

JAFFRAY & ORS v SOCIETY OF LLOYD'S
(Westlaw UK, Daily Telegraph Law Reports, Filed: 03/10/2002)

Court of Appeal (Civil Division)
Waller LJ, Robert Walker LJ, Clarke LJ
July 26, 2002

Insurance - Tort - Human Rights - Fraudulent misrepresentation - Deceit - Lloyd's Names alleged that they had been induced to become and remain underwriting members by fraudulent misstatement in relation to asbestos-related losses - Lloyd's brochures did contain representation that there was in place rigorous system of syndicate auditing which involved making of reasonable estimate of outstanding liabilities including unknown and unnoted losses - Lloyd's global accounts contained no relevant representations - Representations in brochures were untrue - Names failed to prove that Lloyd's knew or believed that representations were untrue or were reckless as to whether they were true or untrue - Lloyd's not liable to Names in deceit - Names were afforded fair trial

FACTS

Lloyd's Names who made substantial losses and who refused to accept Lloyd's settlement offer under the Reconstruction and Renewal plan and who were sued by Lloyd's, counterclaimed that Lloyd's itself was liable for making certain fraudulent misrepresentations.

The Names alleged that in brochures issued by Lloyd's and in global accounts issued by Lloyd's between 1981 and 1987 certain representations were made as to the quality of the Lloyd's regulatory procedures and in particular the audit procedures, described in the brochures as rigorous. It was alleged that the names relied on those representations in making their decisions to join Lloyd's, and in their decisions to remain members and/or increase their underwriting capacity. It was alleged that those representations were untrue because Lloyd's did not have the quality of regulatory procedures, and in particular auditing procedures, which it was asserting it had. Furthermore it was said that those making the representations appreciated that fact. The Names' case was that syndicates' asbestos-related risks were persistently underestimated.

The procedure at Lloyd's was that each year's accounts were, at the end of a three-year period, closed into the next year's accounts. The effect was that new names inherited losses of massive proportions. The Names alleged that by the time they joined Lloyd's it was known by those in the market and at the centre of Lloyd's that there were unquantifiable but potentially massive losses in the pipeline for which proper reserves had never been made, and about which the Names were not warned. The names relied on a letter written by Neville Russell on behalf of a number of panel auditors in February 1982 which referred to the impossibility of determining the liability in respect of asbestosis at that time.

The issue whether Lloyd's made representations which it knew to be untrue and/or as to which it was reckless whether they were true or false and whether such representations were communicated to the Names and if so when (the threshold fraud issue) was tried by Cresswell J.

He held that neither the brochures nor the global accounts made the alleged representations. In relation to both, the alleged representations were unclear in their terminology, did not accord with the administrative structure and governance of the Lloyd's market and the regulatory background, and were inconsistent with what the documents in question actually said.

The judge went on, in case he was wrong about the absence of any representations, to find that the other ingredients of the tort of deceit had not been made out, in particular, that fraud (in the relevant sense) had not been made out. He rejected contentions that Lloyd's had deliberately chosen not to make an independent investigation and assessment of the overall exposure of the Lloyd's market to asbestos-related claims, that Lloyd's deliberately followed a policy of expanding its membership in order to place part of the burden of under-reserving on new names who were not told of the risks; and that the 1979 year of account should have been left open by syndicates affected by asbestos-related claims. The Names appealed.

ISSUES

- (1) Whether the alleged representations were made out.
- (2) Whether the representations were untrue.
- (3) Whether Lloyd's knew or believed that the representations were untrue or made recklessly.
- (4) Whether the Names were afforded a fair trial.

HELD (dismissing the appeal)

(1) The legal tests governing the implication of a term into a contract were irrelevant to the question whether the brochures contained the representations alleged. The question was not whether it was necessary to imply the representation alleged, but simply whether, fairly read and in all the circumstances, the brochure contained (whether explicitly or implicitly) the representation alleged. The judge was right that the starting point was the actual words used in the brochure and that the whole of each brochure had to be considered because each statement in the brochure had to be considered in its context, which included the brochure as a whole. It was also useful to ask what a reasonable applicant for membership of Lloyd's would understand when reading the brochure as a whole. That would involve a consideration of the surrounding circumstances, including the role of the applicant's underwriting agent. On that basis a central representation in the brochure was that there was in existence a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. The brochure further contained a representation that Lloyd's believed that that was the case. Furthermore those at the centre of Lloyd's must have intended it to be understood in that way, and it was material. In those circumstances the judge should have held that the brochure contained representations by Lloyd's to that effect. The judge was right that the global accounts did not contain the representations alleged by the Names.

(2) There was a regulated audit system but the fact that ultimately so many syndicates were shown to be massively under-reserved demonstrated that the system had not been producing reasonable estimates of outstanding liabilities over the years. Therefore during the relevant period the system did not involve the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. Therefore the representation to that effect was untrue.

(3) The Names failed to show to the necessary high standard that those at the centre of Lloyd's did not believe throughout either that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities, including unknown and unnoted losses, or that they at any stage knew or were reckless as to whether the representations in the brochures were untrue.

(4) The court rejected the Names' complaint that, having regard to the inequality of arms between themselves and Lloyd's, they were put under unacceptable pressure. Save perhaps in very exceptional circumstances, no sensible legal system could permit a party who was aware of such problems at trial to allow the trial to proceed for days or weeks and then, having lost on the merits and having failed to persuade the Court of Appeal to hold that the judge was wrong in fact or law, to argue that the trial was unfair and to invite the Court of Appeal to order a retrial. The proper course in such circumstances was to apply for an adjournment at or before the trial. The judge in this case made sensible case management decisions which the Names did not challenge at the time. The judge acted entirely fairly throughout the period both before the trial and during the trial itself. There was nothing unfair about the trial either in terms of substance or appearance.

Charles Aldous QC, Richard Jacobs QC and David Foxton (instructed by Freshfields) for the defendants. Simon Goldblatt QC and Vincent Nelson QC (instructed by More Fisher Brown) for certain members of the United Names Organisation. Gordon Nardell and Giles Richardson (instructed by Grower Freeman) for other Names. Sir William Otho Jaffray and other Names appeared in person. Colin Edelman QC instructed by Barlow Lyde & Gilbert for Equitas (intervening).

Case reported by Stephen Barbour, barrister.