Case: 478/SD/02, 5208/SD/02,
516/SD/02, 503/SD/02

Neutral Citation Number: [2003] EWHC 1890 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 18th July 2003

B e f o r e :

THE HONOURABLE MR JUSTICE LADDIE

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EVERARD AND OTHERS — Applicants

- and -

THE SOCIETY OF LLOYD'S — Respondent

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MR J CALLMAN (instructed by Grower Freeman) appeared on behalf of the Applicants

MR D BANNISTER QC and MR D FOXTON (instructed by Lloyd's) appeared on behalf of the Respondent

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JUDGMENT
(As Approved by the Court)

**MR JUSTICE LADDIE:**

1. This is the judgment in an application in which the primary relief sought is an order setting aside statutory demands issued by the respondent, The Society of Lloyd's ("Lloyd's"). The applicants are a number of former Names at Lloyd's. The respondent has obtained judgments in substantial sums against each of them. The statutory demands are based on those judgment debts. There is no dispute as to the existence of the debts nor is there now any application to set the judgments aside or to appeal them. In fact, these are not the only statutory demands issued by the respondent against former Names. This application is being treated as a test case. Its outcome is likely to affect a considerable number of former Names in substantially the same position as the applicants here.

2. The history of events leading to this application is long and tortuous. It, or parts of it, have been described in a number of judgments in earlier proceedings and applications. I set out below, as briefly as possible, the stages in that history which constitute the necessary background to this application. In doing so I borrow heavily from the admirable skeleton arguments prepared by Mr Jeremy Callman, who appears from the applicants, and Mr Edward Bannister QC and Mr David Foxton, who appear for Lloyd's.

3. As is now notorious, in the 1980s and early 1990s the Lloyd's insurance market was rocked by financial problems which surfaced in large part, but not exclusively, as a result of claims arising out of asbestos litigation in the United States of America. Each Name had unlimited liability for the losses suffered by his syndicate. A reconstruction and renewal plan was put in place. Part of that involved Names and former Names reinsuring all their 1992 and prior years underwriting business into an entity called Equitas Reinsurance Limited. Payment of the Equitas premium for this reinsurance was compulsory. These premiums were large. In some cases they were very large. Some Names, including the applicants in this case, refused to pay. In many cases they said that they did not have the resources to do so. Various challenges were made by Names to their obligation to pay the Equitas premium. All such challenges eventually failed in the courts. Judgments were obtained against defaulting Names and former Names, hence the judgment debts which underlie the statutory demands here.

4. However, the final judgments in relation to the outstanding Equitas premiums was not the end of the Names' fight against Lloyd's. A number of Names put forward cross-claims alleging fraudulent misrepresentation. The leading action in which that allegation was raised is known as the *Jaffray* proceedings. In mid 1998, Coleman J ordered the determination of a preliminary issue in those proceedings, sometimes referred to as the "threshold fraud" point. It is in the following terms:

> "Whether Lloyd's made misrepresentations, which it knew to be untrue, and/or as to which it was reckless, whether they were true or false and whether such misrepresentations were communicated to the Names and if so, when."

5. The trial of the threshold fraud issue, together with another issue which had been added by order of Creswell J, commenced before the latter Judge on 4 March 2000. It lasted about three months. Judgment was given on 3 November of that year. The claims made against Lloyd's by Names in the *Jaffray* action were, in the majority of cases, confined to claims in fraud, although certain Names who had joined Lloyd's before the Lloyd's Act 1982 ("the Lloyd's Act") came into effect, also included claims for negligent misrepresentation, but only in relation to periods before 5 January 1983. The reason for this cut off date was that s 14(3) of the Lloyd's Act purported to protect Lloyd's from, amongst other things, misrepresentation claims unless the misrepresentations were made in bad faith.

6. Before the trial of the preliminary issue had commenced, Lloyd's decided to enforce some of the judgments it had obtained against defaulting Names. To this end, in 1998, Lloyd's served statutory demands on a number of Names. The Names immediately applied to set them aside. The power of the court to do that is contained in Rule 6.5(4) of the Insolvency Rules 1986. The grounds, as set out in Rule 6.5(4), are as follows:

> "(a) The debtor appears to have a counterclaim set off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand or,
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> (b) the debt is disputed on grounds which appear to the court to be substantial or,
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> (c) it appears that the creditor holds some security in respect of the debt claimed by the demand and either Rule 6.1(5) is not complied with in respect of it or the court is satisfied that the value of the security equals or exceeds the full amount of the debt or,
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> (d) the court is satisfied on other grounds that the demand ought to be set aside."

It appears that the Names relied upon grounds (a) and (b).

7. Those applications to set aside, which are known as the *Garrow* proceedings, came before Jacob J in June 1999. He declined to go into the merits of the threshold fraud issue in the counterclaims which were to be considered at the hearing of the *Jaffray* proceedings before Creswell J the following year. He said that to try to do so would be futile. He found for the Names under Rule 6.5(4)(a). An appeal from that decision to the Court of Appeal was dismissed. Both judgments are reported (see *Re: A debtor Number 544/SD/98* [2001] BCLC 103).

