IN THE SUPREME COURT OF JUDICATURE FC3 95/7551/B
IN THE COURT OF APPEAL (CIVIL DIVISION) FC3 95/7542/B
ON APPEAL FROM THE HIGH COURT OF JUSTICE QBCMI 95/1613/B
(MR JUSTICE RIX)
2 applications
1 appeal

Royal Courts of Justice
Strand
London WC2

Thursday, 21 December 1995

B e f o r e:

LORD JUSTICE LEGGATT
LORD JUSTICE ROSE
LORD JUSTICE ROCH

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DR ANDREW JAMES HIGGINS

APPELLANT

\- v -

MARCHANT & ELIOT UNDERWRITING LIMITED

RESPONDENT

\- - - - - -

(Handed down judgment by John Larking Verbatim Reporters,
Chancery House, Chancery Lane
London WC2 Tel: 0171 404 7464
Official Shorthand Writers to the Court)

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MR D VAUGHAN QC with MR N GREEN and MR A HAYDON (Instructed by Messrs Grower & Michael Freeman, London W1H 8DQ) appeared on behalf of the Appellant

MR G POLLOCK QC with MR P LASOK QC and MR R JACOBS (Instructed by Messrs Dibb Lupton Broomhead, London EC2Y 5AE) appeared on behalf of the Respondent

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J U D G M E N T
(**As approved by the Court**)

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Thursday, 21 December 1995

J U D G M E N T

LORD JUSTICE LEGGATT: This is the judgment of the Court. The appellant, Dr Andrew James Higgins, is a Name at Lloyd's. By a 'pay now, sue later' clause in his agreement with the respondents Marchant & Eliot Underwriting Ltd, who are the managing agents of syndicate 282 at Lloyd's, he promised to ensure without question that at all times there are available sufficient funds to enable them to pay all claims. It is obvious that unless the Names who are the underwriters at Lloyd's fulfilled that promise, Lloyd's would cease to exist. Yet since he received cash calls on 24th June 1994 in respect of the 1990 and 1991 accounts Dr Higgins has failed to pay. So the respondents issued a writ against him for the recovery of £6,000. His only excuse for not paying is that his promise is part of an agreement between undertakings which may affect trade between Member States, and which has as its object or effect the distortion of competition within the common market. On 24th October 1995 Rix J. gave summary judgment against Dr Higgins for £6,000 with interest and costs. Against that order by leave of the judge he now appeals.

The background facts as well as the dispute itself and the salient arguments on either hand were well summarised by the judge at pages 1-22 of the transcript of his judgment. The wider context of the relationship between the Society of Lloyd's and those who comprise it has been definitively explained by the Master of the Rolls in The Society of Lloyd's v Clementson [1995] C.L.C. 117 at pages 122E-125D. That material we forebear to repeat.

Dr Higgins appeals on the grounds (1) that the dispute is not suitable for determination under RSC, O.14, and (2) that the clause, the Standard Agency Agreement ('SAA') which includes it, and the byelaw under which the Agreement was made are all

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void under Art. 85 of the Treaty of Rome. The byelaw in question is Lloyd's Agency Agreement Byelaw No.8 of 1988 ('the 1988 Byelaw'). The form of the SAA is set out in Schedule 1 of the 1988 Byelaw. The 'pay now, sue later' clause is clause 7 of the SAA, and so far as material it reads as follows -

> "7.1(a) The Name shall ensure that at all times there are available sufficient funds subject to the trusts of the Premium Trust Deed and held by or under the control of the Managing Agents' Trustees to enable them to pay all claims made or incurred in connection with any request made by the Agent to make such funds available; provided however that the Name shall not be obliged to make any payment in or towards the satisfaction of any such request by the Agent for funds unless the Name has first been supplied:
>
> > (i) if the request for funds is made for the purpose of satisfying an Audited Closed Year Loss, with an audited annual report prepared as at the date at which the relevant year of account was closed;
> >
> > (ii) in any other case, with a statement signed by the Agent, accompanied by a report signed by the auditors of the Managed Syndicate, complying with paragraph (b) below.
>
> 7.1(d) Any payment requested by the Agent under and in accordance with the provisions of this clause 7.1 shall be made by the Name free and clear from any set-off, counterclaim or other deduction or any account whatsoever and in connection with any proceedings which may be brought to enforce the Name's obligation to comply with any such request for payment by the Agent the Name hereby waives stay of execution and consents to the immediate enforcement of any judgment obtained."

