Supplied by Smith Bernal Reporting Ltd for Lawtel

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(Mr Justice Rimer)

CHANI 98/1523/3

Royal Courts of Justice
The Strand
London WC2

Friday 30th July, 1999

B e f o r e:

LORD JUSTICE EVANS
LORD JUSTICE WARD
LORD JUSTICE MUMMERY

\- - - - - -

(1) DIANA ALDRICH
(2) CHARLES DAY
(3) TODD CIVARDI
(4) HENRIETTA BIGGS AND OTHERS

Appellants

\- v -

THE NORWICH UNION LIFE INSURANCE COMPANY LIMITED
(FORMERLY KNOWN AS THE NORWICH UNION LIFE INSURANCE SOCIETY

Respondents

AND:

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
(Mr Justice Rix)

QBCMI 98/1525/3

NORWICH UNION LIFE INSURANCE SOCIETY

Respondents

\- v -

(1) AFZAL HAMMED QURESHI

First Defendant/Appellant

Supplied by Smith Bernal Reporting Ltd for Lawtel

(2) FARHAT DURRANI QURESHI

AND:

NORWICH UNION LIFE AND PENSIONS LIMITED

- v -

(1) AFZAL HAMMED QURESHI

First Defendant/Appellant

(2) FARHAT DURRANI QURESHI
(by original writ and order to carry on dated 3rd October 1997)

and

THE HEALTH CONSULTING COMPANY LIMITED
(Formerly known as CE Health (Financial Advisory Services) Ltd

Third Party

- - - - - -

(Handed down Transcript of Smith Bernal Reporting Ltd
180 Fleet Street, London EC4A 2HG
Tel: 0171 421 4040
Official Shorthand Writers to the Court)

- - - - - -

IN ALDRICH v NORWICH UNION

MR S GOLDBLATT QC and MR J RUSSEN (Instructed by Messrs Harkauys, London W1N 1DA) appeared on behalf of the Appellant

MR R HILDYARD QC and MR N COX (Instructed by The Norwich Union Group Legal, PO Box 89, Surrey Street, Norwich NR1 3DR) appeared on behalf of the Respondent

IN NORWICH UNION v QURESHI

MR L PRICE QC and MR R D'CRUZ (Instructed by Messrs Ambrose Applebe, London WC2A 3RA) appeared on behalf of the Appellant

MR R HILDYARD QC and MR N COX (Instructed by The Norwich Union Group Legal, PO Box 89, Surrey Street, Norwich NR1 3DR) appeared on behalf of the Respondent

- - - - - -

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

Supplied by Smith Bernal Reporting Ltd for Lawtel

©Crown Copyright

Supplied by Smith Bernal Reporting Ltd for Lawtel

LORD JUSTICE MUMMERY:

INTRODUCTION

These two appeals are brought with leave granted by this court on 23 November 1998. They both involve the Norwich Union Life Insurance Company Limited (Norwich Union). The litigation arises out of two kinds of plan (the Life Property Backed Guarantee Plan and the Policy Backed Plan) marketed by the Norwich Union Life Insurance Society (the predecessor of the undertaking now carried on by Norwich Union and its subsidiaries) in about 1989 to underwriting members of Lloyds (the Names). The Names have suffered substantial losses at Lloyds. In the case of most names, those losses have been met, or partly met, by payments made by Norwich Union under guarantees given on behalf of the Names to Lloyds in accordance with the Plans. Norwich Union honoured the calls made on it under the guarantees. The Names whose Lloyds liabilities have been so discharged resist the claims of Norwich Union to recover the sums paid to Lloyds under the guarantees. They seek to be relieved of their obligations to make repayment under the plans and they claim damages for breach of duty. They wish to set off the damages against the sums claimed by Norwich Union. In the case of some of those Names, Norwich Union has not yet made a payment to Lloyds and those Names seek to restrain it from doing so.

