyers and others litigants in person) to put forward arguments which had been considered and rejected in the selected test cases (see, generally, Ashmore v British Coal [1990] 2 QB 338, [1990] 2 All ER 981). On 3 December 1997, in Lloyd’s v Fraser & others [1999] Lloyd’s Rep IR 156, Tuckey J held that that would be an abuse of process. That decision was upheld by this court’s refusal of permission to appeal, for reasons set out in the judgment delivered by Hobhouse LJ, to which I have already referred extensively. That judgment also covered applications for permission to appeal from rulings of Tuckey J on 22 January 1998 as to issues of quantum, and on 27 January 1998 (in a case called Lloyd’s v Daly & Others) as to the significance of Canadian securities legislation.

[18] It is convenient at this point to pick up the little which was said on 22 January and 27 January 1998 about the position of Mr MacBrien, a Canadian litigant in person. At the very end of the transcript of the earlier hearing, the following exchange occurred:

‘Mr MacBrien: My Lord, I raised the same point yesterday in relation to whether Lloyd’s was indeed entitled to charge me for Equitas on the grounds that their ability to do so depended upon my having accepted the general undertaking in 1986. Your judgment this morning was silent about

Mr Justice Tuckey: I said yesterday SYMBOL 45 f “Symbol” s 12 I am sorry if I did not make it clear SYMBOL 45 f “Symbol” s 12 that I will deal with that point in my judgment on the securities issue, which is where it arises on Tuesday.

Mr MacBrien: Thank you, sir.’

[19] At the end of his judgment on 27 January 1998, Tuckey J said:

‘One Canadian name, Mr MacBrien who appeared in person, said that he had not signed a General Undertaking in the form from which I have quoted. He signed an earlier form of the Undertaking in 1973 and so his position is different from the other names. By this form there is no doubt that the member bound himself to the Lloyd’s regime.

It contains no choice of law clause, but the member agrees to appear in any court of justice in England in which proceedings are instituted against him in relation to any matter connected with his underwriting business.

I have no doubt that the proper law of the general undertaking under which Mr MacBrien become a member of Lloyd's was English law. It follows that his position is no different from that of the other Canadian names.'

[20] That passage seems to have been directed to an issue of the proper law of the contract. It cannot be said to deal in a fully reasoned way with the position of a defendant who signed no general undertaking at any time after the enactment of the 1982 Act. The judgment of Hobhouse LJ does not appear to contain even a passing reference to this point. It simply was not an issue before the Court of Appeal in either Leighs or Fraser. That appears very clearly from a passage in the judgment of this court in Leighs ([1997] CLC 1400) to which Mrs Noel has drawn attention in her skeleton argument.

[21] So after that long introduction, I come at least to the claim against Mrs Noel herself. The writ against her was issued on 10 October 1996. Over the next two years or so, and in the course of the case management which I have mentioned, judgments were given at first instance in Leighs, Fraser and Daly, and in this court in Leighs [1997] CLC 1398 and (refusing permission to appeal) in Fraser [1999] Lloyd's Rep IR 156

[22] Shortly before the judgment in Daly, Lloyd's applied for summary judgment against Mrs Noel. The application was based on the standardised points of claim, which I have already mentioned, and on an affidavit of Mr Philip Holden (a solicitor who is or was head of Lloyd's Financial Recovery Department) sworn on 1 December 1998.

[23] Mr Holden deposed (and I put it in direct speech): 'Mrs Noel is a Name at Lloyd's.' In fact she had ceased to be an underwriting member more than ten years before, although she was still a non-underwriting member because of the failure to close the open years for 1985 and 1986. Mr Holden also deposed:

'In all the circumstances, and in view of the fact that the summary judgment proceedings before Tuckey J were intended to identify any conceivable defences to payment of the Equitas premium and none succeeded, I verily believe that there is no defence . . .'

[24] Mr Holden did not state that Mrs Noel had not signed any general undertaking in 1986. In pointing that out, I am not seeking to be particularly critical of this affidavit, but it did give the impression that Mrs Noel's case was a completely straightforward, run of the mill case. That impression certainly tends to be borne out by the judgment that was given in the matter.

[25] Cresswell J gave summary judgment against Mrs Noel on 12 May 1999, and on 28 May 1999 he declined to set aside that judgment. In the second paragraph of his judgment, he said:

'The defendant was elected as an underwriting member of Lloyd's with effect from the 1st January 1979. She signed an undertaking with Lloyd's in which she expressly agreed that she would be bound by the provisions of the Lloyd's Acts 1871 to 1982, such byelaws as were made or were to be made thereunder and any direction given or provision or requirement made by the Council or on its behalf.'

[26] That (as Evans LJ said on the occasion when this court gave permission to appeal) could not be right since the 1982 Act was not even a twinkle in Parliament's eye when Mrs Noel joined Lloyd's (and gave the only relevant express written undertaking) in 1979.

