Drummond and Others v FLP Secretan & Co
R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Manelfi

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
(Transcript: Smith Bernal)
CO/4317/95, (Transcript: Smith Bernal)
HEARING-DATES: 22 MAY 1996
25 OCTOBER 1996
22 MAY 1996
25 OCTOBER 1996

COUNSEL:
R Henderson QC and R Wood for the Plaintiff; D Dohmann QC and R Anderson for the First Defendants; A Temple QC and J Rowland for the Second Defendants; C Symons QC and J Turner QC for the Third Defendants; R Hildyard QC, R Lord and J Butler for the Fourth Defendants
S Richards for the Respondent; D Rose for the Applicant

PANEL: CRESWELL J
JOWITT J

JUDGMENTBY-1: CRESSWELL JJOWITT J

JUDGMENT-1:

CRESSWELL J: This case was fixed for trial to start on 4 June. Following what are described by the Names as "recent and significant developments" between the Names and Lloyd's, the Names apply for an order that this case be adjourned until after the result of the Second Settlement Initiative is known. The managing agents, members' agents, Ernst & Whinney/Ernst & Young and Bacon & Woodrow are all willing to agree to an adjournment. With the exception of Bacon & Woodrow, all of these parties, either agree that or (in the case of Ernst & Whinney/Ernst & Young) do not oppose an order that, the costs of and occasioned by the adjournment should be reserved. Bacon & Woodrow seek an order that the Names do pay Bacon & Woodrow's costs thrown away by the late application to adjourn. Neville Russell say they are ready for trial and do not wish to adjourn unless their costs are paid by the Names.

On 8 February this year, Davies Arnold Cooper, solicitors for Neville Russell, wrote to the Names' solicitors:

"We have noted your counsel's confirmation, after taking instructions, that your clients do not intend to seek any adjournment of this matter in the light of the publication of the various Equitas figures and the further publications in respect of those figures to be produced in the forthcoming months. Should your clients seek at some future point in time to adjourn on the basis of the various Equitas/R & R proposals which are about to be put to them, then we will refer to your counsel's comments in seeking any order for costs wasted between now and that application."

On 12 April, McKenna & Co (solicitors for Ernst & Whinney/Ernst & Young) wrote to the Names':

"As you know, we represent Lloyd's auditors in a number of the long-tail cases which have been brought by Names Action Groups.

"Following the late adjournment of the Wellington trial on the application of the Plaintiffs in that Action, we wrote, as you are aware, to Mr Justice Cresswell expressing our concern that, with the existence of Lloyd's 'R&R' proposals, what happened in Wellington might become something of a trend, and that if that was a likelihood then it should be ascertained as soon as possible to avoid unnecessary expenditure of time and money.

"Although we did not receive a formal response to that letter from the Learned Judge, it is our understanding that the Court did, on subsequent interlocutory hearings in the various actions, endeavour to ascertain from the Plaintiffs what their present intentions were.

"Our concern that the Wellington situation might be the start of a trend has, of course, been realised, with something very similar having occurred in the Poland action just before the Easter break.

"The next case for hearing in this sequence of trials is, of course, the Secretan action. With the commencement of that trial now only some eight weeks away, preparation is reaching a peak, with its attendant costs. We have already invited you to agree to reduce the scope of the trial by withdrawing in respect of years where we consider that your clients must, on the Merrett precedent alone, fail, but you have declined to do so, which is, of course, your clients' prerogative, subject to any penalty which that may incur for them as far as costs are concerned.

"We are now writing to you to seek your confirmation, by close of business next Friday, 20th April, that your clients intend to proceed with trial which is due to commence at the beginning of June. It is our fear that what has happened in the last few months in the Wellington and Poland actions may occur again here. Although we do not have precise figures, there seems to be a close parallel with the Wellington proceedings in that, as we understand the position, the quantum of your clients claim could be less than £10m.

"Your clients will have had longer than the Wellington and Poland Plaintiffs to consider their position. Let there be no misunderstandings that our clients are working to a trial which is due to commence at the beginning of June and they are prepared vigorously to defend the case brought against them if that trial takes place. The position which they do not wish to find themselves in, however, is, for the third time in the space of a few months, to be faced with an adjournment application after a considerable amount of effort and money has been expended.