Appearing for Dr Higgins in this Court for the first time Mr David Vaughan Q.C. sought by amendment of the Notice of Appeal and by ancillary applications to adduce fresh evidence and for discovery, to argue that on the true construction of clause 7 the cash calls made to Dr Higgins by the respondents were not validly made under the clause. Since these applications, which were calculated to cause an adjournment, could readily have been made to the judge, we refused them.

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Mr Vaughan argues that the only fair way of resolving the issues is at trial. The factual issues are far from clear, and the issues of E.C. competition law are complicated and require expert evidence. A number of assumptions of fact and of economics is involved. Dr Higgins' direct concern with the Central Fund makes Clementson relevant. The factual issues include the interrelationship between Names, managing agents and members' agents, and between all three and Lloyd's itself. The judge assumed that the calls were for valid claims; that the respondents are not parties to the Central Fund arrangements; that the purpose of the Byelaws is to protect Names instead of policy holders; that the obligation to pay could never distort competition; and that the market relevant to trade between Member States was the market for agency services rather than the Lloyd's insurance market as a whole.

Mr Vaughan contends that O.14 is inappropriate because the decision is liable to be treated as a precedent for the enforcement of clause 7 in claims amounting to £1.4 billion against 13,500 Names world-wide; because the present claim was made at the instigation of the Council of Lloyd's; and because some who shared the same interests as Dr Higgins were excluded from the hearing in chambers. The last point is raised not as a matter of substantive law but in order to insinuate that the procedure was inappropriate because it was not in conformity with Art. 6(1) of the European Convention on Human Rights. The judge should have held that under O.14, r.3(1) there "ought for some other reason to be a trial", namely that there is to be a trial in Clementson. The principles applied in that case would inevitably result in leave to defend. Disputes about market practices necessitate expert and other evidence. Mr Vaughan submits that upon authority the test to apply is whether there is plainly no defence to the claim, and that applying that test, Dr Higgins should have unconditional leave to defend.

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We consider that the plea that the proceedings are unsuitable for O.14 cannot be appraised on its own. The considerations raised by it are to be borne in mind particularly when the second ground of appeal has been answered. As an afterthought, first introduced by amendment of the Notice of Appeal, it can appropriately be taken into account at that stage.

Confronted by some limitation in time for oral argument Mr Vaughan has provided in relation to his second (and main) ground of appeal a 53-page skeleton argument filed three working days before the first day of hearing. It elaborates, without refining, the argument presented at trial, and adds some criticisms of the judge's judgment. In essence Mr Vaughan seeks to establish a resemblance between this case and Clementson. He submits that (1) the SAA must be considered as part of the Lloyd's arrangements, which include the Central Fund and the relation of Names to managing agents, and which affect trade between Member States; (2) the SAA obliges all Names to trade only on the basis that they pay now, sue later, and that requirement could not be justified, even if it had been notified to the Commission; and (3) even if the SAA did not restrict competition, it is unenforceable because it is closely connected with the restrictive conditions of the Central Fund, and because clause 7 is being enforced by managing agents only on account of pressure from the Council of Lloyd's.

The respondents' claim will succeed unless it is arguable that it offends against Art. 85. That Article strikes at an agreement between undertakings, which at least potentially affects trade between Member States, and which has the object or effect of distorting competition within the Common Market. For purposes of Art. 85 the Byelaws governing the Central Fund (including the 1988 Byelaw), agreements in furtherance of the 1988 Byelaw (including the SAA), and clause 7, are all "agreements, concerted practices or decisions" of an

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association of undertakings, namely Lloyd's, as are associated directions or recommendations made by Lloyd's.

Mr Vaughan submits that, whether examined from the perspective of premium income, percentage of overall business written, number of Names participating, or a combination of the three, the effect of the Lloyd's arrangements on trade in Member States other than the United Kingdom is manifest. Each SAA is the implementation, the consequence, the object, the means and the embodiment of the 1988 Byelaw. Mr Vaughan criticises the judge for supposing that Dr Higgins had to show that clause 7 affected trade, rather than that the "agreement" as a whole does so. He argues that the arrangements are arguably connected with the Central Fund and that the SAA is a classic example of an agreement whose effect on trade must be viewed as flowing from the commercial activity (underwriting) with which it is connected. Mr Vaughan also submits that the judge was wrong to look for an effect on trade arising out of a market such as in the provision of services: it is an "agreement" which must affect trade. In any event, the judge could not reasonably have concluded that services rendered under agency agreements do not have an effect elsewhere in the European Union.