8. As Mr Bannister explains in his skeleton, if the Names had succeeded in the *Jaffray* action in establishing fraudulent misrepresentations by Lloyd's, their claims for losses would have extended, subject to questions of limitation, to all succeeding years including, in principle, the obligation to pay the Equitas premium because the Names had a new cause of action for each year of account in which they participated as underwriting members of Lloyd's. The possibility of such recoveries meant that a successful counterclaim by a Name in the *Jaffray* action could result in a liability on the part of Lloyd's to that Name at least equalling the amount of the judgment on the Equitas

premiums. Any claims in the fraudulent misrepresentation would not have been covered by the immunity given to Lloyd's under the Lloyd's Act.

9. Creswell J's judgment on the threshold fraud point in the *Jaffray* action went against the Names. He held that there was neither fraud nor any representation made by Lloyd's to the Names. He refused permission to appeal. Such permission was subsequently given by the Court of Appeal. That appeal gave rise to a lengthy judgment (see *The Society of Lloyd's v Jaffray* [2002] EWCA Civ. 1101). The Court of Appeal found that various brochures produced by Lloyd's and given to Names contained:

> "A representation that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities, including unknown and unnoted losses."

10. It also found that those at the centre of Lloyd's must have intended the representations to be understood in that way and that it was material, in the sense that it was intended to be relied on, and that the representation was false. However, the court also found that the Names had failed to prove fraud.

11. As Cooke J has said in a recent judgment, the relationship of which to this history will be explained in a moment,

> "By an order dated 28th October 2002, the Court of Appeal spelt out the consequences of its decision. It refused applications for a stay of execution of enforcement of judgments obtained against any Name for that person's Equitas premium, of any costs orders made in the specified Lloyd's litigation or of any original claims forms issued or to be issued in respect of Central Fund debt. By paragraph 8(2) the Court refused the application of the Names to discharge the order made by Creswell J on 27th April 2001, in which he dismissed the Names' claims and refused permission to amend, but, in a passage in parenthesis, the Court stated that *"for avoidance of doubt, nothing in that order shall prevent the Names or any of them making a further application for permission to amend to the Commercial Court."*"

12. Thus, Lloyd's was allowed to seek to enforce the judgments it had obtained against the Names while, at the same time, the Names were handed the opportunity to consider, and if appropriate, to apply to raise negligent misrepresentation claims. Such claims would be made as amendments in the Jaffray proceedings. Needless to say, the Court of Appeal was not in a position to consider and did not consider the strength of any negligent misrepresentation claim nor the impact, if any, such a claim might have on Lloyd's' future attempts to enforce the money judgments it had obtained.

13. Both sides have made use of the opportunities made available to them by the Court of Appeal. In early November 2002, Lloyd's served the statutory demands in issue here in an attempt to enforce the judgments it had obtained. At about the same time, a number of Names applied to amend to raise claims for negligent misrepresentation. This was resisted by Lloyd's on a variety of grounds. Among other things, it relied upon the

immunity given to it by virtue of Section 14(3) of the Lloyd's Act. It said that this immunity applied from the date of Royal assent, namely 23 July 1982. Furthermore, it argued that none of the proposed claims had any realistic prospect of escaping the effect of the Limitation Act 1980. Since, so it said, with certain exceptions, the proposed amended claims did not arise out of substantially the same facts as the facts pleaded in the *Jaffray* proceedings, no amendment to introduce them was permissible. Furthermore, even if the new claims did arise out of the same facts and matters pleaded in the Jaffray proceedings, they were time barred. At risk of great over simplification, old claims were caught by the Limitation Act, newer claims were caught by the immunity created by the Lloyd's Act.

14. The Names raised a significant number of arguments in response to these submissions. No purpose will be served by trying to précis them in this judgment. I only need to refer to one of them at this stage. For various reasons, and again at the risk of great over simplification, it was argued that the effect of the Human Rights Act ("HRA") was to make the court construe the Lloyd's Act in such a way as to, in effect, remove any relevant immunity Lloyd's might have.

15. The application to amend came on for hearing before Cooke J on 26 March 2003. Some indication of the scope of the arguments advanced is given by the fact that the hearing lasted eleven days. Two days later, Cooke J gave a judgment which, to me at least, appears to have been written with great economy of style. For example, although reference is made to many of the authorities which had been cited, there is no extensive quotation from them. Notwithstanding this, the judgment runs to 78 pages, ignoring the schedules attached to it and contains 218 paragraphs of text. It is formidable.

16. On most of the issues Lloyd's won. Cooke J held that a majority of Names represented before him, referred to as the Category 1 Names during the course of the argument before me, failed to obtain permission to amend. A somewhat smaller group of Names, the Category 2 Names, did obtain, in principle, permission to amend, subject to them filing properly particularised claims which would need to be considered by the court. However, although the Category 2 Names achieved some measure of victory, it was very limited in scope.