"Accordingly, we are instructed to invite you to consider your position and to advise us by close of play next Friday whether or not your clients intend to proceed. If we receive a positive answer to that question, then so be it, and we will continue with our preparations for trial. However, if, thereafter, your clients then seek to adjourn the trial date, we put you on notice that our clients will seek an Order for the costs thrown away of any adjournment; and as to an adjourned trial date, will ask the Court to have regard to the convenience of the Defendant auditors and their legal representatives. In that eventuality, we reserve the right to draw the terms of this letter to the attention of the Court.

"For the avoidance of doubt, we reiterate that this letter is written without prejudice to liability (which remains hotly disputed); but is written in a constructive attempt to enable everyone to know where they stand."

On the same day, Fishburn Boxer, solicitors for Bacon & Woodrow, wrote to the Names' solicitors:

"We have just seen McKenna & Co's fax on the subject of an adjournment and we wish to comment on that and two other outstanding issues.

"In simple terms, we associate our clients entirely with the position McKenna & Co have taken on the question of adjournment, except that the date should be 19th April 1996. Whilst some kind of pattern appears to be developing, which suggests an incentive on the part of litigating Names to adjourn, our clients are determined not to bear the costs of that eventuality. There is no question of our relaxing our preparations for trial, and it should not be taken from this letter that our clients seek an adjournment themselves."

On 16 April, Davies Arnold Cooper wrote to the Names' solicitors:

"We refer to McKenna's two page fax to you dated 12th April 1996 on the subject of Lloyd's R & R proposals and the adjournments which have occurred in relation to other actions. We endorse their comments. In the event that you seek an adjournment in the period leading up to trial, we shall vigorously seek costs thrown away by the adjournment. Those will include substantial Brief Fees which we put you on notice will be incurred from 17th April."

On 18 April, More Fisher Brown, the Names' solicitors, responded as follows to McKenna & Co with copies to Fishburn Boxer and Davis Arnold & Cooper:

"I refer to the fax from McKennas of 12th April, fax from Davies Arnold Cooper of 16th April, and from Fishburn Boxer of 12th April. We have previously been irritated by parties raising the question of adjournment and simply mentioning R & R. In a normal case, it might be relevant for a party to make such a point if settlement negotiations

were taking place or an offer was on the table. That is not the case with the auditors or the Actuaries. Litigation credit indications have been provided to Names on the basis of a settlement fund contributed to by agents E & O, but no such indication has been made by auditors. Discussions may be taking place with third parties but we see an application for an adjournment as a blatant attempt to obtain a negotiating advantage. There can be no question of any wasted cost application if it actually turns out that your clients make an offer and then an adjournment might be applied for. In fact, we expect the normal course would be for us to be making a wasted cost order because the late adjournment would have arisen because of the late offer."

On 19 April, McKenna & Co responded:

"The seventh line of your letter seems to indicate that you have missed the point. We were referring to the consequences of your clients making a late application for an adjournment, not ours."

On 22 April, More Fisher Brown responded:

"We have not missed the point. We were referring to the consequences of your clients making a late offer."

On 23 April, Fishburn Boxer wrote to the Names' solicitors:

"Returning to the question of adjournment and your letter of 18th April 1996, we once again follow McKenna & Co in their reply dated 19th April 1996. However, while we understood that in the Wellington and Poland actions, it was the Names that sought an adjournment at a late stage, and we fear that your clients might make a similar decision, our comments regarding the costs of a late adjournment might equally apply to any party that now seeks to delay the trial or terminate the action."

On 24 April, More Fisher Brown responded to Fishburn Boxer with copies to McKenna & Co, Davies Arnold Cooper, Reynolds Porter Chamberlain and Cameron Markby Hewitt as follows:

"We would again reiterate our points on adjournment. Although there have been indications in indicative statements of a possible offer on behalf of agents, there is no indication of an offer by your clients or the auditors. If such an offer materialises which results in an application for an adjournment then it will have to be dealt with in the normal way. We cannot make sense of the point being made. You seem to be saying that if and to the extent your clients and/or the auditors make an offer before the trial which results in an application for an adjournment, then your clients receive the costs in any event. This cannot be right."