[27] Later in his judgment Cresswell J referred to Mrs Noel's written 'Summary of my points of defence' in which she made the point that she had resigned as an underwriting member in 1985 or 1986 (for present purposes it does not seem to matter which year is regarded as right). Mrs Noel also made numerous other points, which the judge summarised. Indeed, she made so many other points that Mr Jacobs may be right in saying that the one point that was unique to her case got buried in the others. The judge said:

'Having carefully considered the materials placed by Mrs Noel before the Court it seems to me that in effect Mrs Noel is seeking to raise the same arguments as were raised before the Court of Appeal (and rejected) in two decisions . . . [those decisions being Leighs and Fraser]'

[28] The judge then analysed and summarised (and it seems to me a wholly accurate analysis and summary) the two decisions of the Court of Appeal. He extracted various points which apply, so far as I can see, to all or most of Mrs Noel's points of defence except for her first and simplest point about never having signed the new general undertaking. He concluded with the passage I have already set out.

[29] Mrs Noel's case on the points previously dealt with by this court, and by Cresswell J in his judgment, appears to me to be hopeless (although we did not hear full argument on that part of the case and I do not express a final view). But the judge did not (as Mr Jacobs has very fairly and candidly accepted) deal with the single point which is special to Mrs Noel's case. The only authority on that single point, so far as I can see, was not Court of Appeal authority. As I have mentioned, neither judgment of this court seems to touch on the point. So far as it can be called authority at all, there is only the short passage, apparently directed to an issue of proper law, at the end of the judgment of Tuckey J in Daly. I note also that in the original declaratory Order Colman J had carefully referred to membership 'at the relevant time or in any relevant context', so as to leave that point open without further investigation and decision as to what the relevant time or the relevant context might be.

[30] If Mrs Noel was to have summary judgment given against her in a matter on which she has the strongest possible feelings, she was entitled to know why her defence was being rejected. On what Evans LJ called the 'contractual ground' (but only, as I have said, on that single ground) she was not given any adequate explanation of why she was debarred from defending the claim.

[31] In this court Mr Jacobs (who did not appear below) has sought to make good that deficiency, relying on a respondent's notice. Mr Jacobs has argued that the point on which Mrs Noel relies is one of form and not of substance. He has candidly conceded that the plea in the second sentence of para 3 of the points of claim was quite wrong but it was, he said, in any event unnecessary. He says that the pleading would still stand up if the whole of that sentence were deleted. His case, at its simplest and starkest, is that Mrs Noel cannot opt out of an Act of Parliament. Mr Jacobs has concentrated on that single, simple and stark point and has not developed other points (including the difference, if any, between the meanings of the expressions 'for the time being' and 'from time to time') which were raised in Mr Smith's skeleton argument.

[32] Mr Jacobs did, however, also rely, at least in passing, on another point made in the skeleton argument, that Mrs Noel carried on underwriting for some years after the 1982 Act came in force. That is so, and it may give rise to all sorts of arguments based on Mrs Noel's state of knowledge and what is to be inferred from her conduct. However, those matters were not part of the case pleaded against her, nor were they the subject of any affidavit evidence in support of the application for summary judgment.

[33] Mrs Noel should, I think, be in no doubt as the strength of the potential claim against her if there is a further application (which under the new Civil Procedure Rules would be an application under Pt 24) for summary judgment against her. But any such application would be made on a different basis from the case which was made against her on the first application.

[34] Mr Jacobs, in brief and realistic submissions, has submitted that to require a new application to be made to the Commercial Court would be a waste of time and resources, and that this court should itself resolve the matter. To do so, he said, would be in accordance with the case management ethos of the new Civil Procedure Rules. I do see considerable force in that. However, fairness is also important. It is no less important under the new regime than under the old. If summary judgment was given against Mrs Noel on a wholly incorrect basis, which in my view it was, she can fairly claim to have the case against her put before a judge of the Commercial Court on a proper basis. A judge of the Commercial Court would be much better placed than this court to deal with the matter in its proper commercial context, if Lloyd's think fit to make a new application for summary judgment and if Mrs Noel (having had the opportunity of considering the matter in the way that it is put afresh) chooses to contest the application.

[35] For my part, I do not think it would be right for this court to say, on the materials now before us, that it is so clear that Mrs Noel has no possible defence to an alternative way of putting the case against her that she should be simply debarred from defending.

[36] If my Lords agree that this appeal should be allowed, Mrs Noel ought to consider very carefully, and ought to take advice, as to whether she should now find some consensual means of disposing of Lloyd's claim at a time when she may be able to do so at a far lower price (in terms of legal costs) than may at one time have seemed likely. However, that must be a matter for her.

[37] In my judgment, the case presented against Mrs Noel on 12 May 1999 should not have led to summary judgment against her, nor do I think that this court should give summary judgment today on a different basis. I would therefore allow this appeal.