Irrespective of effect, it suffices that the object of an agreement is anti-competitive. Having acknowledged that an SAA intrudes on (and so distorts) competition, the judge should not have concluded that its object was not anti-competitive because the mandatory provisions were needed to protect Names. Mr Vaughan submits that certain of the Lloyd's Reports show that the very object of the SAA and clause 7 was the fettering of competition. He relies on suggestions in the Reports that the SAA itself fettered market forces; that it was drafted for the benefit of policyholders and working Names, not external Names; and that its objects are to give agents freedom of manoeuvre, and to underpin the security of the Lloyd's policy, as well as

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to protect Names. The protection of policyholders goes only to the possibility of exemption under Art. 85(3). The object of the Central Fund, to give Lloyd's a competitive advantage, results, if successful, in the distortion of competition. Clause 7 is not only designed with the Central Fund to guarantee the security of the Lloyd's policy but is also a device to protect the Central Fund. Mr Vaughan therefore submits that the Central Fund, the 1988 Byelaw and the SAA all have the object of distorting competition.

When considering anti-competitive effect Mr Vaughan identifies the relevant markets as the international insurance market and the market insurance services at Lloyd's, of which agency services (regarded by the judge as a relevant market) form an integral part. In considering restrictive effect Societe Technique Miniere v Maschinenbau Ulm [1966] E.C.R. 237 shows the need to examine -

> "....the nature and quantity, limited or otherwise, of the product covered by the agreement, the position and importance of the [parties] on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements...."

The E.C. Commission has decided that a number of insurance agreements and standard terms offend against Art. 85. So the imposition by a trade association on standard terms for use by its members has been held to be in breach of Art. 85(1). To a like effect are Council Regulation 1534/91/EEC and Commission Regulation 3932/92/EEC. Such difference as there is between restricting, distorting and preventing is of no consequence in this case. In aid of his submission that the 1988 Byelaw and the SAA in particular restrict competition Mr Vaughan argues that agency services would have been provided on different terms but for the 1988 Byelaw; that the SAA has resulted in business that might not otherwise have been written; that underwriters' freedom of manoeuvre that the SAA is claimed to give confers a major competitive advantage which itself distorts competition; that clause 7 is also designed with the

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Central Fund to give Lloyd's a major competitive advantage; and that the SAA is weighted against external names, and so distorts competition between insurers <u>inter se</u>.

Mr Vaughan accepts that some agreements, although prima facie anti-competitive, may not offend against Art. 85, because they are necessary for the promotion of competition. He contends that which side of the line an agreement falls can only be determined by evidence. In this context Mr Vaughan submits that <u>VdS</u> v <u>Commission</u> [1987] ECR 405 and certain Commission decisions are to be preferred to such cases as <u>Klim</u> v <u>DLG</u> [1994] ECR 5641. The argument that clause 7 is beneficial goes only to whether, had the 1988 Byelaw or the SAA been notified, either might have obtained exemption under Art. 85(3). Mr Vaughan contends that since <u>Clementson</u> is to proceed to trial, so must this case. The respondents' claim is ultimately for the protection of the Central Fund. Mr Vaughan reiterates his argument that clause 7 is part of the Lloyd's arrangements, which include the Central Fund and the SAA. Dr Higgins is now said to have a counterclaim, which he can rely on at this stage if he is not obliged to 'sue later'. But there is no evidence of that.

Finally, in the context of tainting Mr Vaughan invokes examples of lawful acts being rendered unlawful by an unlawful purpose. He submits that Dr Higgins need only show that the respondents' action is the means of enforcing, or the result of, or the subject of, or the implementation of, an illegal agreement. The most effective summary of his argument on tainting is presumably his own: the motive of Lloyd's in instigating these actions is to protect the Central Fund and to avoid plans for the renewed and increased use of the Central Fund being thwarted by further depletions.

Although we have summarised fairly fully the argument for Dr Higgins, and have taken account of it, the response, as is

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appropriate where a claim for summary judgment is upheld, can be stated with comparative brevity.

As a Name at Lloyd's, Dr Higgins promised to pay calls without question. Calls were made to him for the total sum of £6,000. But he and others like him have decided not to pay until they have to, and to leave Lloyd's to take care of itself. Dr Higgins proffers no defence to his managing agents' claim, except under Art. 85 of the Treaty. It is of course fanciful to suppose that he has ever thought of the SAA which he entered into with his managing agents, or of the Byelaw under which it was made, as affecting trade between Member States. But now through the ingenuity of his lawyers he relies upon the Article to evade payment of his debts. It is our task to see whether that ingenuity has been well directed and will avail him.