On the same day, McKenna & Co responded to the Names' solicitors:

"We note your assertion that our point relating to the consequences of a late adjournment would be relevantly made if there were settlement negotiations taking place or an offer on the table from our clients. We hope that you are not seriously trying to suggest that the reason your clients have not sought an adjournment of this action is because there has been no offer forthcoming from our clients.

"We attach a selection of press cuttings of which you are no doubt aware. They demonstrate that, as early as October 1995, it has been public knowledge that negotiations had been underway for a considerable time between Lloyd's and firms of accountants, (including our clients) as regards a contribution to the R & R settlement initiative.

"We again request an indication from you as to the future of this litigation."

On 25 April, the Names' solicitors responded to McKenna & Co with copies to the solicitors acting for the other defendants:

"We are somewhat bemused by your fax. It seems we are supposed to approach this on the basis of what we read in the Press and simply adjourn assuming that your clients will make an offer which is acceptable to our clients. That is to assume, of course, that there was never any point in litigating at all and a party will always make an offer whether or not he is sued.

"The position is quite simple, as you well know. No offer has been made to our clients either through us or to our clients direct.

"As you all keep telling us, there are five weeks to go, (25 working days). MAKE OUR CLIENTS AN OFFER."

On 29 April, McKenna & Co responded to the Names' solicitors:

"We refer to your fax of 25th April 1996, in which you invited our clients to make an offer of settlement. We have no instructions to make an offer of settlement in this action. We were simply trying to point out to you that the Wellington and Poland Names sought late adjournment of their actions purely on the strength of the R & R negotiations which are taking place and regardless of whether or not the auditors are contributing to the Equitas proposal. We were concerned about the costs consequences of your clients making a similar application for late adjournment.

"This is proving to be an entirely unsatisfactory and unproductive exchange of correspondence. This is our last word on the subject."

The first hearing of the pre-trial review in this matter took place on 10 May. It so happened that on the same day Lloyd's made an improved settlement offer in relation to the problems reflected in the "Lloyd's Litigation." In the document entitled "Reconstruction and Renewal: Towards the Settlement May 1996", exhibited to Mr Hamer's affidavit. It is stated:

"The Settlement.

"The Council has consistently sought to improve and increase the offer if possible. We now have the scope to increase the total value of the settlement offer to around 3.1 billion. Negotiations are nearing conclusion with the principal contributors to the settlement and we do not envisage any possibility of increasing the offer above this level.

"Throughout our work, we have been conscious of our duty to act as fairly as possible between all constituencies within the Society. In building this increased settlement offer, we have taken into account the following:

"Brokers -- We are close to agreement with the Lloyd's broking community to contribute a levy towards the future market over the next five years. This levy will enable Lloyd's to commit the present value of approximately £100 million to the settlement."

"The Future Market -- We expect cash funding from the sale, lease back and mortgage of the Society's assets such as Lloyd's of London Press, the 1986 Lloyd's building and the 1958 building, to total some £270 million. This compares with an estimated range of £200-£250 million in the original proposals.

"Agents -- We anticipate a payment from the agency community of around 200 million in cash which, in contrast to the special contribution from Names, is non-refundable. Certain agents have also offered around £20 million to the litigation settlement fund in relation to their uninsured exposure to specific litigation.

"Auditors -- A number of leading audit firms have collectively offered in excess of £100 million towards the settlement of litigation against their firms.

"Agents' Errors and Omissions underwriters -- E&O underwriters have agreed to make a contribution of around £800 million.

"Names underwriting in the 1993, 1994 and 1995 years of account will be asked to approve resolutions requiring them to contribute a sum equivalent to 1.5 per cent of their overall premium limits for each of these years. The reduction in the Equitas premium will result in a very significant benefit for many of these Names and make this contribution much more affordable. The special contribution will be refundable, for all contributing Names, on terms described on page 12 of this document.

"These contributions will provide approximately an additional £250-260 million. We are also now able to deploy additional funds from the Society's central resources to raise the offer from £2.8 billion to around £3.1 billion. With this increase the Council has reassessed the allocation of the settlement fund in order to achieve the twin objectives of providing affordable 'finality' and settling litigation. Since the publication of the Council's initial proposals in February and the release of the indicative statements, the allocation principles underlying the settlement offer have been the subject of much discussion and debate. We have carefully considered the results of this consultation phase and have decided on a series of changes to the allocation principles for the final settlement offer.