17. Mr Bannister summarises the position as follows. First, a Name underwriting on more than one year of account suffered separate damage in respect of each year of account (paragraphs 46-51 of the judgment). Second, the only Names with any realistic prospect of success, and thus of obtaining permission to amend, were those Names who had previously made claims for statutory negligent misrepresentation in the Lloyd's' brochure, as opposed to any other document in the *Jaffray* action, who had relied upon misrepresentations made within 15 years before their counterclaims were to be treated as having been commenced (because of the 15 year longstop provisions in s 14B of the Limitation Act 1980) who had relied upon such representations in concluding arrangements with Lloyd's and with underwriting agents before 23 July 1982 and who did not have the requisite s 14A knowledge earlier than 3 years before the commencement of their counterclaims (paragraph 16 (viii) of the judgment).

18. As noted above, the Category 2 Names did not thereby acquire an automatic right to amend to plead their counterclaim. Cooke J held that those Names would be given permission to amend only if they properly particularised the date of the operative representations and their reliance upon them and properly particularised a case on knowledge, such as to bring themselves within Section 14A of the Limitation Act (see paragraph 216 (xv) of the judgment).

19. In those circumstances, perhaps it is not surprising that during the short hearing at which his judgment was handed down, Cooke J commented that the Category 2 Names had got home by the "skin of their teeth". It should be noticed that the Category 2 Names would not only have to address and overcome the particularisation hurdle set by the Judge, but even if they did so, their counterclaims would be very severely limited. They would only be able to claim in respect of damages for the window between the application of the extended time limit under the Limitation Act and the commencement of Lloyd's' immunity under the Lloyd's Act. This means that in all cases, the window of negligent misrepresentation in respect of which counterclaims may be possible, would be measured in months. This is particularly significant because in most, if not all cases, the permissible counterclaims would be worth significantly less than the sums in the relevant statutory demands.

20. Cooke J refused permission to appeal. An application for permission has been lodged with the Court of Appeal. It is currently outstanding. That application is supported by a lengthy skeleton argument to which I will refer later.

21. It is now necessary to go back in the chronology. It will be recalled that in November of last year, Lloyd's issued the new statutory demands which are in issue here. Beside applying to amend to plead negligent misrepresentation, the Names applied to set aside those demands. In fact, as will be explained below, the relief sought by the Names went beyond simply asking for the statutory demands to be set aside. The Names pointed out that they had applied to plead new counterclaims on the back of the false representations which the Court of Appeal in *Jaffray* found to have been made by Lloyd's and that, as in the *Garrow* proceedings, it would be wrong to allow the statutory demands to stand, which would rapidly lead to the service of bankruptcy petitions, while those counterclaims had not been adjudicated upon.

22. Evidence was served in support of the applications to set aside. That included an affidavit of Michael David Freeman, the solicitor acting for many of the Names. It is dated 19 November of last year. In it, besides asserting that the negligent misrepresentation claims, if allowed to be pleaded and then successful, would overtop the sums covered by the statutory demand - not least because one of the heads of damage claimed is the Equitas premium - he suggested that the course being followed by Lloyd's was not sensible, proportionate or consistent with proper case management. His affidavit neatly encapsulates the position taken by his clients. He said:

> "The application to Amend the Counterclaim is pending and the Court will no doubt manage the Application efficiently. The hearing of the Application will inevitably last several days. No doubt at that Hearing Lloyd's will deploy all of

its arguments as to whether the Claims in negligent misrepresentation disclose a genuine triable issue. The Court will consider the Application in considerable detail. In the event that the Court felt that there was no genuine triable issue disclosed on the proposed amendments then no doubt Permission to Amend will be refused. The course being adopted by Lloyd's in prematurely serving Statutory Demands will merely achieve a needless increase in costs. The proper form for an examination of the strength and the substance of the Counterclaim is at the forthcoming Application to Amend. In the event that the Application fails, then no doubt Lloyd's will pursue its Statutory Demands at that stage. It is difficult to see what advantage is sensibly gained by proceeding at this stage in advance of the Application to Amend. To such extent as Lloyd's may assert some advantage, that will be outweighed by the cost, lack of proportionality and procedural inefficiency of proceeding in the way that Lloyd's is presently seeking to do. This is especially so given the relative disparity of funds available to Lloyd's as compared to funds available to the various individuals faced with Statutory Demands."

23. Sensibly, the parties agreed that is was not appropriate for the Names' set aside application to be determined in advance of the application to amend the pleadings. Without making any concessions, Lloyd's was agreeable to allowing the applications to set aside to stand over and to come on for determination after Cooke J had delivered his judgment on the amendment issues. Lloyd's' position was that the amendments proposed were hopeless. There was, therefore, no good basis upon which to set aside the statutory demands. Unsurprisingly, it says that this assessment has now been vindicated by Cooke J.

24. In relation to the latter, it is worth bearing in mind what Cooke J was doing. He was not considering whether the Names would succeed in their claims for negligent misrepresentation, but only whether those claims were pleadable. The test he used was expressed by him as follows:

> "The essential question is therefore, whether or not the case which the Names wish to advance by way of amendment has a reasonable prospect of succeeding or is properly arguable. If it has no such reasonable prospect then the application should be rejected. If it has a real, not a fanciful, prospect of succeeding at the trial, then it is properly arguable and the amendment should be allowed." (Judgment, paragraph 30).

Applying that test, in substance, he found against the Names.

