

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

Edward Cowtan
witness
Sworn
2003 Folio No 54

BETWEEN

MRS SALLY ROSEMARY NOEL

Appellant/Claimant

-and-

THE SOCIETY OF LLOYD'S & ORS

Respondents/Defendants

AFFIDAVIT

I EDWARD REGINALD COWTAN of 29, the Mount, Rickmansworth, Herts, WD3 4DW
MAKE OATH and say as follows:

1. I was an Insurance Consultant and member of the British Academy of Experts, the British Insurance Law Association, the panel of arbitrators of AIDA and the Insurance Arbitration Society (UK).
2. I was first involved in the insurance industry when I joined E W Payne & Co, the Lloyd's insurance brokers on January 1, 1940. Apart from a spell between November 1943 and October 1947 when I served in the Armed Forces, I remained in the insurance industry until July 31, 1990 when I retired as Special Risks Claims Manager of Terra Nova Insurance Co Ltd, as mentioned below and thereafter became a self-employed Insurance Consultant.
3. The extent of my involvement in the insurance industry was as follows:

- (i) **January 1940-August 1955.** From January 1, 1940 until November 1943 I worked in the Brokers' Accounts department of E W Payne & Co Ltd. Following my Army Service and in October 1947 I returned to E W Payne & Co Ltd where I spent a few months in the Underwriting Accounts department and was then transferred to the American Department. Initially my time was divided between brokering and claims but as the claims built up I devoted more and more time to them and by the time I left at the end of August 1955 the Claims side had escalated to the point where there were about six claims Brokers and we were handling all types of American non-Marine claims, the majority coming from MGA's offices in Chicago, San Francisco and Seattle.
- (ii) **From September 1, 1955 until December 31, 1966** I was employed as Non-Marine Claims Manager of English and American Insurance Co Ltd which underwrote a world-wide non-marine account with the emphasis on the United States and Canada together with certain European countries.
- (iii) **From January 1, 1967 until December 31, 1983** I was employed as Claims Manager by K F Alder and Others, a Lloyd's Syndicate now managed by Sturge Underwriting management Limited. Whilst they had a world-wide account the majority of their business came from the United States and I personally concentrated on casualty business. K F Alder also wrote a certain amount of personal accident business both direct and re-insurance and I was involved in the claims. I served on the Lloyd's Asbestos Working Party for approximately two years as a substitute for E E Nelson and I served on the Lunco contact sub-committee for several years, becoming Chairman in about 1981. Whilst with K F Alder and Others I was involved with re-insurance both inwards and outwards.
- (iv) **From January 1, 1974 until December 31, 1978** I was an underwriting Member of Lloyd's.
- (v) **From January 1, 1984 until September 30, 1985** I was a director of Kingaby Simons (Reinsurance Brokers) Ltd a company of Lloyd's Insurance Brokers being concerned primarily with North American production.
- (vi) **From October 1, 1985 until July 31, 1990** when I retired, I was Special Risks Claims manager, employed by Terra Nova Insurance Co Ltd. In this employment I was involved with all types of professional liability claims as well as casualty claims and was responsible for conducting claim audits of numerous accounts.
- (vii) As an insurance consultant I have been involved in many insurance and reinsurance claims disputes. Apart from the many companies and syndicates for whom I have acted I have also been asked to act as an expert witness on behalf of Lloyd's

4. In view of my special responsibilities for both my own Syndicates and in relation to the special Committee's set up to investigate and monitor the Asbestos claims, I was better placed than most people in the Lloyd's market to make an assessment of the extent of the asbestos claims arising through America.
5. The Borel case in America (1973) was the beginning of a new era in the Asbestos claims scenario, when his widow sought and obtained significant damages over and above the level of claims previously established under Workmen's Compensation legislation. Inevitably this alerted the legal profession to the ability to establish similar claims in other States and eventually across America.
6. Whereas prior to the Keene decision in America (1981) these claims had been limited to claims based on manifestation of the disease at the claimant's place of employment, to which that manifestation was related, from that date victims of asbestos diseases could claim against other employers under whom he had been exposed to asbestos. The Keene decision therefore laid the foundations for very much more extensive claims against companies (and their Insurers) employing the claimants at any time in their working lives i.e from the time of exposure to the time of manifestation and any such employment in between ("the triple trigger" liability).
7. It was accepted by those with knowledge of the situation from 1978 that asbestos liability would be the most significant legal and cost issue in the history of the insurance industry, partly because of the long latency period for asbestosis (15-45 years).
8. As the Claims Manager for Syndicates 122 and 311 whose lead underwriter was Mr E E Nelson, a one time Chairman of the Asbestos Working Party, I made regular visits to Attorneys etc, including Lord Bissell & Brook and Mendes & Mount from 1971 onwards and learned in 1978 of the dramatic increase occurring in the progression of the Asbestos claims to the point of threatening the viability of the insurance market.
9. In Court on the 17th April 2000 in (Jaffray v Lloyd's) I said "It was a situation that really started in the early 70's and gradually built up to enormous proportions; more and more insureds were brought into cases by claimants, so by the early 1980's, there was a very large volume of claims. In fact, my last two years at Alders were almost entirely spent in dealing with asbestos and pollution claims, which were also building up".
10. I told the court on 17th April I became a Name at Lloyd's in 1974 and resigned in June 1978, effective 31 Dec 1978. I was warned that there was a very serious problem arising with asbestosis. There were also a number of quite serious product claims in the field of pharmaceuticals and that sort of thing, but it was principally asbestos that was the problem.
11. I was astounded in Court to be handed a letter of 19 June 1978 from Mr Mott of Bellew & Raven (Underwriting Agents) Ltd to the Manager of the Membership Department saying "I return the form of resignation duly signed by Mr Cowtan, who is worried about increasing competition in the insurance world. He has decided to wind up his Lloyd's affairs before retirement". It was the first time I had ever seen the letter, and Mr Mott gave the wrong reason for my resignation, I said in Court "My recollection is that it was only the asbestos situation that really forced me to resign", a fact that Mr Ted Nelson was well aware of. I continued as a full time executive for another eleven and a half years in the London Market and then became a Consultant for a further six years.