"We have retained the overall framework as recommended by the Names' Committee. With the reduction in the Equitas premium, the cost of providing the benefits of tranches 1, 2 and 3 of the debt credits as shown in indicative statements has fallen by about £250 to £300 million. This will enable us to redeploy the debt credits no longer required for this purpose.

"We are now in a position to enhance the offer as follows:

"Provide more assistance to Names who have paid all their Lloyd's obligations.

"Provide more assistance to Names with extreme losses who face the greatest financial difficulty in meeting the cost of 'finality'.

"Improve the prospects of settling litigation against agents and the Society.

"Settle litigation against certain audit firms."

At page 11 of the same document, it is stated under the heading "Settlement of audit or related litigation"

"A number of leading audit firms have collectively offered in excess of £100 million for the settlement of litigation against their firms. This fund will be directed towards action groups with claims against the contributing audit firms.

"The allocation principles for this fund are now being finalised. The amounts allocated to individual Names will be shown in statements sent to Names in June. Awards from the auditor settlement fund will be disregarded for the purposes of calculating a Names cap."

On 17 May, this matter came back before the court on the adjourned hearing of the pre-trial review. I received a fax from Mr Henderson on behalf of the Names that morning. The fax was dated 16 May, the previous day, and read:

"I am pleased to say that the meeting at Lloyd's this evening, i.e., 16th May, has satisfied the Chairman of the Action Group that this case most probably should be adjourned until some appropriate date after the second R and R initiative has taken place. I will be asking tomorrow morning that the matter do stand over until a convenient time next week to allow the Committee to approve the proposal being advised that those concerned are confident of that approval."

Mr Henderson added to that fax on the morning of 17th and applied for an adjournment of the pre-trial review until a convenient date this week. I adjourned the hearing of the pre-trial review until today and reserved the costs.

On Monday of this week, 20 May, I received a further fax from Mr Henderson (copied to all the parties in the case) which read:

"I am pleased to say that the Committee of the Names Association agreed unanimously this morning that upon the basis of the assurances offered on behalf of the Society of Lloyd's and by leading counsel for the members' agents, speaking on behalf of the managing agents, members agents and Ernst & Whinney/Ernst & Young, the Names should apply on Wednesday ... for the action now listed for trial on 4th June to be adjourned until some date suitable to the Commercial Court in 1997 with costs reserved."

The Names' submissions

The Names submit that an adjournment with costs reserved is the appropriate course for the reasons set out in the third affidavit of Mr JN Edwards. This action is part of a very much wider picture involving the overall settlement negotiations at Lloyd's. Those negotiations appear to be reaching a critical stage and it is undesirable to have a trial involving parties to the settlement process taking place at such a juncture. Decisions and findings by the court might in some unpredictable way prejudice the finalisation of the R and R package. There is now a real chance that litigation will not be necessary if the Second Settlement Initiative is successful. To occupy a considerable amount of court time on a case which may not in the event be necessary to resolve the issues between the parties is a waste of the Court's resources. Whether the settlement will succeed at the end of the day cannot be presently known. An adjournment with costs reserved preserves the position, without prejudice to any party, until such time as the picture has been clarified.

Given that five of the six parties to the case are now agreed the trial should not commence on 4 June, the Names submit that the Court should be reluctant to compel those parties to proceed because of the position adopted by Neville Russell. The Names submit they should not be ordered to pay the costs of the adjournment simply because they made no application in February or April. The material change in the R and R scheme was the participation of the auditors and the consequent increase in the amount of the global settlement figures. This was only finalised on 10 May during the first PTR hearing on that day.

Consequent upon that development, the indication given to the Names by Lloyd's was substantially improved on more than one occasion and they took the view that in the light of those developments it was inappropriate for this trial to continue, until such time as it became clear whether or not the R and R package would be finalised.

The Names are not to be criticised or penalised for not having reached that view any earlier, at a time when there was no certainty that the auditors would participate in R and R and at a time when the indications from Lloyd's as to the terms these Names might be offered were wholly unacceptable to them and materially more disadvantageous than the offer ultimately made.