25. As recorded above, the Names' application before Cooke J for permission to appeal also failed. The criteria relevant to determining that issue are those set out in CPR 52.3(6) namely that permission will only be given where:

> "(a) the court considers the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

26. Thus, in refusing permission to appeal, it must be taken that the judge considered that not only was the Names' case not properly arguable, but that there was no real prospect of successfully overturning that decision on appeal.

27. As I say, these decisions were made by the Judge after eleven days of argument. Unless and until overturned on appeal, assuming permission to appeal is granted, they constitute a final determination in the High Court of those issues. Mr Callman was anxious to make it clear that he was not inviting me to usurp the function of the Court of Appeal in relation either to Cooke J's judgment on the amendment or on the application for permission to appeal issues. He also disclaimed any desire to invite me to conclude, *sub rosa*, that I would have decided either issue differently.

28. Before considering the arguments, it is worth highlighting what will be the impact of making or not making the order sought by the Names. If the Names do not succeed on this application, the automatic stay which has so far prevented Lloyd's from presenting bankruptcy petitions will be removed. The presentation of such petitions is likely to have a significant adverse effect on the Names. It is because of the well known impact of presentation of winding up and bankruptcy petitions that the court is given the power, for example, to restrain publication. Furthermore, there will follow rapidly the hearing of the petitions which will lead, almost inevitably, to bankruptcy. That, in turn, will result in the trustee in bankruptcy for each Name taking over the current amendment proceedings.

29. As both Mr Callman and Mr Bannister agree, it is inconceivable that the trustees will pursue amendment any further, even were the Court of Appeal to indicate that the Names have reasonable prospects of success. Because the trustees' function is to get in the bankrupt's assets for the benefit and on behalf of the creditor, he will not use his powers to pursue the creditors. The result is that if this application fails, the Names will have lost what is likely to be their last opportunity to bring counterclaims against Lloyd's.

30. Mr Bannister points out that bankruptcy would not be the end of the road. A bankrupt would be able to ask his trustee in bankruptcy to sell him the cause of action for a nominal sum. On reflection, Mr Bannister accepts that that would take the Names little further. First, it is far from clear that the trustee acting for the creditors would be prepared to sell the cause of action and in any event, if the Name acquired the cause of action, he could only pursue it for the benefit of the creditors. As a practical matter, this application, if unsuccessful, will sound the death knell for the Names' attempts to sue Lloyd's.

31. Mr Callman says that that would be unfair to the Names. It would deprive the Names of the appeal process which the CPR makes available to them. He says that there are HRA consequences of that.

32. Mr Bannister agrees that the outcome will be bleak for the Names, but he points out that all this litigation is being funded by Lloyd's and therefore indirectly by the

Names who have met their obligations. What Lloyd's wants is enforcement of debts, the existence of which is not now open to doubt, and to put an end to the delaying tactics based on unsustainable counterclaims. He points out that further delay could be harmful to Lloyd's' attempts to make recoveries. Lloyd's is being kept out of the ability to make use of the considerable investigative powers which the trustee in bankruptcy has. Delay will assist Names to put assets beyond reach, an activity which, it is suggested, has already been engaged in by one of the Names who is party to these applications. It will delay the ability of the trustee to unravel impeachable transactions. In addition, Lloyd's does not have a limitless ability to present bankruptcy petitions. The six year time limit for doing so will expire in about March of next year. The Names' offer not to take any limitation point is said to be insufficient to meet all Lloyd's' concerns; in particular, any such undertaking could not bind third parties who may have entered into transactions which the trustee seeks to unravel.

33. I can now turn to consider in more detail the relief sought. Mr Callman put his clients' case in three ways. The first is that the circumstances here justify the making of an order setting aside the statutory demands under Rule 6.5(4)(a) or (d). The second is that, as a matter of case management, it is appropriate to adjourn this application until after the final determination of the appeal process from Cooke J's judgment. Such an adjournment would automatically extend the prohibition on Lloyd's petitioning for bankruptcy. The third is that I should exercise the powers under Rule 6.5(6) to fix a date after which Lloyd's may present its petitions. That date would be after the determination of the appeal process.

**Rules 6.5(4)a) and (d)**

34. It is convenient to consider Rule 6.5(4)(a) first. In full it reads as follows:

> "The court may grant the application [to set aside the statutory demand] if the debtor appears to have a counterclaim which equals or exceeds the amount of the debt or debts specified in the statutory demand."

35. This should be read in conjunction with the Practice Direction: Insolvency Proceedings [2000] BCC, 927, ("the 1999 Practice Direction"). The making of that practice direction is governed by s 1 of the Civil Procedure Act 1997. It has the force of law. Paragraph 12 is concerned with setting aside statutory demands. Paragraph 12.4 provides:

36. "Where the debtor, (a) claims to have a counterclaim set off or cross-demand (whether or not he could have raised it in the action in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand or (b) disputes the debt (not being a debt subject to a judgment or order) the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue."

37. Mr Bannister suggests that it is also relevant to have in mind paragraph 12.3 which is in the following terms:

> "Where the statutory demand is based on a judgment or order, the court will not at this stage go behind the judgment or order and inquire into the validity of the debt nor, as a general rule, will it adjourn the application to await the result of an application to set aside the judgment or order."

