Society of Lloyd's v Jaffray and others (No 2)
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
(Transcript: Beverley F Nunnery)
HEARING-DATES: 25 JANUARY 2000
25 JANUARY 2000

COUNSEL:
S Houseman for the Plaintiff; Sir William Jaffray appeared in person; M Freeman (solicitor) and J Edwards (solicitor) for the United Names Organisation; T Weitzman for the Defendant Holman; M Cummins for the Defendant Troostwyk; RM Carter appeared as a Litigant in Person and for K Adams; S Butler appeared as a Litigant in Person; JA Evans appeared as a Litigant in Person; AC Harrison appeared as a Litigant in Person

PANEL: COLMAN J
JUDGMENTBY-1: COLMAN J

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COLMAN J: The United Names Organisation's application that claimants in the Lloyd's fraud litigation who are not members of the Organisation should be ordered to pay a proportion of the costs and disbursements of the lead claimants' solicitors, More Fisher Brown, even though that firm is not the solicitor on the record for those non-members raises an important problem in the management of group litigation.

It seems to me that the principle which one should strive to achieve is that each Name should contribute some pre-determined amount to the costs and disbursements sustained in the general prosecution of the proceedings, and that that amount should be no more than the Name can reasonably afford. The appropriate amount which should be determined seems to me to be an amount which must have some regard to apportionment.

Now, apportionment is something which is not easy to do upon lines which would ordinarily be used, simply because the quantification of individual Names' claims has not, as I understand it, been accomplished. There are at the moment general claims for damages for fraud but, so far as I know, there is no very precise quantification of the amount which any particular Name would claim to recover. Even if there were, it might not reflect what, if the Name was successful, what that Name would recover.

There are of course at the moment a certain number of Names who are members of UNO and a certain number of Names who have registered in accordance with the order of Cresswell J, but who are not members of UNO and that is a finite number. The problem is that that number can change right up to 21 February, which is only seven days before what is currently projected to be the start of the trial. Accordingly, the quantification of what might be a proportionate contribution to whatever was decided as the global costs cannot take place until after 21 February if it is to be done on a numerical basis - that is to say on the basis of simply taking the total number of Names and dividing that into the total amount of relevant costs.

It does seem to me that there are other general considerations which have to be taken into account. Firstly, there is the position that, for reasons which have been explained this afternoon, More Fisher Brown are unwilling to act as solicitors on the record for any Name who is not a member of UNO. In so far as the legally aided Names are concerned, they are to be represented by Mr Freeman, and an arrangement has been arrived at whereby those legally aided Names' position can be compatible with More Fisher Brown's continuing control over the conduct of the proceedings as the lead firm of solicitors. In other words, More Fisher Brown will be the lead firm of solicitors and Mr Freeman's firm will support it. Equally, More Fisher Brown will be the firm which instructs the leading and junior counsel who are to be representing the Names.

An enormous amount of work has, of course, been put into this case and it seems to me that the way that the litigation has been constructed - and I have had a good deal to do with the earlier stages of this - has been directed to identifying certain typical factual situations by reference to the dates when particular Names joined Lloyd's, and trying to arrive at a position where the substance of the claim in fraud against Lloyd's was determined in respect of each of those three separate factual situations with the object that, once this determination had been arrived at, that

would be an end of the litigation and that the determination would enable everybody else who might have a claim against Lloyd's to see that they either could or could not succeed.

For the purpose of adding machinery in support of this purpose, Cresswell J ordered the system of registration which has been put in place here so that, as it is now provided in the extended order, until 21 February, Names who are not members of UNO can register and, if they do, they can take a very limited part in the proceedings. That is set out in para.4 of Cresswell J's order of 10 December. Really what it amounts to is this: that, subject to any order to the contrary, such other Names can instruct a firm of solicitors and indeed counsel of their choice to appear, or they can appear as a litigant in person, but whatever they do they cannot adduce any additional factual evidence or witness evidence. They cannot cross-examine anybody called by Lloyd's but they can adopt the cross-examination of witnesses by counsel instructed by More Fisher Brown. However, they will be able to make closing submissions in writing and to make oral closing submissions, such oral closing submissions as the trial judge shall allow.