As to Bacon & Woodrow's solicitors' letter of 12 April, the Names decision not to seek an adjournment at that stage was entirely reasonable and has been vindicated by subsequent events. It is inappropriate and a waste of the Court's time to ask the Court to embark on the hypothetical exercise of seeking to determine whether, but for the adjournment occasioned by the recent developments in 'R and R' and the improved offer to the Names, the case could have been ready by 4 June. The adjournment now being sought has nothing to do with the state of preparedness for trial. The trial should now be adjourned until some time in 1997 to permit the R and R package to be finalised. Even if some additional time had been required to prepare the case for trial, as Neville Russell were suggesting (but as the Names do not accept would have been necessary) all that might have been required would have been an adjournment for a week or so. The Names would not have been ordered to pay the costs of and occasioned by such an adjournment because the delay flowed from the late service of the defendants' factual statements which inevitably delayed the Names' preparation for trial and particularly the preparation of their experts' reports.

Two matters are distinct. If an adjournment is appropriate now because of recent developments in 'R and R' and the improvement in the offer made by Lloyd's to the Secretan Names, the fact that but for those developments the Names might, assuming the point against them, have had to face an application for the costs of a short adjournment to allow for additional preparation time, does not lead to the conclusion that the Names should bear all or any part of the costs of an adjournment until 1997. In any event, the late service of the witness statements delayed the plaintiffs in the preparation of their expert reports.

As to the first PTR on 10 May, it is true that the hearing was adjourned for one week to enable the Names to consider whether they wished to pursue the so-called alternative case, but the fact that they needed further time for that purpose was a consequence of the difficulties and time pressure they had in preparing experts' reports in the run-up to the PTR, due in turn to the late service of the defendants' witness statements.

Neville Russell's submissions

Neville Russell submit that they are ready for trial and do not wish to adjourn unless their costs are paid by the Names. The Names are not ready for trial (see their proposed amended pleadings and the fact that four of their expert

reports are inconsistent with the present pleadings). The Names now apply to adjourn to consider 'R and R'. There are ample letters from 2 February 1996 asking the Names not to proceed and warning the Names they would subsequently apply for an adjournment at their peril.

The warning experience of the late adjournment of the Wellington and Poland cases and the massive costs involved in this litigation should have led the Names to be particularly astute to avoid their late application to adjourn which would inevitably waste costs. The court cannot trespass into the detailed 'R and R' negotiations. It is impossible for the court to weigh those factors into account. The relevant facts in no way include the nature, terms or potential effect of confidential and extraneous discussions. There is no public or other interest and no course of conduct which could disentitle Neville Russell from their entitlement to costs. There is no special favour or order to be shown to Names. It is no answer to reserve costs. The facts that are appropriate to determine the issue of costs are known. The Names will not be able to identify factors which are now unknown but which need to be known to determine the issue now. Only one order is appropriate against the party applying very late in the day for an adjournment against another party that is ready to proceed. Neville Russell should have their costs from 2 February 1996 to date, to be taxed if not agreed and paid forthwith.

I pause to note that Neville Russell have not informed the court whether they are or are not participating in the Second Settlement Initiative.

Bacon & Woodrow's submissions

Bacon & Woodrow do not oppose the Names' application to adjourn the trial. However, they submit that such indulgence should be granted on the usual terms, that the Names compensate Bacon & Woodrow for their costs thrown away by the late application to adjourn. Bacon & Woodrow refer to the inter-solicitor correspondence which I have quoted above. Bacon & Woodrow have no role or function in 'R and R'. They have never been asked to contribute to any global financial settlement of the Lloyd's litigation and have not offered to do so. If the actions against them are settled, this must be done without the settlement initiative. If not, the actions must proceed to trial. The position adopted by the Names on 17 May represented a complete volte face at the last possible opportunity. They have sought and will be granted a very belated indulgence. They should compensate Bacon & Woodrow for the privilege.

In considering the appropriate order for costs, it is necessary to refer to the following factors:

(1) The management of the Lloyd's litigation.

