IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

1996 Folio No. 2199 and Others.

ROYAL COURTS OF JUSTICE

Before

THE HON. MR. JUSTICE TUCKEY

4th March 1998.

BETWEEN:

THE SOCIETY OF LLOYD'S

(Plaintiff)

-and-

TERENCE WILLIAM FRASER & Ors.

(Defendants)

JUDGMENT TO BE DELIVERED
on WEDNESDAY 4th MARCH 1998
at 10.30 am in Court 20
at THE ROYAL COURTS OF JUSTICE

CONFIDENTIAL TO COUNSEL AND THEIR INSTRUCTING SOLICITORS, BUT THE SUBSTANCE MAY BE COMMUNICATED TO CLIENTS NOT MORE THAN ONE HOUR BFORE THE GIVING OF THE JUDGMENT

THIS IS AN UNREVISED JUDGMENT. It is made available on the clear understanding that it is to be treated as such. The official version of the judgment will be available from the shorthand writers once it has been approved by the judge.

Please inform the Judge's clerk in writing before or the Judge after delivery of the Judgment of any typographical and other obvious errors in the attached draft.

INTRODUCTION.

On 22nd January 1998 I gave judgment on the first of the quantum issues in these Order 14 proceedings. In that judgment I decided that Lloyd's had recently produced evidence which complied with clause 5.10 of the Equitas Reinsurance Contract (the Contract) under which they seek to recover premium against names who did not accept the R&R settlement. At that time only sample records and calculations were produced in the form of reports accessed from the two data bases containing the relevant records. Such reports have since been produced for each of the remaining 570 names against whóm the proceedings continue.

The issues I now have to decide also arise out of clause 5.10 which says :

> For the purposes of calculating the amount of any Name's Premium as set out in clause 5.1(b) and the amount of any Name's Premium discharged by the transfer of assets or the amount realised through the liquidation of Funds at Lloyd's for application in or towards any Name's Premium, the records of and calculations performed by the (MSU) shall be conclusive evidence as between the Name and (Equitas), in the absence of any manifest error.

On the debit side (Name's Premium) I have to decide whether Lloyd's have proved their case at all (the schedule 1 point) and an issue of construction as to whether Name's Premium includes name's personal expenses.

On the credit side (transfer of assets or liquidation of Funds at Lloyd's) I have to decide whether names have shown manifest error in the reports now produced by Lloyd's. The names contend that such errors exist in the sums credited to them in respect of Combined Litigation Settlement Funds (CLSF), Personal Stop Loss (PSL) recoveries and their funds at Lloyd's (FAL).

This raises threshold questions as to whether clause 5.10 applies to all credits, what can be relied on to demonstrate manifest error and the effect of clause 5.5 of the Contract.

All these issues are raised by the EGMF names whose submissions were adopted by each of the other represented names. Seven of the names in person made submissions of their

own. I will deal with these as necessary later in this judgment.

DEBIT ISSUES.

Clause 5.1 says :

> In consideration of the assumption by (Equitas) of the Reinsurance Obligation : ......
>
> (b) each Name covenants with (Equitas) to pay his Name's Premium, being the aggregate of :
>
> > (i) the proportion payable by him (calculated by reference to that Name's participation in the relevant Syndicate ......) of the Syndicate Premiums, as set out in schedule 1, for each Syndicate of which he is a member ......
> >
> > (ii) an amount equal to the aggregate of the proportions payable ...... of any losses declared to 31 December 1994 but not called as at 15 March 1996 in respect of any Syndicate of which he is a member ......
> >
> > (iii) an amount equal to the aggregate of any deferred losses owing by that Name as at 15 March 1996 in respect of Closed Year Syndicates of which he was a member ......
> >
> > (iv) an amount equal to the aggregate of any called but unpaid losses in respect of Syndicates of which he was a member at 15 March 1996 ...... "

The Schedule 1 Point.

Earlier in these proceedings Lloyd's produced what they described as a conformed copy of the Contract. On this copy, although syndicates were listed, no figures appeared in the Syndicate Premium column. The point was therefore taken that Lloyd's had not shown that any sums were due from the names. At the hearing on 8 December 1997 a copy of the completed schedule was produced and such a copy is now formally exhibited to Mr. Holden's third affidavit.

Mr. Goldblatt, QC, Counsel for the EGMF names, submits that as this is not said to be a true copy of the schedule to the Contract which was actually signed, Lloyd's have still not proved their case. In view of the history of the matter there must be some doubt as to whether the Contract did contain a completed schedule.