The essence of the Plans was that (1) Norwich Union would provide a guarantee of the Name's liability to Lloyds up to a stated limit; (2) the Name would charge real property or investments to Norwich Union to secure his liabilities to Norwich Union in respect of payments under the guarantee; (3) the Name would take out an endowment/life policy with Norwich Union and assign it to Norwich Union by way of security. The sums paid by Norwich Union under the guarantee were to be treated as sums advanced under the charge. Provided that the Name paid interest on those sums and the premiums under the policy he could not be required to repay to Norwich Union the principal sum

representing the payments made by Norwich Union under the guarantee unless and until the policy matured.

The Names in these cases had previously had bank guarantees, for which they paid a fee related to the amount guaranteed. The guarantees by the banks and by Norwich Union were intended to demonstrate to Lloyds financial ability to underwrite risks. Under the Plans no fee was charged. Instead Norwich Union obtained insurance business when the Name took out the policy. The Name, if he kept up the policy as he agreed to do, obtained an asset in return for his payments to Norwich Union.

In the cases where Names' liabilities have been discharged, the Names have not paid to Norwich Union all the sums claimed by way of principal and interest in respect of payments by Norwich Union to Lloyds under the guarantees. Some of the Names have also stopped paying the premiums under the policies which are treated as fully paid up.

THE APPEALS

(1) The Qureshi Appeal

This appeal is from the order of Rix J on 8 June 1998. He struck out an amended defence of Mr Qureshi as disclosing no reasonable defence to a claim against him by Norwich Union under a Legal Charge to secure Mr Qureshi's liability to Norwich Union. He also struck out Mr Qureshi's counterclaim for damages as disclosing no reasonable cause of action. Norwich Union obtained final judgment against Mr Qureshi for £381,500 together with interest on the monetary claim.

(2) The Aldrich Appeal

This appeal is from the order of Rimer J on 31 July 1998. He struck out, as disclosing no reasonable cause of action, proceedings by Mrs Diana Aldrich and other members of the Norwich Union Action Group (NUAG) against the Norwich Union for declarations of the alleged unenforceability of rights claimed against them by Norwich Union.

The decisions in both cases turn principally on the interpretation of the provisions of section 47 of the Financial Services Act 1986 (the 1986 Act) relating to the offence of dishonest concealment of

material facts. The issue is whether those provisions create private law duties, causes of action and defences available in private law proceedings to individual investors.

The Background Facts

A. Qureshi

(1) Mr Qureshi was a Name at Lloyds and a member of the Gooda Walker syndicates. He was required to provide security for his potential underwriting liabilities. In November 1989 he made a contract with the Norwich Union for the Life Property Backed Guarantee Plan marketed to Lloyds Names by the Norwich Union. Pursuant to the contract Norwich Union provided to Lloyds on 23 November 1993 a guarantee for 10 years from 1 November 1989 in the sum of £400,000 in respect of his potential underwriting liabilities as a Name. That was twice the sum covered by the guarantee that he had previously had with Lloyds Bank. For his part Mr Qureshi took out an endowment/life policy with Norwich Union for £69,504 to mature in 30 years time. The monthly premium was £257.67. He assigned the policy to Norwich Union as security for the liabilities arising from sums paid by Norwich Union to Lloyds under the guarantee. The premiums payable under a policy were designed to create a growing fund which could be used to secure and, if necessary, discharge Mr Qureshi's liabilities to Norwich Union. The premiums were set at a rate sufficient to create a fund worth the equivalent of the maximum sum payable under the guarantee i.e. £400,000. In the event of no draw down under the guarantee by Norwich Union the fund accumulating under the policy would at the expiry of the term enure for the benefit of Mr Qureshi. He and his wife also granted a legal charge over their matrimonial home at Hillview, Bishop's Walk, Shirley Hills, Croydon as security for those liabilities.

(2) When Mr Qureshi suffered losses at Lloyds calls were made by Lloyds on Norwich Union under the guarantee until it was exhausted. Norwich Union paid a total of £400,000 to Lloyds under the guarantee between October 1990 and June 1995.

(3) Mr Qureshi stopped paying the monthly premiums.

(4) On 2 August 1995 Norwich Union started proceedings in the County Court for possession of the matrimonial home and for payment of £381,500 and interest. The proceedings were

transferred to the Commercial Court.