I refer to the statements I have made on this subject dated 4/3/94, 23/5/94, 30/6/94, 29/7/94, 12/4/95 and 22/3/96 and to my judgment dated 21/7/95 in relation to Wellington and other cases. In my statement dated 23 March of this year I said:

"Naturally it is to be hoped that Lloyd's will achieve a fair settlement to this extensive litigation which is satisfactory to all parties."

This court has sought to give guidance on preliminary issues and in lead or pilot cases to facilitate an overall or partial settlement of this litigation which is on an unprecedented scale.

(2) The "first past the post" decision of the Court of Appeal created a dilemma for action groups. On the one hand, following that decision, action groups understandably have been concerned about losing their place in the queue. On the other hand, some action groups would not wish to incur the costs of a trial if: (a) there is a reasonable prospect of a satisfactory settlement offer to the Names forming the Action Group; and, (b) if there is a reasonable prospect of an overall settlement being achieved. There are obvious difficulties in assessing the prospects of (b) . The First Settlement Initiative failed. The perception of the prospects of the Second Settlement Initiative is inevitably affected by changing events.

(3) Delays and slippage in the Second Settlement Initiative. The problems for action groups and for defendants have been compounded by regrettable slippage in the attempts to find an overall solution to the Lloyd's Litigation. In a

document published in May 1995 entitled "Lloyd's Reconstruction and Renewal" at s 6 "Securing Approval" Lloyd's stated:

"During October we will be in a position to present the Society with an update on progress and a more detailed financial outlook. The Equitas premium indications will be made public, as will the basis for allocating the settlement package. We will clarify both our funding targets and their resources. At this time we will seek a mandate from members to proceed with the plan. Separately, on the assumption that it remains a part of the plan to seek a special contribution from members on the 1993, 1994 and 1995 years of account to be offset against future CF2 contributions, we will conduct on this specific measure in accordance with the procedures now established for voting on levies. We will also seek appropriate approval for the CF2 arrangements. Finally, in the spring of 1996, individual Names will be in receipt of their finality statements together with their debt credit and settlement fund allocations. Each name will be invited to accept the settlement package in return for an undertaking not to litigate in respect of any 1992 and prior year liabilities."

There has been regrettable slippage since the above statements in May 1995.

R and R October 1995 stated:

"Process for securing approvals. Our current timetable is as follows. We will publish proposals for the allocation of the settlement package in January, 1996. In deciding on these proposals, the Council will take into account the recommendations of the Names' Committee chaired by Sir Adam Ridley. We will supply a future progress report to Names in late February 1996. At this time, we will provide as much detail as we can to assist Names in understanding their individual circumstances. However, the accuracy of Name level financial information may be constrained by the fact that the reserving process will not have been completed. Before the end of March, we will seek approvals from members on the 1993, 1994, and 1995 years for the special contribution and from the 1996 members for the new central fund arrangements and the financing of the future market contribution. In addition, we will seek approval from the entire membership to proceed with the final stages of implementation. Names will receive their individual finality statements before the end of May and the deadline for acceptances will be the end of June. Names will then have to pay their finality bills or enter into a structured payment plan."

See further R and R Allocating the settlement February 1996 and R and R Guide to your indicative finality statement March 1996."

It was on 8 March of this year that Lloyd's issued the first indicative statements. I have already quoted from "R and R Towards the Settlement May 1996".

Page 13 sets out the latest revised timetable as follows:

"By mid-June we shall have issued Names with a second indicative statement containing updated Equitas premium figures and much more reliable figures for the credits that Names will be able to set against their liabilities. These statements will break down allocations from the settlement fund by syndicate year of account. The triple release figures will still be based on unaudited estimates at this stage.

"On 15th July, as previously announced, we shall hold the ordinary general meeting and the votes on the special contribution from 1993, 1994 and 1995 members. Names will be asked to vote on the basis of their second indicative statements, which should serve as a good guide to the final statements. Payment of the special contribution will not, however, be required unless and until the settlement offer becomes unconditional and the other requirements have been met to enable Equitas to become operational.

"By late July we shall send finality statements to Names. Names will then be invited to accept the settlement offer.

"The end of August will be the deadline for acceptance of the offer with the deadline for payment of finality bills to be advised."