38. Both counsel agree that, although Rule 6.5(4)(a) is drafted in terms of what the court "may" do, this does not create a discretion. If the debtor appears to have a counterclaim which equals or exceeds the amount of the debt specified in the statutory demand, the court must set the demand aside. That was the limit of their agreement.

39. Mr Callman puts forward three possible constructions of the Rule. His least ambitious argument is also his most persuasive. He says that what the court has to determine is whether there is a genuine triable issue on the counterclaim. Although Cooke J's judgment and his refusal to give permission to appeal may be taken into consideration, they are not determinative. On the other hand, the mere existence of an application to the Court of Appeal for permission to appeal is not enough to determine that a genuine triable issue exists. He says that a genuine triable issue exists if the application for permission to appeal and any appeal to be conducted if such permission is granted, amounts to an appeal of substance and weight.

40. In relation to this issue, he drew my attention to a number of authorities. The starting point is *Ex parte Yeatman* (1880) 16 Ch D 283. That was a case in which the bankruptcy proceedings had been commenced and the debtor had challenged the creditor's debt. He had lost at first instance on that issue, but an appeal was pending. Translated to the modern procedures involving statutory demands, this was not an attempt to prevent the presentation of a bankruptcy petition, but an attempt to adjourn the hearing of that petition until after the determination of the appeal. It was, therefore, in substance an application like those covered by paragraph 12.3 of the 1999 Practice Direction. In the Court of Appeal Cotton LJ, in considering the Registrar's power to adjourn, said:

> "But if he is satisfied that a real appeal from the judgment is pending he ought, in my opinion, as was done in the present case, to adjourn the hearing of the petition until after the appeal shall have been disposed of."

41. The next case chronologically is *Re: Noble* [1965] 1Ch, 129, in which Russell LJ said:

> "It seems to me that there is power to make a receiving order, where the petitioner's debt is the subject of a pending appeal, although it should not be then made if the Registrar is satisfied that the appeal is bona fide." (p 145)

42. Both these cases were considered by Harman J in *Ex parte Cobbs Property Services Ltd* [1995] 1WLR, 467. Once again, this was a paragraph 12.3 case. Counsel for the debtor had submitted that the test was, "Can the appeal be said to have some substance?" Harman J accepted that submission. He said:

> "Mr Patchett-Joyce shows me that the phrase 'bona fide' [in the head note in *Re: Noble*] comes from the head note in *Re: Yeatman* 16 Ch D 283. The phrase of Cotton LJ himself was 'a real appeal.' That has been followed and applied in cases more recently and the test advanced by Mr Patchett Joyce, which in my judgment is the correct way to look at the matter for the purpose of the Registrar considering whether to exercise the power which he has to adjudicate on the bankruptcy petition, or whether to adjourn that petition pending an appeal, must turn upon the Registrar's consideration as to whether the appeal was serious and whether the appeal was being taken seriously. Mr Patchett-Joyce's words are, in my opinion, entirely apt. Serious appeals are real appeals, to use Cotton LJ's phrase, and could be called bona fide appeals, that is, appeals properly worth considering and raising a point of law or other relevant appellate ground of substance." (p 470)
>
> and:
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> "When I consider that test, and without involving the court in a mini trial, which should not be undertaken for the purpose of this decision, it seems to me quite clear that there is a serious point of construction raised on appeal from Master Trench's judgment. Whether that point is right or wrong is not a thing I ought now to consider, merely that there is a serious appeal." (p 471).

43. By 1994 Hoffman LJ was able to summarise the practice as follows in *Royal Bank of Scotland v Farley* [1996] BPIR, 638 at 641:

> "The bankruptcy procedure has ample safeguards built into it for enabling the bankrupt to challenge the existence of the debt. He may, as I say, do so on an application to set aside the statutory demand. If he has a bona fide appeal or application to set aside the judgment in existence at the time when the petition comes on to be heard, it is the invariable practice to adjourn the hearing of the petition until that application or appeal has been decided.

44. Mr Callman argues that the terminology does not matter. Whether one talks in terms of "real" or "bona fide" appeals or appeals which are "serious and are being taken seriously", where such an appeal exists, the court must allow the debtor to pursue it. At the stage of a statutory demand, this means that the court must accede to an application to set aside. The court is therefore obliged to consider whether there is a non-frivolous appeal which is being conducted seriously. In doing that, the court must not engage in a mini trial but it must get sufficient feel for the issues which the debtor wishes to raise in order to determine whether the appeal is sufficiently serious, real or bona fide. If it is

then the counterclaim raises a genuine triable issue within the meaning of paragraph 12.4 of the Practice Direction.

45. I understand Mr Callman to go further than this. He relies on *Clifton v Barclays Bank Plc* [1998] BPIR, 565 in which a statutory demand was set aside. The head note records that this was because the debtor might have a counterclaim. The way Mervyn-Davies J expressed it in his judgment was:

> "It may well be … that submissions could be made to the effect that [the debtor] has a substantial counterclaim." (p 570).