I do not accept these submissions. One thing is clear and that is that the documentation which brought the Contract into existence was extremely carefully drafted. The schedule 1 amounts were the product of a massive reserving exercise designed to collect a premium for all future losses on the 1992 and prior years of account for all Lloyd's syndicates. I cannot accept that the Contract inadvertently failed to provide for any such premium to be collected.

A further point is taken on the schedule that it only contains premium payable. A zero appears in the case of any syndicate which had a surplus of assets over liabilities. The schedule should have shown such releases and as it does not it is manifestly in error.

I do not think this point gets names anywhere since it is accepted that in fact they have been given credit for all releases. In any event the obligation in clause 5.1 (b)(i) is to pay the Syndicate Premium. Syndicate Premium is defined by the Contract as meaning: "any positive amount shown in the column headed Syndicate Premium in Schedule 1". The premiums payable were shown as positive amounts. The Contract therefore contained no obligation to give credit for releases.

Personal Expenses.

Personal expenses include the name's managing agent's annual fee or salary and profit commission, his Lloyd's subscription and contributions to Lloyd's central fund.

The issue of construction is whether the word "losses" in clause 5.1 (b) (ii) (iii) and (iv) includes such expenses. The EGMF names say that the word is limited to underwriting losses. Lloyd's say that it covers all the elements which make up the loss which a name has incurred on the relevant syndicate's years of account which include the personal expenses of his underwriting.

Mr. Goldblatt's principal submission was based on the fact that the " losses " referred to in (ii) (iii) and (iv) are " in respect of " each or any " Syndicate " of which the name is or was a member. " Syndicate " is defined by the Contract as " each of the syndicate's years of account listed in schedule 1 ". So, he submitted, the losses are related to the syndicate's losses for each year of account. Such losses can only refer to underwriting losses and not to the losses of the individual name. A name's liability to pay his managing agent or reimburse him for monies paid out on his behalf is not a syndicate loss. Alternatively Mr. Goldblatt submitted that the word " losses " had a number of possible meanings and so the clause should be construed contra proferentem in a way most favourable to names.

I do not think the meaning of the word " losses " is confined in the way Mr. Goldblatt submits. The reference to " syndicate's years of account listed in schedule 1 " merely identifies those syndicates and years of account which have to be considered for the purpose of determining the name's losses. The words " any losses " are wide enough to include any expenses for which the name is liable which are referable to his share on a particular syndicate for a particular year. That can be done with personal expenses but not with members' agents' expenses which it is common ground are not collectible under clause 5.1 (b).

Clause 5.1 (b) (ii) and (iv) refer to losses being called. Managing agents may call upon a name to make funds available " to enable them to pay all claims and all necessary and reasonable expenses and outgoings made or incurred in connection with the underwriting ". This obviously includes personal expenses. The link between losses and calls made in clause 5.1 (b) suggests that personal expenses were intended to be included.

There are other indications in the Contract itself and within the matrix which support this view.

The purpose of the Contract was to pass each syndicate's assets in respect of their 1992 and prior years' business to Equitas. Amounts due from names for personal expenses were included in the syndicate's assets. Certain ready assets (Segregated Account Assets) were transferred directly to Equitas. These assets did not include " Name's

Debts " which were defined in the same terms as the clause 5.1 (b) (ii), (iii) and (iv) losses.

Name's Debts were left to be collected as part of the Names' Premium under clause 5.1 (b). There is nothing in the Contract to show that personal expenses were not intended to be included in Name's Debts. From the date the Name's Premium was struck (31st December 1995) Equitas assumed liability for all personal expenses. This not only shows that the Contract was intended to deal with personal expenses but also strongly suggests that the Name's Premium was intended to include personal expenses for the period before 31st December 1995. So Equitas was entitled to all the assets of the business including amounts owed by names for personal expenses up to that date but obliged to meet all liabilities including liability for personal expenses after it.

In the broader context R&R was intended to take the managing agents out of the picture for the 1992 and prior years of account. It is common ground that the asset represented by monies owed for those years by names for losses other than personal expenses was transferred to Equitas. There can be no commercial reason for leaving the asset represented by monies owed for personal expenses with the managing agent.

Both parties relied on passages from the Settlement Offer Document (SOD) as part of the matrix. There are points to be made both ways from this document and I do not find it necessary to consider those points in detail for the purpose of deciding this question of construction. It can be decided principally on the provisions of the Contract which I have considered above. In short I conclude that " losses " in clause 5.1 (b) of the Contract does include personal expenses.

CREDITS.