In referring to the delays and slippage on the part of Lloyd's 'R and R', I do not belittle the complex and deep-rooted problems facing Lloyd's and the enormous complexity of setting up 'R and R'. What is clear is that Lloyd's should have started addressing these problems many years ago.

(4) Mr Edwards' third affidavit sets out the reasons for this application and I refer particularly to paragraph 3 which states:

"In respect of paragraph 15 of Mr Hamer's Affidavit in which he deposes that the Names' concerns about devaluation appear to be groundless, the Court should know that the concerns were real and founded upon fact. Inter alia, Lloyd's decided recently to degrade the Names' arbitration claims in respect of the 1990 1991 open years from category B to category D. The Names submitted that this was seriously unfair. The reason for adjournment of the arbitration by consent was expediency. It was agreed to be impracticable for the arbitration to be heard in parallel with the litigation. Expediency and fairness have been recognised as principles upon which the second R & R terms would be constructed and in practice adjournments of proceedings on grounds of expediency in (Poland and Wellington) have not devalued their claims. It transpired that Lloyd's subsequently recognised that if the subject of the arbitration were the subject of litigation and supported by evidence the arbitral claims would not be devalued. This was one of three problems which led Counsel to inform the Court of the Names concerns; it would be inappropriate for me to go further in the Affidavit and to explain the other concerns. Moreover, I should emphasise that these are matters which, although they concern the Defendants because Lloyd's is effectively negotiating on their behalf should be kept confidential. The resulting words from the Honourable Mr Justice Cresswell have produced most salutary and beneficial reaction from Lloyd's. In the course of the following week, in a number of meetings with Lloyd's, the indications of the proposed offer by Lloyd's were very significantly improved. As Mr Henderson informed the Court on Friday 17th May 1996, a final meeting took place with Lloyd's on the evening of 16th May and the indications of the Secretan Names' participation in R & R were considered by a meeting of the Committee of the Names' Association on Monday 20th May and the Committee voted to consent to the case being adjourned on the basis of those indications."

(5) All defendants, save Neville Russell, sensibly wish to await the result of the Second Settlement Initiative rather than incur further costs.

(6) In other cases when the Court has adjourned hearing dates because of the Second Settlement Initiative, I have reserved costs (see Wellington, Pulbrook 90 and Poland). I refer to my ruling in the latter case dated 29 April 1996.

(7) It is necessary to refer to one further feature of this unique Litigation; so far as I know not a single case forming part of the Lloyd's Litigation has settled. It appears that some of the defendants are working to an arrangement not to discuss settlement, save on a global basis.

(8) As I said in my statement dated 23 March, naturally it is to be hoped that Lloyd's will achieve a fair settlement to this extensive litigation which is satisfactory to all parties. The Court would not wish to take any step which might impair such an overall settlement. The time has come for the teams of legal advisers in the Litigation to become "healers" and not "hired guns".

(9) It is necessary to distinguish between assessment of responsibility for matters occurring in the context of litigation and assessment of matters connected with the Second Settlement Initiative ("settlement matters") when considering the reasonableness or otherwise of the Names' decision not to seek an adjournment until this week. As to the settlement matters, the Names are able to point to the improved terms in "R and R Towards the Settlement May 1996" announced on 10 May, but I should emphasise that I cannot trespass into the territory of settlement matters and the information before the court as to such matters is inevitably limited.

(10) Neville Russell have not informed the Court whether they are or are not participating in the Second Settlement Initiative. If they do participate and if the initiative is successful, any argument about costs will probably be academic so far as they are concerned.

In all the circumstances, on the material before me I am not prepared to say that the Names have behaved unreasonably in seeking an adjournment at this stage to enable the Names to consider the latest 'R & R' offer. In all the circumstances, in the exercise of my discretion I order that costs be reserved. Lloyd's should give consideration

to seeing that no party suffers as to costs as a result of the adjournment of this action. A fundamental problem has been delays/slippage in 'R and R' and, to the extent that costs have been incurred unnecessarily in this case, the primary cause has been such delays/slippage.