There are various provisions about bundles being shared between Names who come in on this basis. The order also makes it clear that if a Name does not register by the relevant date then the consequence of that would be that that Name will thereafter be precluded from advancing any allegations based on fraud of the same kind as those raised by the claimants in these proceedings without further order of the court.

There is no doubt at all, as I see it, that if a Name is now to come in and register and take the benefit of the conduct of the proceedings by the lead solicitors and by counsel instructed by them, that Name in all fairness properly ought to make some contribution to the putting together of the claim, or counterclaim as the case may be. A huge amount of money has been spent on this exercise and a huge amount of money will continue to be spent.

It is perfectly true that in the course of the trial the Names will have, or can do if they choose to do so, separate legal representation with a limited input by way of final submissions. Nevertheless, if the result of the trial is that the Names are successful that result will be due in very large measure to the vast amount of work which has preceded the trial and indeed which takes place while the trial is going on in the hands of the solicitors acting for UNO and counsel instructed on behalf of UNO. I consider that, as I said last time, it would be unfair if no contribution were made to those costs.

However, there are acutely difficult problems which arise as to how the contribution which is made to those costs ought to be arrived at. There are two aspects to this: how the calculation ought to be done and by reference to what principles; and secondly, the machinery for doing it. It seems to me that there is an argument - and it may be one which we shall have to discuss tomorrow - for the appointment of a master of the Supreme Court to conduct an inquiry and an account of the costs and of what would be an appropriate apportionment of those costs so that the outcome of that exercise would be that each Name who registered as a non-member of UNO would know his proportion of contribution which ought to be made to both historic costs and to ongoing costs. It seems to me that this could be done provided that the court laid down appropriate objective criteria by reference to which the person conducting the inquiry account could operate. Absent appropriate objective criteria the matter would be too much at large and too indefinite for any appropriate machinery to be operated.

There are two stages or sets of circumstances in which this problem has to be addressed. There is the stage at which one will arrive after 21 February. At that point of time, unless something very dramatic happens in the meantime, there will be known the final number of Names who have registered and who are not members of UNO. There will also be known the final number of those Names who are legally aided. There will also be known, or at least ascertainable, the total amount which has been spent putting this claim or counterclaim, as the case may be, together and which is the amount in relation to which apportionment would have to operate.

As it seems to me, an order which would accomplish that which I have in mind would involve this: there would have to be an investigation - and this could not take place before 21 February, as I see it - by reference to objective criteria as to how much it would be appropriate that any given Name should contribute to the common fund. This clearly, as I see it, ought to have regard to the fact that contribution would be expected to be paid before any damages were recovered, so that what a Name could afford would have to depend on disposable assets - disposable income and disposable assets. It should be possible to put together, for example, a body of information which told you what a given Name would have by reference to, say, one year's disposable income, together with that Name's total disposable assets and then add the two together and apply to that a number of bands of contribution which really are

matters which would have to be discussed and which are difficult to identify but obviously should not be particularly high. I would have in mind, for example, that one would have a nil rate band rather as one does for tax purposes so that if the aggregate of one year's disposable annual income and total disposable assets were, say - and I do not put this forward as any concluded view £50,000, there would be nil contribution up front. If the total were more than £50,000, say between £50,000 and £100,000, one might say that 5% should be the up front contribution; and above £100,000 perhaps 10 or 15%.

If such instructions were given by the court to the investigating master for the purpose of ascertaining what the position was and how much each Name ought to pay, it might not be an insuperable task for a result to be arrived at within a few weeks of the commencement of the trial and if, in those circumstances, any of the Names who had been assessed by the Master in that way felt that they were unable to contribute the amount for which they had been assessed, they would have liberty to apply; or alternatively they could simply extract themselves from the litigation in accordance with the let-out provision of the kind which I suggested last time the matter was before me on 21 December. Nobody would have imposed upon them an intolerable contribution up front before the final issue of damages was decided.

