The Society of Lloyd's v Padway Holdings Ltd
Court of Appeal (Civil Division)
(Transcript:Association)
HEARING-DATES: 27 April 1988
27 April 1988

COUNSEL:
AGS Pollock QC and SA Nathan for the Appellants; IGA Hunter QC and DGM Marks for the Respondents
PANEL: Lord Donaldson of Lymington MR, Nourse, Mann LJJ
JUDGMENTBY-1: LORD DONALDSON MR
JUDGMENT-1:

LORD DONALDSON MR: This is an appeal from a judgment of Mr Justice Hirst who found in favour of the plaintiffs, The Society of Lloyd's, on a summons under Order 14 giving Judgment for £749,259.13 with interest from 4th October 1985. The claim against the defendants was under a contract of guarantee dated 28th January 1978. Mr Pollock rightly points out that, if we were academic lawyers, we should decline to categorize this as a contract of guarantee, although it is convenient so to refer to it, because the ultimate liability of the defendants' was to provide monies for The Society of Lloyd's to dispense in settlement of creditors of the guaranteed.

The history is briefly this. In 1971 Greenway Insurance Brokers Limited was incorporated by Mr Meyer Padwa as a joint venture in which he was by far and away the controlling share-holder, but there were two other joint venturers, namely, the two Mr Greenways. The purpose was to carry on business as Lloyd's brokers. Under Lloyd's rules as they then existed, Mr Padwa, and indeed the two Greenways, as shareholders had to guarantee, or enter into a contract of guarantee of this nature in relation to the business of the incorporated brokers.

In 1978 the business of Greenway Insurance Brokers Limited and its shares were sold to the defendants, Padway Holdings Limited, a company again controlled by Mr Padwa. Under Lloyd's rules, as they then existed, Padway Holdings Limited had to guarantee the liabilities of Greenway Insurance Brokers, and that is the guarantee which is now sued upon.

Mr Padwa's original guarantee, given in 1971, continued, because it was expressed to continue, so long as he was a director and he continued as a director.

In 1982 Greenway Insurance Brokers Limited got into financial difficulties and there were a series of meetings with Lloyd's because they were unable to meet Lloyd's solvency requirements. It is certainly a fact that in April of that year when that was being discussed with Lloyd's one of the factors mentioned to Lloyd's, and taken into consideration by Lloyd's, was the existence of this guarantee. Shortly thereafter Mr Padwa decided, as he put it, that he "wanted out". He therefore entered into a provisional agree ment to sell Greenway Insurance Brokers Limited to the two Mr Greenways. Such a sale required the approval of Lloyd's under Lloyd's rules, and accordingly the transaction was discussed with Lloyd's. There was an insistence that all the existing liabilities of Greenway Insurance Brokers should be secured by the injection of further capital and the writing off of some prior loans, the details of which do not matter. Lloyd's approved then the change in ownership. Nothing in terms was said about the 1978 guarantee given by the defendants.

In November 1984 Greenway Insurance Brokers Limited ceased trading, and in 1985 they were wound up. Lloyd's thereupon called upon Padway Holdings Limited, the defendants, to meet the obligations said to arise under the guarantee.

Four defences are put forward. The first relates to the time when the guarantee was given in 1978. It is said by Mr Pollock that it was, or it is arguable that it was, a term to be implied in the guarantee that the defendants' liability would cease upon their ceasing to be shareholders in Greenway Insurance Brokers Limited. The reason given in support of that contention was that the defendants were originally required to give the guarantee because of the very fact that they were shareholders. That being so, it must have been an implied term of the guarantee that, upon their ceasing to be shareholders, the guarantee would come to an end. For my part I entirely agree with the learned judge that there is no reason to imply any such term. It would be a possible term, but, applying the Moorcock test, there is

no reason why, if the officious bystander asked the question, one should assume that both parties would have said: "Well, of course this guarantee comes to an end as soon as the defendants cease to be shareholders".