There is a detailed dispute as to whether this case would, in any event, have been ready for trial on 4 June. As this question has been overtaken by the Names' decision to seek an adjournment in the circumstances described above, this aspect of the case has not been fully argued. It is complicated by the fact that had it been necessary to proceed on 4 June or shortly thereafter, the Names were inclined to abandon parts of their case in an attempt to hold the hearing date. As this case is being adjourned, I propose to record the following:

(1) On 2 February 1996 when asked by the Court whether the Names were pursuing an alternative case as to under-reserving, counsel said that no alternative case as to under-reserving would be pursued. On 25 April, the Names' solicitors wrote to Reynolds Porter Chamberlain as follows:

"We have been reviewing with Counsel the statement made by our Counsel in answer to Mr Justice Cresswell on 2nd February 1996 when he asked whether the Names were pursuing the 'alternative' case and Mr Macey-Dare said that no alternative case would be pursued. We were subsequently asked by yourselves by a letter of 20th February 1996 to confirm that we would be pursuing the case purely on the basis of the allegation of negligent closure of each year of account as opposed to what was called an alternative case that the Defendants failed to make adequate provision by way of reserves for future claims making the RITC.

Our review leads us to this position, namely that we will not be abandoning the pleaded case."

On 10 May, the Names' skeleton argument stated that "the plaintiffs submit they should be allowed to pursue paragraphs 69, 80 and 81 of the Points of Claim. The plaintiffs wish to resile from the position taken on 2nd February. Upon reflection, it was wrong. Notice of this change of position was given by letter of 25th April 1996 to all parties."

The position taken by the defendants on 10 May is recorded in the skeleton arguments: Secretan, para 5; members' agents, para 3.1; Bacon & Woodrow, paragraph 2; and see Neville Russell's and Ernst & Young's in their skeleton arguments. On 17 May, the Names skeleton argument read:

"In the light of the indication from the court on 10th May as to the likely need for an adjournment if the alternative case were to be argued, the Names, while not conceding that an adjournment would in fact be required, were prepared to accept that at the trial commencing on 4th June they should not be allowed to advance a case that the years could have been closed and that the defendants should be held liable to the plaintiffs in respect of inadequacy of reserves. The Names took that position only in order to maintain the 4th June trial date. If the case were to be adjourned from that date for any significant period for whatever reason, they would wish to maintain the alternative case and, on that hypothesis, there would be no reason why the defendants could not be prepared to deal with it at the adjourned hearing."

(2) As to amendments to the case against the members agents, these were addressed in Mr Edelman's supplementary skeleton argument for 10 May. The plaintiffs, in the face of the objection from the members' agents, withdrew the draft amendments against those defendants.

(3) As to exposure analysis, the respective positions of the parties on 17 May were set out in their skeleton arguments as follows: Secretan Defendants, pages 3 to 6; members' agents, page 1; Neville Russell, pages 1 to 2; Ernst & Whinney/Ernst & Young, pages 2 to 8; Bacon & Woodrow, page 3; the Names pages 3 to 12. In the event, I have not been required to rule as to exposure analysis. I confine myself to pointing out that whereas the Court would always wish to ensure that the plaintiffs' case was fully and properly pleaded so that the defendants should know what case they had to meet, it would not necessarily follow that the trial date would have to have been aborted on this account, although there might well have been some slippage. But I emphasise that this aspect of the case has not been fully argued before me today.

(4) The Names accepted on 10 May that the defendants needed time to consider the draft amended Points of Claim recently provided by the Names.

(5) The Names say that the delay flowed from late service of the defendants factual statements. I express no opinion on this argument at this stage.

I add one footnote. It is highly desirable that finality should be achieved in this case. Lloyd's will no doubt want to have regard to the position of Bacon & Woodrow who are not participating in the Second Settlement Initiative. There can be no finality to this case until the question of their costs is addressed. The same point applies to Neville Russell, if in fact they are not participating in the Second Settlement Initiative.

I propose to adjourn this case until October 1997 with costs reserved. It would be perverse in the all the circumstances to order that the trial should continue on 4 June because of the position adopted by Neville Russell. I direct that, if necessary, this matter should be restored for further directions and/or for determination of the reserved costs after the result of the Second Settlement Initiative is known.

This ruling will be treated as having been given in open court.

{text of decision in unrelated GCHQ employment case deleted}