So far as the position of those who might pay less than their rateable contribution because of the way in which the percentage is worked out is concerned, it would seem to me that they should only have to contribute at the end of the day if they in fact have succeeded in recovering damages from Lloyd's which enabled them to fund the amount of their contribution, having regard to the ceilings which have been calculated by reference to their affidavit of means. If the Names succeeded in recovering damages the position would have to be, as I see it, that the damages would have to be paid into court and the costs and disbursements of More Fisher Brown would have to be deducted from the amount and paid out of court to them. That would then involve the question: how much of each Name's proportion of the damages should be charged to, or accounted to, the amount that had been paid to More Fisher Brown. That would have to be done, as I see it, by reference to that Name's proportion of the total costs and disbursements of More Fisher Brown as determined having regard to the numerical apportionment of the total amount of costs. That could all also be done by the master instructed to carry out the inquiry and account of the damages and costs under this regime.

Once that had been calculated the balance of the fund in court could be paid out to the Names because that would be their damages and would not have to bear any further costs, except, of course, they would have to pay whatever they might become liable to pay to their own legal advisers if they chose to instruct any legal advisers. They might not, they might just choose to act in person and not incur any legal costs. In that event, they would take the whole of the damages that were there.

If, on the other hand, the Names were to lose and the position then was that there were no damages to distribute against which proportionate contributions could be made to the costs and disbursements of the UNO solicitors and counsel, the ceilings which had been arrived at initially by the application of the percentages and the nil rate band and so on, which I have already described, would govern and, if and in so far as those ceilings were not already exhausted, then the Names would have to pay the balance. If the application of the ceiling originally calculated was, say, £25,000, and in the course of the hearing some £23,000 had already been spent out of that by way of contributions to More Fisher Brown's costs and disbursements, and so on, then there would only be another £2,000 to pay out because there would be an absolute finite ceiling on the contribution which any particular Name was required to make. All that, as I see it, could be administered by means of the appointment of a master who would, in effect, act as receiver and who would, as I say, conduct an inquiry and account for the purposes of ensuring that there was equitable contribution but not a contribution which any particular Name could not afford to make.

This is, I accept, a completely novel concept in group litigation. Nobody has ever done it before. I have to tell you that I have had preliminary discussions with Master Miller who is, as some of you may know, the Queen's Bench Division Master who works most closely with the Commercial Court. He is satisfied that if the court makes appropriate orders he would have jurisdiction to do what the court invited him to do. I, in turn, am satisfied, unless anybody persuades me to the contrary, that if orders of this kind were made they would be within what is now seen as the necessarily proactive means of dealing with group litigation and therefore within the jurisdiction of this court.

The problem, as I see it, is to work out the detail. The devil is very much in the detail. I am not a drafting committee. The ideas which I have put forward need thinking about by what is, in effect, a drafting committee to put together a

regime which would work and enable the various different interests to be dealt with fairly and in a way which is manageable by the master. One must not lose sight of the importance of ensuring that More Fisher Brown are actually paid. After all, it is they who are incurring the disbursements on a day to day basis and they whose time and energy is being taken up by the conduct of these very heavy proceedings.

There are one or two separate points which have occurred to me which need to be dealt with and I think the most satisfactory way of dealing with all this, rather than pressing anybody into committing themselves - and I include in "anybody" Mr Freeman - at this stage, is to deal with it tomorrow morning. The points which have to be dealt with which seem to me to be important at this stage are these. It is going to be necessary if this thing is going to work at all to work out ceilings or caps on what people are expected to contribute having regard to their disposable annual income and disposable assets. In order to get at the latter it is going to be necessary for them to put in affidavits of means. Now, I am not absolutely convinced that Mr Freeman's very detailed draft affidavit of means is really needed. I think it may be possible, by a much simpler route, to arrive at this.