(5) In his amended defence and counterclaim Mr Qureshi contends that, at the time when he made his contract for the Plan in November 1989, Norwich Union knew, through two affiliate or subsidiary companies (Norwich Winterthur Reinsurance Corporation and Stronghold Insurance Company Limited) involved in insurance and reinsurance business with persons in the Lloyds market, that substantial losses were about to be incurred by several underwriting syndicates operating in specified areas of the Lloyds insurance market; that Norwich Union dishonestly concealed the information; that the information was material; that if he had been aware of this "Information Regarding Impending Losses", as it is compendiously described in his pleading, he would have forthwith ceased to participate in those underwriting activities; that he would not have entered into the Plan marketed by Norwich Union; that Norwich Union owed him a duty to disclose the Information Regarding Impending Loss, which it had failed to observe; and that, by reason of non-disclosure of information material to the policy and the Plan prior to selling him the same, Norwich Union was in breach of a common law duty to act in utmost good faith and had dishonestly concealed information relevant to the policy in breach of a statutory duty created by section 47(1) of the 1986 Act, for which damages were recoverable.

B. <u>Aldrich</u>

(1) Mrs Aldrich and her co-plaintiffs are Names at Lloyds. The Norwich Union contracted with them either for the Plan marketed to Mr Qureshi or for a similar plan under which the security provided to Norwich Union was property other than land eg. a Norwich Union investment product, such as the Jersey Investment Plan.

(2) Under the Plans Norwich Union provided guarantees to Lloyds in place of existing guarantees. Norwich Union have honoured calls under the guarantees by Lloyds and those liabilities of the plaintiffs to Lloyds have been discharged.

(3) These proceedings were started by Mrs Aldrich and others, personally and representing

members of the NUAG. Their claim is that they are entitled to be relieved of their obligations to Norwich Union under the Plans; that they are not bound to indemnify Norwich Union; that the security granted by them should be set aside; and that they should receive damages or equitable compensation from Norwich Union, which they wish to set off against any liability they may have to the Norwich Union. These claims are based on alleged breaches by Norwich Union of a statutory duty created by section 47(1). In support of that they make allegations similar to those made by Mr Qureshi about Norwich Union's dishonest failure to disclose to them in the marketing documents Information Regarding Impending Losses at Lloyds alleged to have been acquired by its senior executives prior to entering into the guarantee Plan contracts.

The 1986 Act

The main arguments are based on or revolve around the interpretation of section 47 ("Misleading statements and practices"), the opening section in Chapter V of the 1986 Act, which provides:-

> "(1) Any person who-
> (a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceals any material facts; or
> (b) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive,
> is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made or from whom the facts are concealed) to enter or to offer to enter into, or to refrain from entering or offering to enter into an investment agreement or to exercise, or to refrain from exercising,any rights conferred by an investment."

The section is a revised version of section 13 of the Prevention of Fraud (Investment) Act 1958.

The section contains other provisions on the scope of the criminal offence, the defences available and the maximum penalties on conviction. There are, however, no express provisions in the section with respect to civil proceedings for damages for breach of duty or to the private law

consequences of the commission of an offence in contravention of the section.

It is common ground that

(1) the marketing of the Plans constituted the conduct of "investment business" by Norwich Union,as endowment policies were included in the plans: Schedule 1, Part 1, paragraph 10; and

(2) every time Norwich Union concluded a deal with a Name it made an "investment agreement": section 44(9) and Schedule 1, Part II. paragraph 12.

The Issues

When leave to appeal was granted it was limited to two grounds : first, whether non-disclosure by Norwich Union constituted a breach of statutory duty arising under section 47 of the 1986 Act, sounding in damages and/or giving rise to a defence of illegality; and, secondly, whether Norwich Union, as provider of an endowment/life assurance policy owing a duty of utmost good faith to disclose material facts, was obliged to disclose facts to the Names about the Lloyds insurance market. These two issues may be conveniently dealt with under five heads.