The action is to enforce a Name's obligation to make funds available to his managing agent so as to enable valid claims to be met on policies that he has underwritten. That does not involve the carrying out of an unlawful agreement or the implementation of an unlawful arrangement. There is nothing unlawful about it. On the contrary, the obligation to pay debts is as old as commerce.

Dr Higgins received premiums for the acceptance of a liability to pay if losses eventuated from prescribed risks. They did. He is liable to pay the insured. His managing agents have to co-ordinate the payment due from all the Names in the syndicate. So they have made a call. If the insured is not paid, Lloyd's will suffer as well as the insured. Clementson has permitted the argument that a Name should not have to reimburse sums expended on his behalf from the Central Fund. The only obligation here in question is the liability of a principal to make available to his agent money required for the discharge of the principal's liability.

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Dr Higgins' reliance on Clementson is misplaced. The Court of Appeal there concluded that it was not possible to hold that Mr Clementson's defence based on Article 85 was unarguable. That defence, so far as is presently relevant, related to the Central Fund byelaw which, it was said, arguably had the effect of distorting competition within the common market, by providing Lloyd's with a source of competitive strength, whereby, by offering lower premiums in reliance on the ultimate indemnity provided by the fund, business might be captured which otherwise would have gone to other insurers. Sir Thomas Bingham M.R. (with whom Hoffmann LJ agreed) said at 129D "I do not feel able to reject Mr Clementson's argument ... as plainly wrong in law. Nor am I persuaded it is right in law". Steyn LJ at 133F was even more reluctant to accept that the defence was arguable and expressed the view that it would ultimately fail.

It is apparent that the market identified in Clementson as susceptible to possible distortion was that between companies in the Member States competing for insurance business. In the present case the market is entirely different, namely that between names and agents for agency services. Such a market conspicuously lacks any element affecting trade between Member States. In Clementson at page 125F Sir Thomas Bingham said "it could scarcely be said, in the case of any individual name, that the decision to make payment" under the bye-law provision for the application of central fund monies "might affect trade between member states". That comment would apply with equal force to enforcement of clause 7.1(a).

Furthermore, it is impossible to see how clause 7.1(a) can be said to restrict or distort competition. Standardised terms govern the relationship between name and agent but in no way inhibit choice as to whether or not to become a name on a particular syndicate: on the contrary, standardisation removes a possible source of distortion or restriction. The 'pay now,

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sue later' provision is an essential debt enforcement mechanism to provide the first line of Lloyd's provision for policyholders: it is a source of funding not distortion.

Although it is right to say that the SAA is part of the Lloyd's arrangements which include the Central Fund, there is no nexus between that fund and the provisions of clause 7.1(a): resort to the Central Fund only takes place when a Name's Premium Trust Fund has been exhausted, cash calls have been made and the Name's securities realised. It simply does not follow that, because the existence of the Central Fund gives rise to arguable anti-competitive issues in the light of its possible impact on competition for insurance business, Lloyd's internal mechanism to ensure funding for claims likewise gives rise to similar arguable issues. There is no nexus because of the fundamental distinction in relation to an insurer's conduct between the inter-state market place and its own internal arrangements for funding claims.

Mr Vaughan relied on VdS v Commission [1987] ECR 405 as authority for the proposition that the 'rule of reason' does not apply to agreements in the insurance sector, and as showing that restrictions comparable with the terms of the SAA are within Art. 85(1) and can only be validated by exemption under Art. 85(3). He distinguished Gottrup-Klim v DLG [1994] ECR 5641 as not being concerned with the justification for a restriction or with an agreement for the settlement of insurance claims. But in VdS the argument was that Art. 85(1) was not yet applicable to the insurance industry in full and without qualification. That was rejected by the European Court. The recommendation that the Court was considering directly and indirectly fixed the level of premiums, and the Court found that the recommendations were contrary to Art. 85(1)(a) in that they fixed prices. That authority does not support the proposition advanced by Mr Vaughan that the 'rule of reason' does not apply to agreements within the insurance

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sector. It is only authority for the proposition that a 'rule of reason' cannot excuse a price-fixing arrangement.