Perhaps I should explain what I mean by this. I mean the disposable annual income of a particular Name, namely what cash and securities not charged to anybody that Name has at its disposal. I am not including here houses or anything of that sort for present purposes. I am including by annual income and disposable assets literally income which they receive and assets of which they can immediately dispose. That should enable one to get a pretty fair idea of where the hardship lies. Where one fixes the nil rate cap is a matter for judgment. I would find this quite difficult. I would have to get the solicitors' help on this, and indeed the help of everybody concerned.

Equally, however many further bands one has, it might be quite difficult to work out at what level they ought to be set. I put forward a moment ago a band which extended from £75,000 to £150,000, or something like that. It is a very hit or miss approach but it has to be kept very simple indeed, because if it is not very simple you get into an Inland Revenue situation where the master is really confronted by an impossible number of permutations and it would make it very difficult to administer this sort of scheme. I would not be in favour of more than three bands which set the percentages of the total disposable assets of the Name in question.

Then the question of what past costs arises. I have, subject to Mr Freeman persuading me to the contrary, formed a very clear view that the past costs can only be the costs of the Jaffray litigation and no other. The Leighs and Wilkinson litigation and the Frazer litigation have simply, in my view, got no part whatever to play in the calculation of the pot. I appreciate that it was all part of a historic development which led to the position at which the Names have now arrived. The fact remains that that is water under the bridge so far as the costs to which rateable contribution ought to be made are concerned and I would not be disposed to make any order which took into account costs other than putting together the defence - by that I mean putting together the fraud claim and the fraud counterclaims which are relied upon as the whole basis for the allegations of tort and the right to recover damages against Lloyd's.

Accordingly, the overall costs are going to have to be stripped down to those levels and part of the remit of the master, it seems to me, would have to be to ascertain what the More Fisher Brown costs were and if there are Freeman costs which relate to this area - and I am quite satisfied from my recollection that there will be quite substantial costs - how much they amount to, and add the two together and one arrives at the total historic costs bill. But it has to be done, so far as I can see, in that way.

So far as concerns the employment of further lawyers by the Names who are not members of UNO, the legally aided Names are already looked after. It is the other Names which now concern me. They have a choice. They can either instruct their own lawyers or they can be litigants in person. If they instruct their own lawyers there are the following considerations. Firstly, there is no reasonable prospect at all, given that the trial is due to start in five weeks time, of those lawyers ever getting to grips with a great deal of the detail of this action. The documentation is vast. There are 40 odd witnesses to be called by Lloyd's alone; and no doubt lots of witnesses to be called by the Names. It is simply asking more than an ordinary solicitor or barrister can provide to expect them to get that little lot up by 28 February. Accordingly, the contribution which any such additional lawyers could make will necessarily be limited. Not only will it be limited because there is not time for it to be anything else, but it will be limited because Cresswell J has confined the participation of such lawyers within the narrow limits set out in para.4 of 10 December order. So the Names who are not members of UNO will have to ask themselves very clearly: is it really worth spending additional

funds on further legal input over and above that which is being provided already? That is a decision that everybody will take according to their own means and their perception of what part they want to play in this litigation.

All I would say is that it does not seem to me, in principle, right that the fact that they choose to go to an additional lawyer for the purposes of further legal back-up, over and above that to be provided by More Fisher Brown and their counsel, should entitle them to any reduction in the contribution which they make to the overall costs fund. It seems to me that so much more work will be done by the UNO lawyers in the course of the trial, so much more work has already been done than ever can be done by additional lawyers, that the justification for a reduction in contribution on that basis simply is not there.

I can put together overnight a rather more coherently expressed scheme than I have explained orally now. I have ensured that what I have just said has been recorded and I am hopeful that it can be put on transcript overnight.

It seems to me that these matters will have to be discussed rather carefully by all concerned, particularly UNO and Sir William and the others who are concerned to take part in these proceedings. I think the principle is reasonably clear. The machinery can be set up and, as I say, it is the detail of the contributions, and so on, which needs attention. By this means I am satisfied that one would be able to avoid calling upon Names who could not really afford to pay to put money up front. They would not have to pay if they could not afford to put it up front until damages were recovered, and if damages were not recovered then the amount which they would be expected to contribute to the common costs would be capped in accordance with the provisions which I have suggested.