JUDGMENTBY-2: BROOKE LJ
JUDGMENT-2:

BROOKE LJ: [38] I agree. After Cresswell J gave judgment on 12 May 1999 in the terms to which my Lord has referred, Mrs Noel reapplied to that judge on 28 May, and we have a transcript of the discussion which took place that day. She made the point which she is making in this court. She said at p 4:

'I have got a general undertaking and it has not been signed, my Lord, because I resigned in 1985 and I joined in 1979 before the 1982 Lloyd's Act, so basically I was signing on the basis of existing Acts which did not have an immunity from suit clause in it or provisions for making byelaws. And I would have thought it must be against all the laws in the land that you sign something with existing Acts in it and then basically that is changed unilaterally without your signature to approve that change. I signed nothing after 1979, which is before the 1982 Lloyd's Act.'

[39] At p 5 she said:

'I probably must be one of the few cases, you could say, that signed before the 1982 Lloyd's Act and basically never signed the 1986 agreement either. There must be one or only two, but I am absolutely sure that is why there was a general undertaking to tie in all those people that have never actually -- like me, and there probably were not that many people that were not locked into the Lloyd's Act. So I am saying I am not locked in by the conditions of the Order 14.'

[40] Mr Foxton, who appeared for Lloyd's, responded to this by referring the judge to Mr MacBrien, who has been mentioned by Lord Justice Robert Walker, who signed an earlier form of the undertaking in 1973. He said (p 6):

'You need to sign an undertaking when you join Lloyd's, and if you join Lloyd's in 1986 or prior, you sign the old form of general undertaking by which you nevertheless agree to be bound by the Acts and byelaws of the Society from time to time. As Mr Justice Tuckey held in Society of Lloyd's v Daly, in considering an identical submission by a Name who had signed a 1973 form of general undertaking but no other form, he remained bound.'

[41] It is not at all clear to me from the transcript of Tuckey J's judgment what agreement Mr MacBrien signed. It is also not at all clear to me that Cresswell J had in mind, following these submissions, as tothe terms of the undertaking which Mrs Noel signed on 1 January 1979. The judge, after the matter had been raised in this way and had been responded to by Lloyd's in the way to which I have referred, simply said:

'The points that Mrs Noel seeks to raise have already been covered by earlier decisions of this court and the Court of Appeal. I refer to the judgment that I gave on 12th May.'

[42] It appears to me, in those circumstances, that elementary principles of fairness now require that this matter be reopened before a judge of the Commercial Court and that we should not deal with it in this court in the way suggested by Mr Jacobs. For all I know, Mrs Noel may wish to put further evidence in response to the case which Lloyd's now wish to make against her.

[43] For these reasons, and for the reasons given by my Lord, Lord Justice Robert Walker, with which I agree, I agree that this appeal should be allowed.

JUDGMENTBY-3: SIMON BROWN LJ
JUDGMENT-3:

SIMON BROWN LJ: [44] I too agree that the appeal should be allowed, for the reasons given by my Lords.

[45] I do want to emphasise, however, the narrowness of our decision and what little comfort Mrs Noel ought in reality to draw from it. Her case, it appears, is unique (or very nearly so) as a result of her having refused to sign the post-1982 Act form of undertaking, which would have expressly bound her to the new Lloyd's regime introduced under that Act.

[46] This particular dimension to her case was not recognised below. On the contrary, the claim against her was wrongly pleaded on the footing that she had signed such a later form of undertaking, and the judge appears to have decided it on that basis.

[47] What Mr Jacobs QC for the respondents says is that, frankly, that particular plea was not a necessary part of Lloyd's case. Once the appellant became a Name (as undoubtedly she did and as perforce she remains, although no longer as an underwriting member) she became subject to the Lloyd's regime under whatever legislation Parliament chose to enact. Her liability under the Lloyd's Act 1982 is no more dependent upon her signed assent than her liability under the Finance Acts or for parking fines. I have to say, for my part, that that argument appears to me not merely powerful but almost certainly irresistible.

[48] True, the appellant has available to her the forensic question: why get everyone else to sign the post-1982 Act form of undertaking if that was not necessary; and why, indeed, plead that particular case against her? But in truth, that is a jury point rather than one carrying any legal force.

[49] Although, therefore, we are allowing the appeal to enable Lloyd's true case to be put formally on a proper basis, for my part I do so without any real expectation that Mrs Noel will be able to defeat it. I cannot sufficiently emphasise to her, therefore, how important it is that she should now take this last opportunity to reconsider her position, hopefully with the benefit of legal advice. Of course I do not now decide how matters will go once the respondents plead their case anew and seek a fresh summary judgment upon it, as I would expect them to do. It appears a strong likelihood, however, that unless Mrs Noel were now to submit to it, she would lose the case, be held liable to Lloyd's also in costs (assessed last time round at £5,500) and next time round would almost certainly fail to persuade this court to grant her permission to appeal.

[50] By the success of this appeal Mrs Noel lives to fight another day. Rather, however, than fight it she would almost certainly be better advised to settle.

[51] The appeal is allowed and the judgment of 12 May 1999 is set aside.

DISPOSITION:
Appeal allowed.

SOLICITORS:
Financial Recovery Department, The Society of Lloyd's