It may be necessary for insurers to include an anti-competitive provision in their arrangements if it is only by that means that effect can be given to other acceptable provisions. So in Klim the Court accepted that a rule preventing members of one co-operative being members of a rival co-operative was not a breach of Art. 85(1). However, the anti-competitive restrictions must be limited to what is necessary to render the arrangements as a whole properly operable. In Klim Advocate General Tesauro made at page 5653 the apposite comment that -

> "In my opinion, in fact it can be contended that, in cases where a collective purchasing organisation itself conforms with the requirements of protection of competition, it must be accorded the right to say whether and how it will protect itself from action by members which it considers incompatible with the common interest: and that is so for the simple reason that some restriction of the independence of the individual may be regarded as inherent in his very membership of any form of organised economic activity."

The crucial question is whether Dr Higgins can show an arguable case that clause 7.1(a) is void. Article 85 reads as follows -

> "(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the common market, and in particular those which:
>
> > (a) directly or indirectly fix purchase or selling prices or any other trading conditions....
>
> (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

Art. 85(3) sets out the conditions for exemption by the Commission from the provisions of Art. 85(1) of notified agreements.

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That Article strikes down only those provisions of an agreement which are anti-competitive. It is then for the national law to decide what effect that has on the remaining provisions of the agreement. An important case in this context is Société Technique Minière v Maschinenbau Ulm (supra). A French company agreed to take delivery of 37 graders from a German undertaking which granted the French company the exclusive right to sell the graders in French territory. The first question for the court was whether that agreement offended against Art. 85(1). The Court said at page 249 -

> "It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in Community law found in Art. 85, whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law and of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."

About the effects of the agreement on competition the Court said:

> "This interference with competition referred to in Art. 85(1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact prevented or restricted or distorted to an appreciable extent."

In answer to the second question relating to the interpretation of Art.85(2) the Court said at page 250 -

> "This provision, which is intended to ensure compliance with the Treaty, can only be interpreted with reference to its purpose in Community law, and it must be limited to this context. The automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself.

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> Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law."

It is common ground that severance is permissible in English law where the offending parts of an agreement can be struck out without rewriting the agreement or entirely altering its scope and intention. If what remains stands as a contract in its own right, it is enforceable.

Mr Vaughan has addressed no argument to the Court either orally or in writing about severance. Instead he argues that it is necessary to look at the whole of the Lloyd's arrangements. If then the 1988 Byelaw is anti-competitive or the SAA is anti-competitive, the whole of what is comprehended within the arrangements is void. We agree with Mr Pollock Q.C. that this approach is appropriate only in cases such as the cartel cases where in order to see the scope and effect of the provisions creating the cartel the court has to look at the whole of the context in which the offending agreement was made.

Before considering the object and effect of clause 7, it is helpful to have in mind the reason for having a 'pay now, sue later' provision in an agreement between managing agent and Name. That was clearly stated by all three members of this Court in Arbuthnott v Fagan [1995] CLC 1396. Considering a similar clause, the Master of the Rolls said at page 1399H of the transcript of the judgment:

> "....the scheme of the clause seems to me to be clear and sensible. The duty of the Name to pay sums required by the Agent without prevarication or deduction or delay is stated clearly and unequivocally. That reflects the overriding need, acknowledged on all sides, to ensure that funds are available for the prompt settlement of the claims of those who have insured or reinsured at Lloyd's."

At page 1402G Steyn L.J. said simply -

> "Cash calls directed to Names to pay for liabilities, expenses and outgoings of the underwriting business will....be readily collectable by summary judgment."

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Hoffmann L.J. said at page 1403F -

> "The purpose of clause 9 is clear and uncontroversial. It is designed to insulate the liability of the Name to provide whatever funds are necessary for the underwriting business from the state of accounts between himself and the Agent. Such insulation is necessary for the purposes of enabling the Lloyd's market to meet its liabilities. Otherwise the flow of funds needed to pay policyholders' claims may be clogged by disputes within Lloyd's between Names and Agents, to the detriment of the market as a whole."

It is against that background that the object and effect of clause 7.1(a) has to be judged.

Unless Dr Higgins can show that clause 7.1(a) is arguably unenforceable, the respondents' claim succeeds. First, he relies on a supposed 'nexus' between clause 7 and the Central Fund. In our judgment, for the reasons we have explained in connection with Clementson, there is none. It is obvious that if in compliance with clause 7 a Name pays what he owes, recourse to the Central Fund is avoided. But the fact that both are designed to ensure that the policyholder is paid what is his due, does not mean that there is any necessary connection between the two. Even if there were no Central Fund, the Name would still have to pay. Clause 7 cannot be said to give Lloyd's a competitive advantage. It merely seeks by co-ordinating the performance by Names of their respective obligations, to place Lloyd's on the same competitive footing as a corporate insurer would be.