I know there will be a continuing degree of uncertainty until the master resolves various quantifications and that necessarily cannot be avoided because of the time limits involved and the trial coming on so quickly. I am satisfied that this is a way of doing justice between the parties, the claimants, which will ensure that the principles of equitable contribution are satisfactorily adhered to and which will avoid hardship where otherwise it might be sustained. It will also mean that anybody who does not like what they get when the Master has resolved how much should be paid can simply leave. If he leaves, then, of course, he can only hope that those who are still in the action succeed. By that means he might at some future time be able to persuade Lloyd's to pay him some money. As things stand at the moment, once he leaves that is it, unless he gets the leave of the court to come back in and take further points against Lloyd's. That is the end of the matter as far as he is concerned.

So there it is. I do not think, unless anybody feels called upon to do so, there is a great deal to be said for continuing the debate now. I would rather leave time for consideration of the ideas I have put forward, but I want to arrive at finality tomorrow.

MR FREEMAN: My Lord, there are one or two points of principle. Obviously there is no point whatever in me addressing your Lordship on all the minutiae of what you have said because you have come to a decision which I fully understand.

COLMAN J: Well, I have not actually come to a decision, Mr Freeman, I have come to a suggestion.

MR FREEMAN: You have indicated a suggested which I understand and respect, but there certain practical points which I must ask should be fed into the thought processes overnight.

COLMAN J: Yes.

MR FREEMAN: It is of course right to say that class does not close until 21 February, but let us assume that you are a Name in Nebraska and Sir William gets on the telephone tonight and says to Names in Nebraska: "Well, we have got the 21st February and the probability is an order, such as you have justice indicated will be made". That Name in Nebraska or anywhere else is going to say: "Well, until I know what it is that I am likely to pay, I cannot know whether I am going to register". So you are getting in, I would have thought, to this uncertainty meaning that people will decide not to register or will make their registration conditional upon what it is that they eventually have to pay.

COLMAN J: I think that is a theoretical problem, Mr Freeman, simply because an order of magnitude contribution can easily be arrived simply by determination of what the base figure is for the costs. That is the first factor that has

got to be introduced; and secondly, what the number of Names is currently. If one knows what the number of Names is currently, what you can say is that it will not be more than.

MR FREEMAN: That is, of course, right, my Lord. There is an element - there has to be - of uncertainty, as I was mentioning to you earlier on - as to future costs. More Fisher Brown can say: "Well, we know what counsels' retainer is, refresher is, for each day they are in court", but how long the case is going to last or what imponderables occur is going to be very much for More Fisher Brown a guesstimate. It has to be.

COLMAN J: Of course it has.

MR FREEMAN: Therefore, to that extent there is an uncertainty.

COLMAN J: If I may just interrupt you, given that there will have to be calculated for each new participant a cap, all the participants needs to know is what the cap is. He does not need to know what More Fisher Brown's overall costs may be. His interests will be: "What is my maximum exposure?"

MR FREEMAN: Certainly. What is being asked behind is, on that basis, who is going to pay the part that the capped Name does not pay?

COLMAN J: The part that the capped Name does not pay: if the overall costs exceed the totality of the caps then there is nobody at all except UNO to pay.

MR FREEMAN: My Lord, the only other point just perhaps overnight to think about is this: the timing of all this.

COLMAN J: I ought perhaps just to say that what I have been describing is a regime which is to apply to the non-members of UNO obviously. I do not propose any regime which would, so to speak, be fed into the UNO system at all.

MR FREEMAN: Which would interfere with the contractual relationship. I understand that.

COLMAN J: They have got their own rules. They must adhere to their rules. The rules either engender or do not engender -

MR FREEMAN: My Lord, the other point I just wanted to make was the timing. I am very pleased you mentioned Master Miller because, of course, he is familiar both with assessing income and capital -

COLMAN J: He may not be able to shoulder absolutely everything because he has got other commitments himself, but he would treat this as a matter of priority.