A. Duty of disclosure at common law.

B. Statutory duty of disclosure under section 47.

C. Civil causes of action and remedies under section 47.

D. Causation.

E. Illegality.

There is no dispute about the practice of the court and the principles relevant to strike out applications. The power should only be exercised in cases where there is no point in having a trial because it is plain and obvious that the claim or the defence, as the case may be, cannot succeed at trial, even if all the facts pleaded in support of the claim or the defence sought to be struck out are true. As Lord Browne-Wilkinson said in Barrett v Enfield London Borough Council [1999] 3 WLR 79 at 83 D

> "....unless it [is] possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case [is] inappropriate for striking out.....[In] an area of the law which [is] uncertain and developing...it is not normally appropriate to strike out."

He went on to point out that the decision of the European Court of Human Rights in Osman v.United Kingdom [1999] 1 FLR 193 on infringement of Article 6(1) of the Convention created an unsatisfactory state of affairs for English Courts in dealing with an application to strike out a case where to do so,without hearing evidence at trial and without knowing all the facts, might be regarded as depriving a party of his right to have a trial to determine how a balance should be struck on the principle of proportionality: for example, in would-be duty of care situations, weighing public interest considerations against the seriousness of the harm suffered by the aggrieved party. The scope of the Osman decision is uncertain and no submissions have been made on its relevance to this case.

A. Duty of Disclosure at common law

No claim is made against Norwich Union for deceit or for fraudulent or innocent misrepresentation. There is no plea of a fiduciary relationship between Norwich Union and the Names. It is not alleged that Norwich Union owed any contractual or common law duty to the Names to advise them on their activities at Lloyds or on their underwriting with particular syndicates. They retained Underwriting Agents for that purpose. The majority of them also retained an Independent Financial Adviser as to the suitability of the Endowment Policy.

The only common law claim pleaded is that, as a result of the inclusion of the endowment/life policy as an integral element in the Plan, Norwich Union was under a duty to act in the utmost good faith by disclosing every material fact to the Names. The relevant principle was stated by the Court of Appeal in Banque Keyser [1990] 1 QB 665 at 772F in terms later approved by the House of Lords:

> "...the duty falling upon the insurer must at least extend to disclosing all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer."

Supplied by Smith Bernal Reporting Ltd for Lawtel

In the House of Lords Lord Jauncey said at [1991] 2 AC 249, 281 G that:

> "The duty is, however,limited to facts which are material to the risk insured, that is to say, facts which would influence....a prudent insured in entering into the contract on the terms proposed by the insurer. Thus any facts....known to the insurer but not the insured, which reduce the risk should be disclosed by the insurer."

The facts which it is contended should have been disclosed by Norwich Union to the Names included the alleged Information Regarding Impending Losses at Lloyds. The claim is that Norwich Union is in breach of that duty to the Names as it dishonestly concealed that information.

It is further submitted that that duty under insurance law required the Information Regarding Impending Losses to be disclosed by Norwich Union in connection with the guarantee plans. Norwich Union had used the guarantee to attract the Names. It was the nub of the marketing of the insurance policy. It was obvious that the Names expected to make money out of continuing to underwrite; that, in the light of the information which Norwich Union had, the Names were likely to lose large sums of money; and that, if that information had been disclosed to the Names, few of them would have entered into the guarantee plans. In this way, it is argued, the successful marketing of the endowment policies, as part of the guarantee plan, crucially depended on Norwich Union withholding the Information Regarding Impending Losses which was directly relevant to the likelihood and risk of draw down under the guarantee. As a matter of commercial reality that was the primary risk which the policy sought to cover.

As to the point made by Norwich Union that the matters to be disclosed as an incident to the contract of insurance should be material to the risk sought to be covered by the insurance or to the recoverability of a claim under the policy it was argued that the insurance policy should not be treated in isolation from the whole of the guarantee plan of which it formed part. The endowment policy, the legal charge and the guarantee were not separate and distinct transactions: they were inter-linked and inter-dependent. The charge on the property and the endowment policy were to be security for the

guarantee and the guarantee was to be granted to Lloyds in consideration for the legal charge and the covenant to maintain premiums under the policy. The endowment policy was for the amount of the guarantee. The premiums payable under the policy were based not on the charges made by banks for providing a guarantee but on the payments required to create a fund which on maturity would create a fund at least equal to the amount of the guarantee. The endowment policy was specifically designed by Norwich Union to be and was marketed and promoted as being cover for the risk of draw down under the guarantee facility.