Clauses 5.6 and 5.9 of the Contract deal with cedits. Clause 5.6 says :

> Where any part of any Name's Premium due from ......
>
> > (b) any Name who is not an Accepting Name but who is a member of an Action Group which is party to an Action Group Settlement Agreement

> is discharged by Lloyd's or a person acting at Lloyd's direction through the application of the Combined Litigation Settlement Funds ...... the Name's obligation in respect of that amount will be deemed to have been satisfied to that extent. Save as aforesaid, no provision of consideration to (Equitas) by any person other than the Name will discharge any liability of any Name under this Agreement unless that consideration is provided to (Equitas) (i) at the specific direction of that Name by a party other than Lloyd's, (ii) from the ...... Funds at Lloyd's of that Name, or (iii) by or at the direction of Lloyd's but only, in the case of a Name who is not an Accepting Name, where Lloyd's appropriates any such sum to the Name's account or benefit and expressly for the purposes of discharging the liability.

Clause 5.9 says :

> " (Equitas) shall be entitled to set off, against the Name's Premium of any Name who is not an Accepting Name, any amount which (Equitas) would otherwise be obliged to pay to that Name ...... as reinsurer of any Syndicate 1992 and Prior Business insofar as it relates to any personal stop loss contract ...... of that Name ".

<u>Which Credits Does Clause 5.10 Apply To ?</u>

This is the first of the threshold questions I have to answer.

Based on the wording of clause 5.10 Mr. Goldblatt submits that the records and calculations of MSU are not or may not be conclusive evidence of whether Name's Premium has been discharged by PSL recoveries or CLSF monies paid under an Action Settlement Agreement (AGSA). Discharge by such means, he submits, does not involve " the transfer of assets " or " the liquidation of Funds at Lloyd's ".

I do not agree. I think the words " discharged by the transfer of assets " are wide enough to cover payments of both kinds. Assets include cash, choses in action or the proceeds thereof. There is no reason to believe that the draughtsman intended to limit the type of asset to which the clause applied. If the records and calculations were not conclusive evidence of all credits appropriated against the liability for the Name's Premium the clause would be worthless.

What Can Be Relied On To Demonstrate Manifest Error ?

This is the second threshold question. It is common ground that an error is manifest if it is clear or obvious to the mind or eye. So if an error can be seen on the face of the reports now relied on there is no difficulty. If the error to which I referred on page 7 of my last judgment had appeared in those reports the sum recoverable would have been reduced to reflect the error. But can error be demonstrated by any other means?

Mr. Goldblatt realistically confined himself to submitting that for this purpose one could look at other records and calculations produced by MSU, notably the finality statement. Clause 5.10 does not permit Lloyd's to choose which records and calculations they can rely on. As the finality statement is a record of or calculation performed by MSU it can be used to demonstrate manifest error.

Some of the names in person made submissions to me based on documents which were not the records or calculations of MSU both as to credits and debits. Mr. Huskinson, for example, produced documents from a number of sources which, he argued, showed that syndicates might have assets which should have gone to Equitas in the shape of time and distance and rollover policies, deferred premium income and inter-syndicate loans.

Clause 5.10 is clearly designed to avoid challenges to the MSU figures based on such material. It is as I said in my last judgment classic Order 14 machinery. The words mean what they say: the records and calculations are to be conclusive evidence (that is to say the only evidence) unless there is a manifest error on the face of those records.

But this does not deal with Mr. Goldblatt's point. Lloyd's answer to it is simply that the credit figures in the finality statements were produced for the purpose of the settlement offer and so one is simply not comparing like with like.

Finality statements were sent out to each name with the SOD at the end of August 1996. The statement first set out the name's total underwriting liability. This included what became the Name's Premium defined by clause 5.1 (b) of the Contract. The components of the Name's Premium came from the finality statement data base (see pages 4-6 of my last judgment). These figures have remained the same and have not been challenged for manifest error based on other MSU records or calculations.

The statement then sets out various credits and adjustments which were deducted from the total liabilities to produce an " amount due (from) to you after above adjustments before taking into account Funds at Lloyd's ".

The SOD and statement made it clear that the credits shown for CLSF and PSL recoveries were only available to those who accepted the offer. Those who did were able to pay their finality bill by liquidating their FAL and the statement gave a value for those funds and a specific date. Those who did not had no such right.

The credits and adjustments shown on the finality statements came from the finality statement data base. In September 1996 a new data base, the R&R NAS data base, was created. This includes information concerning the allocation of the name's assets to the various types of indebtedness which he may have at Lloyd's. It is this data base which has been used to produce the credit items in the sums claimed against the names (see pages 5 and 6 of my last judgment).

The EGMF names' primary case however is that as they have not been given credit for the CLSF, PSL recoveries and FAL shown on their finality statements, they can demonstrate manifest error.