The second defence arises at the time in 1982 when the sale to the Greenways took place. It is said that the defendants' liability under the guarantee was terminable on notice, and that in all the circumstances it is arguable that notice was impliedly given. The learned judge took the view that the guarantee was not terminable upon notice, but, with profound respect to him, I would not agree with that. I think that most guarantees are terminable on notice. What would constitute a reasonable notice in all the circumstances may be very much more difficult to determine. One would have thought it would at least involve a crystallisation of all liabilities under the guarantee and their discharge, and that the length of notice would take account of the need to achieve that result. But I am quite unable to find any evidence from which it is possible to say that the defendants impliedly communicated to Lloyd's an intention to terminate what was prima facie a continuing liability under the guarantee. Mr Pollock says that the brokers were making losses at that time and Lloyd's knew it; that Mr Padwa was unwilling to go on funding the brokers and that Lloyd's knew that. He says that Mr Padwa was willing to make good losses up to that time and that Lloyd's knew that (all of which is quite correct) and that Mr Padwa wanted out and that Lloyd's knew that. He also says that it was obvious (and indeed must have been known to Lloyd's) that at that time Mr Padwa had alternative courses of action open to him: he could inject further funds into the brokers in order to comply with the solvency requirements, or he could have wound the brokers up and met his, or, more accurately, the defendants', liabilities under the guarantee. He chose to inject funds, and in all the circumstances he was implicitly saying to Lloyd's "I am going to cut my loses, and I am going to get out."

I am afraid I am unable so to interpret the situation. It seems to me (and this is borne out to some extent by a memorandum from the brokerage department of Lloyd's) that the view was being taken by all concerned that there was a solvency crisis at that time which would be resolved by the action which was in fact taken in injecting further capital, but that for the future the brokerage company was likely to be profitable; and that nobady -- Mr Padwa, the defendants or Lloyd's really applied their minds to the question of what was the status of the defendants' guarantee. Unless they did apply their minds to that, I can see no basis for saying that anybody gave notice terminating the liabilities under the guarantee.

The third defence, which is really related to the one I have already been dealing with, is that Lloyd's are estopped from seeking to enforce the guarantee in relation to liabilities incurred by the brokers after the defendants had ceased to be shareholders. It is said that, in so far as this is different from the original implied term, it rests upon the submission that Lloyd's knew perfectly well that Mr Padwa thought that he was no longer, or his company was no longer, to be liable under the guarantee; that, knowing that he considered that to be the position, they stood by and allowed his liability to increase; and that in those circumstances it would be wholly inequitable that they should be allowed to enforce the guarantee at this stage.

I would entirely agree that, given the facts assumed, that would be an arguable defence. Whether it succeeds is another matter, but it is certainly arguable. Again I can find no trace of the facts upon which it is said to be based. I can find no trace of any evidence which would call for a reply from Lloyd's in response to a charge that they stood by knowing that Mr Padwa misunderstood the situation.

The fourth defence is that Lloyd's owed a duty of care to the defendants in the exercise of their supervisory powers over Lloyd's brokers, bearing in mind that, as is assumed for the purposes of this submission, there was a continuing liability on the part of the defendants for losses and debts which might be incurred by the broking company after the defendants had ceased to have any shareholding in or control over that broking company. This is the basis of the defendants' counterclaim, but it also operates as a set-off and provides them with a defence.

I say as little as I can about this head because on any view the defendants will be entitled to pursue it as a counterclaim. Suffice it to say that I do not think there is sufficient substance at this stage to justify it being relied upon as a defence and as an answer to the claim put forward for summary judgment.

Finally, there is of course the factor that the decision to give judgment under Order 14, unless it turns entirely upon a question of law, is a discretionary one for the Judge concerned. I can detect no error in principle in the way in which the discretion was exercised. For all those reasons I would dismiss the appeal.

JUDGMENTBY-2: NOURSE LJ
JUDGMENT-2:

NOURSE LJ: I agree and do not wish to add anything of my own.
JUDGMENTBY-3: MANN LJ
JUDGMENT-3:

MANN LJ: I also agree and do not wish to add anything.

DISPOSITION:

Appeal dismissed with costs; application for leave to appeal to the House of Lords refused.

SOLICITORS:
Young Jones, Hair & Co; S Cooper