46. Based on this, Mr Callman suggest that a statutory demand could be set aside in a situation like this even if the appeal was not substantial, as long as it could be said that the debtor "might" have a counterclaim. Whatever the correct test for determining whether a counterclaim is genuinely triable, in my view it cannot be as low as this, nor do I read Mervyn Davies J as so holding. I will concentrate on Mr Callman's less ambitions argument that a counterclaim is genuinely triable if there is a real, substantial or bona fide appeal seeking the introduction of that counterclaim.

47. Mr Callman argues that construing the Rules in accordance with his submissions way is to be encouraged because it is consistent with the HRA. The Names are entitled to have access to the appeal procedure made available under our court rules. The almost inevitable result of the failure of this application would be that the Names would be deprived of their right to pursue the appeal process to its natural conclusion.

48. Mr Bannister argues that this is an illegitimate construction of the Rules and the Practice Direction. He has taken me through a tour of the history of the use of statutory demands in relation to bankruptcy proceedings and he argues that the authorities relied upon by Mr Callman, with the exception of Clifton, are all cases in which what was at issue was an appeal in relation to the judgment which created the judgment debt. Very different considerations apply to these sort of cases.

49. As he explains, the current Rules make it clear that once a statutory demand exists it creates a rebuttable presumption that the money is owed. Furthermore, where the statutory demand is based on a judgment debt, unless and until the judgment debt is set aside, the existence of the debt and that it is owed to the creditor is not open to dispute. Any attempt to challenge the debt has to be made at the time of the hearing of the petition, which is consistent with Practice Direction 12.3. At the hearing of the petition it is open to the debtor to challenge the judgment debt. It is in this context that *Yeatman* and the other authorities relied on by Mr Callman come into play. They indicate the level at which one must challenge a judgment debt. They throw no light on whether there is a "genuinely triable issue" as to whether the debtor has a counterclaim of sufficient merit and size to equal or exceed the debt set out in the demand.

50. Mr Bannister develops the latter point as follows. Rule 6.5(4)(a), when read in conjunction with paragraph 12.4, is dealing with cases where there has not been a

judicial determination of the counterclaim. Appeals from, or application to set aside, judgment debts are dealt with at the hearing of the petition. Arguments that there is a triable counterclaim arise at the set aside stage. In this respect the terminology is important. Paragraph 12.4 refers to "triable" issues, not "appealable" ones.

51. Translated the facts of this case, there has been a judicial determination that the issues which the Names wish to raise are not triable. It is not open to me, nor am I being asked, to determine that Cooke J was wrong. Even if I were, the fact is that he has listened to eleven days of argument. I have heard very little. Indeed, Mr Bannister has only touched very lightly on one or two of the issues considered by the Judge, but then only to give me a flavour of why Lloyd's is confident that Cooke J's judgment is correct.

52. The profound differences in these submissions can be appreciated by the limited concessions each side is prepared to make. Mr Callman concedes that, on his analysis, the application to set aside will fail if either the Court of Appeal refuses permission to appeal or, if it gives permission, the appeal fails. Save in those cases, the question is only whether there is a serious appeal or appeal process being advanced seriously by the Names. On the other hand, Mr Bannister only concedes that there will be a genuine triable issue if the Court of Appeal both gives permission to appeal and allows the appeal on points of substance. It is only in those circumstances that Practice Direction 12.4 is engaged. This means, as he readily accepts, that, even were the Court of Appeal to give permission to appeal, before the appeal is determined there is no jurisdiction to set aside the statutory demand. Until such final determination, there is a judgment binding on all the parties that the Names' claims are, in substance, not sufficient to be pleadable or triable. As Mr Bannister said in the course of his submissions, this would be so, even if, at the time of giving permission to appeal, the Court of Appeal were to express strong misgivings as to the correctness of Cooke J's judgment on matters of substance.

53. Mr Bannister says this is not as unfortunate a result as it may at first appear. If the Court of Appeal were to grant the Names permission to appeal, it could always order that all further steps in the bankruptcy petition be stayed, pending the outcome of appeal. Similarly, Cooke J could have ordered a stay, but he did not. As Mr Bannister puts it, it is not for this court to impose a stay where other courts have not.

54. These are not complete answers to the point. Most importantly, in many cases, of which this may well be one, the Court of Appeal may well not consider the application for permission to appeal before the creditor has launched the bankruptcy proceedings. The fact that those proceedings may be stayed does not address the desirability in suitable cases of avoiding the harm which is likely to be inflicted on the debtor by the presentation of the petition.

55. In coming to a conclusion on the issues surrounding the application of Rule 6.5(4)(a), it is convenient to start at a fairly basic level. When an attempt is made to bankrupt an individual, it is a defence for that individual to demonstrate that his net indebtedness to the creditor is zero, or more precisely, below the bankruptcy limit of £750. This can be done in either of two ways. First, the debtor can demonstrate that

there is no debt. Second, he can demonstrate that the debt is matched or exceeded by sums owed to him by the creditor. He could put forward a mixture of the two. Whichever ground or grounds he advances, the purpose is to demonstration zero net indebtedness. The Rules and case law impose procedures which indicate how and when the debtor can raise his objections to the bankruptcy procedure.