12. It is my belief that if it had become known that in my capacity of Claims Manager I had resigned in 1978, solely on the basis of the Attorneys' warnings first hand of "the very serious problems arising with Asbestos" it would have caused concern in the Market in light of the recruitment programme under way.
13. Mr Nelson and other members of the AWP had access to the same information as that provided to me, and therefore were fully aware of its implications. This information included specific Attorneys' Reports directed to particular Underwriting Syndicates but also general Attorney's Reports commissioned by the AWP on the Asbestos scenario in America and its effects coming through to the Lloyd's market.
14. As the position worsened these Reports became confidential to those to whom they were directed. Whereas originally they had been held by Solicitors Elborne Mitchell in London, later this function was taken over by Toplis and Harding, and subsequently by Lloyd's Underwriters' Non-Marine Claims office, of which I was Chairman on the Contact Sub-Committee in 1981. During the latter period the relevant information was sifted and distributed to interested underwriters, so there was a general knowledge across the underwriting community of the general state of play although this would probably not apply to motor, aviation and other syndicates. However, the point should be made owing to the lack of capacity in the non-marine market many of the marine syndicates had been drawn into extensive underwriting of general liability policies, which is where the asbestos claims were coming from.
15. In my opinion, prospective Names should have been warned of Asbestos and the fact that they would be inheriting retrospective liability for losses under policies dating back to the 1940's; also that with open years they would never be able resign and, in the event of their death, their estate would inherit this unlimited and unquantifiable liability. This policy of non-disclosure was adopted in order not to impede recruitment by the lead underwriters such as Murray Lawrence and Ted Nelson with whom I was closely associated.
16. I recently gathered from Mrs Noel that the two central elements in Lloyd's assessment made to Lord Neill in 1986 of the effectiveness of the briefing given by agents to prospective Names were the verification Form and Rota Interview. I would like to say that after being shown a copy of the Verification Form I had never seen and was not aware of its existence during my time at Lloyd's.
17. I was particularly concerned at the superficiality of the Rota Interview, and have always had great sympathy with the outside Names who joined the market from the seventies onwards, but not with the working names, who should have been aware of the build up of asbestos losses. More particularly I was concerned that the Names on various Syndicates were not being properly informed. This information must have been available to several underwriters, a number of whom visited the USA at regular intervals for the purpose of extensive recruitment in the late 1970's/early 80's.

18. As explained above, in 1978 my responsibilities flowed from my duties as a claims manager and did not extend to disseminating informative reports on the growing progression of the asbestos claims within the market, among the membership at large or to prospective Names. However, bearing in mind the knowledge available to me and to other working Names in the market, including particularly those associated with or receiving information from the Asbestos Working Party, some of whom were at various times on the Lloyd's Committee, in my opinion there was a regrettable failure to disclose to the existing and/or prospective underwriting Names material information about the asbestos scenario as it was developing at that time and later, if not also beforehand.
19. Had the seriousness of the situation been properly addressed, disseminated and publicized it would, of course, have been more difficult for underwriters already caught up with these risks to reinsure them within the market, or perhaps even to cover themselves adequately with personal stop loss insurance. There was therefore an intrinsic incentive among market traders associated with the problem and linked to the Asbestos Working Party to limit any such dissemination to those already "in the know"
20. Such dissemination could also have threatened the Society's evident policy of encouraging prospective investors to become underwriting Names for the purpose of attracting new capital to pay for the increasing level of claims originating in occurrences in earlier decades (the "recruit to dilute strategy"). A corollary to that attitude was the developing practice of taking out time-and-distance policies and minimizing the provision for losses incurred but not reported in the annual syndicate accounts.
21. As we all know, in the (Jaffray) Threshold Fraud case, the accusation of the failure of Lloyd's to disclose material information was deleted from the points of claim before Cresswell on day 9. That left the Names with the task of proving positive misrepresentation amounting to fraud. For various reasons they failed to persuade the courts that fraud had occurred. That judgement left the issue of a conspiracy of silence in certain quarters of the market unresolved. I interpret Mr Mott's explanation to the Administration of the reasons for my decision to close down my underwriting account in 1978 in that context (see para 11 above).
22. In my opinion the position of the Defendant Sally Noel in the present case and her purported liability arising from the RITC Debts (and/or the Equitas Premium) should be viewed in the context of these circumstances, quite apart from any other defences available to her. Had she been appraised of the evidence of the increasing level of asbestos claims that was presented to me in 1978 by American attorneys with whom I was doing business, she would have had good reason to adopt a similar response by deciding not to proceed with her application to become an underwriting Name with effect from 1st January 1979..

I verily believe the facts and expert opinions related herein are true.

SWORN AT
DARLINGTON HARDCASTLES
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RICKMANSWORTH
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(Signature) *[Handwritten Signature]*

This *4th May* 2005

Before me *[Handwritten Signature]* (Signature)
A Solicitor
C. J. V. DARLINGTON
Solicitor (Capital)