MR FREEMAN: He does have the experience, of course, of assessing incoming capital for the purposes of Ord. 47 applications, so it would be very helpful for him to do it.

COLMAN J: Absolutely. You and I have been down this route before, Mr Freeman.

MR FREEMAN: Indeed, we have, my Lord. I was just hoping that perhaps the process could start at a very early stage, because it does sound comparatively simple though it has taken a while to deal with.

COLMAN J: The calculation could be extremely simple and very quick indeed, because it could take place from the very moment the affidavit of means were available.

MR FREEMAN: If you have made an order where the affidavit had to go in within a certain period. Do I take it then that the order will look something like: "It is a condition of everybody who has registered that this regime would be adhered to"? That is the way your Lordship is thinking of it?

COLMAN J: I think anybody who joins in the process or who has already joined, but anybody who in future joins will be subject to this regime. If they do not like it then they can withdraw at any stage.

MR FREEMAN: I understand. So we meet tomorrow?

COLMAN J: We will meet tomorrow. I shall mark it not before 10.30. There might be a slight delay because I have a commitment at the other end of London which may delay me slightly. It depends on the traffic.

Mr Weitzman?

MR WEITZMAN: Your Lordship, I hesitate to trouble you at this late hour but I am right in thinking that the order you envisage would include a provision that those who have already joined, such as my client, would have liberty to depart with no adverse costs consequences to them in the event that they are unhappy with the proposed amount.

COLMAN J: They will not be asked to contribute on a proportionate basis to the costs.

MR WEITZMAN: Or indeed to Messrs. Freshfields' costs, because of course in joining one potentially exposes oneself to that. That was the original regime.

COLMAN J: That is up to Freshfields. I am not saying anything about that.

MR FREEMAN: My Lord, we would be happy to incorporate your band suggestion, if that would help.

COLMAN J: I would be very much assisted by any ideas about how the capped band should work. Anybody who has got any contribution on that - it may be that the UNO committee would be best able to help on that, because they have got some perception of what people could afford to pay out of annual disposable income and disposable assets. It would be a much, much, much smaller percentage the lower the totality of the income and the assets is obviously.

MR FREEMAN: We will give it some thought overnight. It is just that those behind me are understandably seeking reassurance. I know you have given it but I just want to repeat that nothing that you have said in relation to a new regime interferes at all with the contractual basis of those who have joined UNO.

COLMAN J: No.

MR FREEMAN: And the responsibility that they have for subscriptions.

COLMAN J: No, absolutely, it leaves that entirely intact.

One thing I have not mentioned which somebody is going to have to think about quite hard, whether it has got to be thought about by me or whether it can be thought at some later stage, is the problem of control over settlement. I mentioned that earlier on in this hearing. It is a matter which I think people are going to have to think about quite hard. I am not going to deal with it now. You all know the problems because we have debated it. It seems to me that very much depends upon the relative resources in play here. At the moment what appears to be the position is that the UNO group and the legal aid group between them would command the lion's share of the resources in funding the continuation of proceedings. If that continued to be the position the reality would be that if a settlement offer were put up which that group was minded to accept, it would not really be possible for the remainder of the Names to pursue the proceedings. There simply would not be funds to do so. The costs exposure might be absolutely vast to Lloyd's.

In practice - it is not theoretically the position - if a settlement did become a prospect in the course of the hearing, I would have expected that the Names who are not members of UNO would be guided by those who were advising UNO, their leading counsel and their team. That can be discussed tomorrow.

I hope that provides some sort of useful ground for consideration, but we will have to try and put together a detailed regime tomorrow and if the various fertile minds available in the room can direct their attention to putting together a regime of that kind then it would, I think, be of great assistance.

I will rise now and we will say not before 10.30 tomorrow.

DISPOSITION:

Judgment accordingly.

SOLICITORS:

Freshfields; Grower Freeman & Goldberg; More Fisher Brown; Donne Mileham Haddock, Brighton; Magrath & Co