56. Rule 6.5(4) indicates that all objections, including the existence of a counterclaim and the disputing of the debt, can be raised at an early stage as grounds for setting aside the statutory demand. This means the petition will not be presented. However, there are refinements to this. First, where the indebtedness is challenged on grounds available under Rule 6.5(4), not only is the debtor obliged to get on with the challenge (see 1999 Practice Direction paragraph 12.1). Second, and more importantly, it is not appropriate to adjourn the challenge so that it can be raised on the hearing of the bankruptcy petition. In other words, the challenge should be assessed before the petition is issued. This was explained by Chadwick LJ in *Turner v The Royal Bank of Scotland* [2000] BPIR 683. Having referred to the Practice Note (Bankruptcy: Statutory Demand: Setting Aside) (No 1/87) which is, in substance, the same as the 1999 Practice Direction, he said:

> "That note reflects the practice, long-adopted in the bankruptcy courts and in the companies court in the context of petitions to wind up companies, that insolvency proceedings are not the proper forum in which to determine issues in relation to disputed debts or cross-claims. If there is an issue which can be described as 'a genuine triable issue', then that ought to be resolved by a trial before the insolvency process is invoked. But it is important to have in mind that para 4 of the Practice Note refers to a counterclaim, set-off or cross-demand *which equals or exceeds the amount of the debt or debts specified in the statutory demand*. There has to be a genuine triable issue on the question whether the amount of the cross-demand will exceed the amount of the debt specified in the statutory demand.
>
> The scheme of those provisions, plainly, is to ensure that if the debtor wishes to dispute the debt, or wishes to raise a counterclaim or cross-demand against the debt creditor, he should have the opportunity to do so by an application to set aside the statutory demand; and that until that application has been heard and determined, no petition for bankruptcy can be presented. If an application to set aside a statutory demand is made, the court is required to consider, and adjudicate upon, any contention advanced by the debtor that he has a cross-demand which extinguishes the debt. If satisfied that there is a genuine triable issue in that respect, then the court will normally set aside the statutory demand and no bankruptcy petition can be presented." (p 692).

57. He went on to state that once these challenges had been mounted at the set aside stage, they could not be argued again in the hearing of the bankruptcy petition. The effect of this is to require challenges which are capable of being levelled at the statutory demand, to be made at that stage and to be evaluated by the court at that stage.

58. The same point was made, and the reasons for it explained in the judgment of Robert Walker LJ in *Garrow*:

> "Although Lloyd's has a judgment against G, it has chosen to proceed by way of statutory demand and the statutory demand is crucial to the making of a bankruptcy order. It would be contrary to the scheme of the legislation and to the practice of the bankruptcy court, to allow a doubtful statutory demand to stand on the ground that the debtor would still have the opportunity of opposing a bankruptcy petition, once presented. Counsel for Lloyd's have argued that that course would enable Lloyd's to present a petition and so establish a date by reference to which transactions might be invalidated or impeached under Sections 284 and 339 (and following) of the Insolvency Act 1986, while protecting G by an adjournment of the final hearing of the petition. However, it is precisely because of the far-reaching effect of those Sections, incomparable sections in the winding up legislation that the bankruptcy court and the Companies Court have a strong and well established policy of discouraging long or repeated adjournments of bankruptcy and winding-up petitions. The judge was right to reject the suggestion that he should allow a petition to be presented and then go into suspended animation." ([2000] 1BCLC, 116-117)

59. The other major refinement is that a different regime applies where the debtor's attempt to demonstrate net zero indebtedness involves attacking a judgment debt. Perhaps because, as Mr Bannister says, as between the debtor and the creditor the judgment debt creates an issue estoppel, such a debt cannot be impugned prior to the presentation of the petition. This is expressly provided for in 1999 Practice Direction paragraph 12.4. Thus, the procedure applied to these proceedings ensures that most challenges have to be mounted at the set aside stage. This includes all challenges based on the existence of an alleged counterclaim and most challenges to the existence of the debt itself. It is only one particular category of debt, namely judgment debts, which have to be challenged at the petition stage.

60. Although this means that different challenges are to be considered at different stages, there is nothing in the Rules or authority to suggest that the court's assessment of the seriousness of the challenge should differ from one stage to the other. On the contrary, there is every reason why the height of the hurdle the debtor has to negotiate should be substantially the same at whichever stage he mounts he challenge. There can be no doubt, for example, that challenges to the debt which have to be brought at the set aside stage (Rule 6.5(4)(b)) have to demonstrate a genuine triable issue (1999 Practice Direction paragraph 12.4). There is no reason why the debtor's challenge should have to reach a different level of substantiality when he challenges the debt (that is, in the form of a judgment debt) at the petition stage.

61. If this is correct, then there is no difference of substance between the extent to which the debtor needs to show he has a triable counterclaim or challenge to the debt at the set aside stage and the extent to which he needs to show he has a ground for appealing or setting aside a judgment debt at the petition stage. If the debtor, at the petition stage, challenges a judgment debt, it is no answer to say that, pending a successful appeal, the original judgment binds the parties. Cases such as *ex parte Cobbs Property* factor in the reality that sometimes judgments are reversed on appeal.