The 'sue later' provision has the effect of protecting policyholders because it precludes the Name from failing to make available what is due to policyholders on the pretext that the Name is in dispute with his managing agent. The absence formerly of a 'sue later' provision no doubt is a relic of the days when it was unnecessary expressly to forbid Names to put their own interests first. Names are more professional now.

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Clause 7 cannot be said to have the object of affecting trade. Even if it could, it would represent the minimum provision that it is necessary to make in order to ensure the punctual payment to policyholders of money due to them. Nor does clause 7 have any effect on trade, since it does no more than seek to ensure that Names fulfill their obligations to policyholders in priority to the pursuit of their own claims. It has not been seriously argued that any of the other provisions of the SAA have or could have any effect on trade. Even if they did, they would be severable.

The imposition by Byelaw of standard terms has effect only in the market between agents and Names for agency services. That is the relevant market, and is unique to the United Kingdom. So the relevant undertakings are the Names and the managing agents. Contracts between them are essential if syndicates of Names are to be able to compete effectively against insurance companies as well as against each other. Such contracts do not harm the insurance markets, which it is accepted are international markets. In our judgment it is not possible that any agreement for agency services could have any influence on the pattern of trade between Member States.

Mr Vaughan submits that the critical question is the form of the obligation to pay and whether in a free market different forms of pay obligation could arise which would form the basis of competition by agents for clients. Competition could exist between agents as to the form of pay obligation included in contracts with Names. But as Mr Pollock submits, the 1988 Byelaw did not require all agents to offer the same payment rate; these were negotiable. There was no evidence that agents, if left to themselves, would have offered materially different terms to their Names; and there was no evidence that competition in regard to contract terms would have any or any appreciable effect in the market for agency services by comparison with, for example, the relative performance of

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agents. Accordingly, there was no evidence of any appreciable effect on competition in the market for agency services. In fact the evidence indicated that the wide discretion conferred on agents pre-dated the mandatory agency agreement. In any event, it is impossible to see how the Lloyd's market, where each syndicate comprises numerous "sleeping" individuals, could work without such a discretion.

Mr Vaughan submits that this action is tainted by the illegal purpose of seeking to reduce the depletion of the Central Fund, which is itself arguably illegal. To that we answer simply that even if the Central Fund is illegal, that cannot render illegal other methods of discharging Dr Higgins' indebtedness to policyholders, although it does make his reiterated acknowledgment of that liability ring a little hollow.

In summary, we do not see how competition between agents can affect trade between Member States. There is no evidence to suggest that the Lloyd's market is not unique. Managing agents at Lloyd's are in competition with each other but not, in relation to those whom they represent, with agents outside Lloyd's. Without some form of 'pay now, sue later' obligation Lloyd's could not function. The corollary of that is that if Dr Higgins were to succeed in his defence to the respondents' claim, it would destroy Lloyd's ability to provide insurance, and so would destroy Lloyd's itself. But in our judgment there is no evidence that even if the SAA were not mandatory, Dr Higgins and others like him would have been able to negotiate a substantially different or more advantageous term than clause 7. In relation to the international insurance market that obligation does not have any effect on competition and cannot have been intended to do so. Clause 7 is capable of standing on its own. As the judge held at page 57 of the transcript -

> "Even if other aspects of Lloyd's arrangements may be arguably open to attack, and even if other aspects of the standard agency agreement itself may be arguably open to attack this action must succeed unless clause

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> 7, and in particular clause 7.1(a) is arguably unenforceable. The fact that other aspects of the standard agency agreement might be arguably unenforceable would be no reason for failing to enforce clause 7, unless under domestic principles of severance, which are the relevant principles, clause 7 could not survive an attack on other parts of the agreements."

About the procedure adopted by the plaintiffs, which is the subject of the first ground of appeal, we need say no more than that, since in our judgment the attempt to invoke Art. 85 is a pretext for non-payment which is bound to fail, the application for summary judgment was amply justified.

We therefore endorse the judge's conclusion that it is not arguable that clause 7.1(a) would not survive as valid, whatever other arguable breaches of Art. 85 there might be. The appeal is accordingly dismissed.

Order: **Appeal dismissed with costs; liberty to apply in relation to costs; certificate for three counsel refused; costs on the indemnity basis in relation to the three issues raised late; leave to appeal to the House of Lords refused.**

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