I do not accept this. It is clear that the finality statements were not produced for the purpose of the exercise contemplated by clause 5.10 or which clause 5.6 had in mind. They were records and calculations performed by MSU but not relevant records and calculations for the purpose of clause 5.10. For this reason they cannot be used to demonstrate manifest error in the relevant records in my judgment.

On behalf of the EGMF names Mr. Freeman has filed two affidavits (his sixth and ninth) directed to showing manifest error.

He relies in part on material other than the finality statements. This includes information from names challenging the reports now relied on by Lloyd's. However, clause 5.10 does not allow this.

Mr. Freeman also relies on the discrepancies between the sums claimed in the writs and the decreasing amounts claimed under Order 14 in the schedules to Mr. Bradley's affidavit of 28th November 1997 and the reports now relied on (see pages 1 - 7 of my last judgment for the history).

Mr. Goldblatt submitted generally that if there was a conflict between two or more records of MSU that was good enough for Order 14 purposes: statements of explanation in affidavits are not relevant. However, in the context of what was a highly complex transaction involving thousands of different parties, I do not think I should be prevented from looking at such explanations as have been given for what has happened.

The explanation Lloyd's give is that the sums claimed have been progressively reduced by the appropriation by Lloyd's of the various credits contemplated by clauses 5.6, 5.9 and 5.10 of the Contract.

It is clear that this is what has happened from the reports now relied on. So I do not think that manifest error can be shown simply by looking at the earlier material. Mr. Freeman is not able to point to any manifest error on the face of the reports themselves.

The conclusions I have reached on this question are fatal to the names' case on credits, but in case I am wrong I will consider and state shortly my conclusions on the other points which have been argued.

<u>Clause 5.5.</u>

Clause 5.5 says :

> Each Name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever ...... "

Lloyd's submit that even if a name can show manifest error in respect of credits this only gives rise to a right of set-off etc. leaving intact his obligation to pay the Name's Premium, the entitlement to which they have established.

I do not think there is any answer to this point unless it can be that manifest error, at least on any scale, destroys clause 5.10 altogether so it cannot be relied on to establish the Name's Premium. I have already decided that mere manifest error does not have this effect (see page 7 of my last judgment). I do not think this is a question of degree. Either the clause stands in the face of manifest error or it does not. In my judgment it does.

My conclusion about the effect of clause 5.5 underlines that what that clause and clause 5.10 were intended to achieve was cash flow. Clause 5.10 does not determine what CLSF or PSL recoveries a name is entitled to or what his FAL are. It is only dealing with appropriation of those assets in discharge of the obligation to pay premium. The records and calculations of MSU are conclusive as to what asssets have been appropriated but not as to what those assets are. A name may still assert his right to those assets in the same way as he may assert any other claim despite clause 5.5.

<u>CLSF.</u>

By Clause 5.6 a non-accepting name's CLSF could only be used to discharge his Name's Premium if he was a party to an AGSA. I do not read the clause as requiring this to be done. In the AGSAs Lloyd's agreed to apply each member of the action group's fund in accordance with paragraph 9 of the SOD. This paragraph required Lloyd's to procure that the member's share of the fund would be used to reduce " the Equitas premium ...... and other liabilities covered by his finality statement ...... and for no other purpose ". Included in the name's liabilities in the finality statements were losses on business which was not reinsured into Equitas and amounts owed to the central fund and to members' agents.

The EGMF names contend that these provisions required Lloyd's to allocate at least some part of the CLSF credit shown on their finality statements to their Name's Premium and where the reports now relied on show that this has not been done there must be manifest error.

Lloyd's do not accept this. They say that paragraph 9 does not require them to allocate any part of the credit to the premium. It can be wholly allocated to the payment of the

other liabilities. Furthermore, in some cases the fund comprises judgment monies held by solicitors which have not been paid to Lloyd's and for that reason is not yet available for allocation.

I do not think paragragh 9 requires Lloyd's to allocate some part of the credit to the premium. It confines the purposes for which the credit may be used. Provided it is used for these purposes it does not have to be allocated to each purpose. Mr. Goldblatt suggested it should be allocated in equal proportions or pro rata but this is not what paragraph 9 says.

It follows that names who were party to an AGSA may not have been credited with any or part of their share of the fund because Lloyd's have lawfully allocated all or part of the credit to other liabilities shown on their finality statement or because the funds have not been received. Non-Accepting Names who were not party to an AGSA were not entitled to any credit.

In these circumstances it is impossible to say that a name can demonstrate manifest error simply by comparing the amounts shown as a CLSF credit on his finality statement with the amount, if any, for which he has been given credit in the report relied on for the purpose of these proceedings.