62. The question to ask at the set aside stage is whether the debtor has raised a genuine triable issue. The fact that at first instance a Judge has held the issue to be too insubstantial to be allowed to be pleaded is an important factor in deciding whether the issue is genuinely triable but it is not determinative. If an appeal process is on foot, the court must decide whether it is a real, as opposed to a frivolous, appeal. Once again, the fact that the first instance Judge refused permission to appeal is a factor to take into account in deciding whether the appeal is real, but it cannot be determinative.

63. How, then, does one respond to Mr Bannister's point on the use of the word "triable" and not "appealable" in the 1999 Practice Direction paragraph 12.4? A simple answer is that there is nothing to suggest that the draughtsman of the paragraph had in mind and intended to draw distinctions between trials and appeals. Most challenges at the set aside stage will not have entered the list at all, let alone reached the level of an appeal. This litigation is likely to be somewhat unusual in that respect.

64. A more involved answer can be given by reference to an example. It will be recalled that Mr Bannister argues that unless and until reversed by the Court of Appeal, Cooke J's judgment means that as between the parties, the negligent misrepresentation claims are not sufficiently substantial to go to trial. They are, in the language of paragraph 12.4, untriable. The result is that even were the Court of Appeal to grant permission to appeal and at that stage to express grave misgivings about the first instance judgment, the position would remain unchanged. Until successful on the appeal, the debtor's counterclaim is not triable and the court has no jurisdiction to set aside the demand. Mr Bannister accepts that this might appear hard on the debtor but it is the inevitable consequence of the way the provisions are written. As Mr Callman points out, not only would this be hard on the debtor, it also would be arbitrary. If the appeal process were to be speeded up and the application to set aside slowed down, it might be possible to obtain a favourable judgment from the Court of Appeal before the court has to determine whether the counterclaim is triable.

65. Mr Callman provides an answer to this point of construction. It is not in dispute that were the Court of Appeal to give permission to appeal and to allow the subsequent appeal on points of substance, at that stage it would be clear and determined once and for all, ignoring the possibility of appeals to the House of Lords, that the counterclaim is triable. If it is triable at that stage, it has always been triable even though at earlier stages that may have been less easy to discern. The position after the decision at first instance is that the Judge's decision to refuse permission to plead the counterclaim is a major factor in determining whether the counterclaim is triable but is not the final word.

66. For these reasons, I have come to the conclusion that Mr Callman is correct in saying that Cooke J's judgment and his decision not to give permission to appeal are not determinative of whether the Names' proposed counterclaims raise a genuine triable issue. It is necessary to take into account the fact that an application for permission to appeal has been lodged with the Court of Appeal and to assess whether the appeal which the Names wish to pursue is a real bona fide and non-frivolous one. In these circumstances it is not necessary to consider Mr Callman's argument that the construction of the rules should be modified to accommodate HRA considerations.

67. On the issue of whether the Names' appeal here is substantial or real, I have been taken at some length through the skeleton argument which the Names have served in support of the application for permission to appeal so as to appreciate at least some of the major arguments which the Names intend to raise. Whether or not this exercise was necessary, or necessary in the detail with which Mr Callman conducted it, is academic because Mr Bannister has chosen not to challenge this part of his opponent's submissions. Although it is clear that Mr Bannister considers that some of the Names' argument, including in particular the HRA arguments designed to circumvent the effect of the Lloyd's Act, to be hopeless, he does not argue that, taken as a whole, the appeal could be dismissed as frivolous or other than real. In the result, Mr Callman succeeds in relation to his Rule 6.5(4) argument.

68. I would only add that, had I not been prepared to set aside the statutory demands, I would almost certainly have refused to exercise any discretion I have under the CPR to stay these proceedings so as to achieve an equivalent result by the back door. If the effect of the Rules is to prevent the court from setting aside the statutory demand, it would not be appropriate to try to undermine the legislative intent by use of the CPR. For very similar reasons, it is most unlikely that I would have felt it appropriate to exercise the power under Rule 6.5(6) in a way which appears to be contrary to its purpose.

69. I would only add a few points. First of course, if the application to the Court of Appeal for permission to appeal is unsuccessful, it will be open for Lloyd's to serve new statutory demands. Second, if permission is granted, but the appeal is unsuccessful, subject to any questions concerning appeals to the House of Lords, again Lloyd's will be able to serve new statutory demands. Third, if permission is granted and the appeal is wholly successful, as Mr Bannister accepts, it will not be appropriate to serve new statutory demands.

70. On the other hand, if the appeal is successful, but only in part, it may be that it would be open to Lloyd's to serve new statutory demands. For example, if the Names were only to be successful on the issue of the commencement date of the Lloyd's Act with the result that the period of negligent misrepresentation, in respect of which they could sue, is expanded by a few months, then it may well be that any counterclaim based on that would be too small to match the sums in the statutory demands.

71. I should also say something about the undertakings offered by the Names in respect of the limitation period for the presentation of bankruptcy petitions. The precise form of these was not finalised or discussed before me and in any event, Lloyd's is not prepared to accept them since they do not meet its concerns. In the circumstances, I shall set aside the statutory demands but without requiring any undertakings from the Names. The absence of any safeguard for Lloyd's in relation to the limitation period is, however, a concern. For what it is worth, this is a matter which should be drawn to the attention of the Court of Appeal. It may affect the timing of consideration of the application for permission to appeal and the appeal, if there is one.