PSL Recoveries.

Complicated arrangements were made for giving accepting names credits for PSL recoveries as part of the settlement. These arrangements were reflected in the credits shown on the finality statements. The rights of those names who did not accept R&R were not affected by these arrangements.

Many of the PSL policies were written by Lloyd's syndicates and therefore reinsured into Equitas. By clause 5.9 of the Contract Equitas (but not the Name) were given the right but not the obligation to set-off its stop loss liability against the Name's Premium. Where stop loss recoveries from Equitas or elsewhere were caught by the Premium Trust Deed and therefore held within Lloyd's Lloyd's had the power to allocate the money once it was received to the name's liability other than his Name's Premium.

There are therefore a number of good reasons, absent manifest error, why the credits shown on a name's finality statement may not correspond with the amounts, if any, with which he has been credited in the report relied on for the purpose of these proceedings.

FAL.

Neither clauses 5.6 or 5.10 of the Contract require Lloyd's to use FAL to discharge Name's Premium. Such funds are held as security against all the names indebtedness at Lloyd's. Lloyd's may direct that they may be used to discharge any such indebtedness but the name is not entitled to liquidate or appropriate them to any particular debt.

There are therefore good reasons, absent manifest error, why the amount shown on the finality statements for a name's FAL, valued at a particular date exclusive of the costs of realisation, may differ from the amounts, if any, for which he has been credited in the report relied on for the purpose of these proceedings.

NAMES IN PERSON.

I have already dealt with the submissions made by Mr. Huskinson.

Mr. Jebb, on behalf of Sir Michael Leighton and Mr. Neiger sought to rely on reports from an insurance expert, Mr. Black, to the effect that there must be errors in the calculation of their Name's Premium because of discrepancies between the figures claimed and the records of the members and managing agents for the syndicates concerned. Such comparisons are not permitted by clause 5.10.

Both Mr. Jebb and Mr. Nieger raised a number of questions about the credits appearing on the records relied on. Clause 5.10 does not allow such questions. It makes the records conclusive.

Mr. Micklethwaite raises points about the calculation of his and his wife's Name's Premium which depend upon his own evidence and are not based upon any demonstrable manifest error in the records and calculation of MSU. He also raises

questions about his profits for 1993/94 and 1994/95 which do not appear to have anything to do with the Contract although I can understand his concern. Part of his CLSF credit has apparently been used to discharge his central fund liability. Lloyd's were entitled to do this.

Mrs. Strong has been given a CLSF credit of over £6,000 although she says she was not a party to any AGSA. For the purpose of these proceedings the record showing this credit is conclusive.

Mr. Wakefield, on behalf of himself and his brother, raised a number of points as to why their Name's Premium might be wrong. They did not disclose manifest error. He also alleges that Lloyd's have broken an agreement which they made not to sell assets comprising his FAL without his consent. He is not precluded from making such a claim, but it does not give him any right to avoid paying the sums now claimed against him.

CONCLUSION.

I resolve the quantum issues which I identified at the beginning of this judgment in Lloyd's favour. I am to hear argument on 11th March 1998 as to what the consequences of this should be.

FOOTNOTE.

Throughout the quantum hearings I have become increasingly concerned about the lack of information provided or available to names about the allocation of such assets as they have at Lloyd's. In this judgment I have accepted that credits for CLSF, PSL recoveries and FAL can be allocated to discharge liabilities to Lloyd's other than for Name's Premium. But if this is what has happened, names should be able to discover that it has.

— How much of which asset has been allocated to discharge which liability and when.
— How much, if any, of which asset remains to be allocated ?

Lloyd's say that the responsibility for providing such information lies with the member's

agent for CLSF and FAL. For PSL payable by Equitas, Equitas gives notice of set off under clause 5.9 to the name. For PSL not payable by Equitas where recoveries are held within Lloyd's the member's agent is responsible for providing information about allocation.

Both the evidence filed on behalf of the EGMF names and the names in person demonstrate clearly that members' agents do not understand that they have these responsibilities and Lloyd's have not provided the information themselves.

This is unacceptable as I hope I have made clear. If names are to have summary judgment entered against them based on the conclusive evidence provisions which I have had to consider in this judgment it is only fair that they should be able to ascertain without difficulty or delay what other assets of theirs are or might be available to meet that judgment for which they have not yet received credit.

At the end of the hearing on 12th February 1998 Mr. Grabiner, QC., Counsel for Lloyd's, explained clearly the responsibilities of those involved and the assistance which Lloyd's would give in the event of difficulty. I hope this solves the problem which I am sure has caused difficulty for many names in the last year.