The key question was whether the Names would have entered into the transaction had the concealed information been revealed by Norwich Union. The issue of materiality gives rise to triable questions of fact as does the related question whether, and to what extent, Norwich Union, in its structuring and marketing of the plan to Names, regarded as material and took account of Information Regarding Impending Losses at Lloyds. Material facts included matters relating to the likelihood or prospect of draw down under the guarantee. The Information Regarding Impending Losses was directly relevant to the risk of a draw down against the guarantee and to the question of recoverability under the policy of a sum accruing on maturity for the benefit of the Name, but which sum was to be used first and foremost to discharge any payments to Lloyds under the guarantee.

Norwich Union disputes this analysis of the Endowment Policy as an insurance against the risk of draw downs against the guarantee. It contends that, even if the Policy in each case is regarded as an element in the overall plan, neither the Policy nor the Plan as a whole was an insurance against the risk of losses at Lloyds and there was therefore no duty of disclosure of the Information Regarding Impending Losses. The Endowment Policy was in common form: it was paid out only on maturity or earlier death, not upon earlier draw down against the guarantee. Those were the relevant risks. The Information Regarding Impending Losses was not material to the risks covered by the insurance transaction undertaken by Norwich Union.

It is accepted by Mr Goldblatt QC for the members of NUAG that there are difficulties in contending that non-disclosure in the context of insurance entitles his clients to make a direct claim for

damages against Norwich Union as opposed to a right to rescind at the cost of restitutio in integrum. The difficulties are presented by the decision of the House of Lords in Banque Keyser Ullman SA -v- Skandia (UK) Insurance Co Ltd [1991] 2 AC 249 at 280B. But Mr Leolin Price QC contends that, even if damages cannot be claimed, the court may in equity take into account any deterioration and loss sufferred by the party seeking rescission where to do so would be practically just: Erlanger -v- New Sombrero Phosphate Company (1878) 3 App Cas 1218. That was a case of equitable accounting in the context of breach of fiduciary duty. There is no such duty in this case. But it was submitted that the court should take into account the underwriting losses of the Name under the plan to offset sums paid under the guarantee so that, for example, Mr Qureshi should be treated as having brought into account an entitlement to £400,000. This was suggested as a way of restoring the parties to their original position on rescission.

This is disputed by Norwich Union which contends that the reality of the situation is that the Names are seeking to retain the benefits acquired by them under the transactions with Norwich Union while renouncing the burden of them. That is not a basis of rescission, particularly in the case of Mr Qureshi whose losses at Lloyds exceeded the guarantee before it was entered into.

The fact that these points have been argued at length on both sides does not of itself mean that the claims of the Names under this head are reasonably arguable. In my judgment they are not. Rix J and Rimer J were right to strike the claims out as disclosing no reasonable cause of action. The duty of utmost good faith applied only in respect of matters material to the risks to be covered by the endowment/life policy and which the prudent insured would take into account in deciding to place the risk for which he seeks cover from Norwich Union. The only matter material to the risk covered by the policy and to the recoverability of a claim under the policy was the Name's life. The risk covered by the policy was not the risk of losses by the Name at Lloyds or of a draw down under the Guarantee and loan facility provided to the Name by Norwich Union. Nothing in the policy is conditioned on any event at Lloyds.The risk of losses at Lloyds is irrelevant to the risk insured against and the fact that the policy stands as security for the liability of the Names to Norwich Union does not alter the risk

covered by the policy. It is the risk which determines the scope of the duty to disclose. The duty of disclosure does not operate to require disclosure of any fact which would or might induce a person to enter into an insurance contract or into a composite transaction of which an insurance contract forms part as security.

Even if the Names were able to establish a breach of a duty of disclosure,they would be faced with the problem of remedy. They would, in the absence of fraud which is not pleaded, only be entitled to claim rescission. In Banque Keyser (supra) it was held by the Court of Appeal [1990] 1 QB 665 at 771-781 that a breach of the duty of disclosure in relation to an insurance policy does not give rise to a claim in damages, as there is no breach of contract, express or implied, and no tort is thereby committed. The remedy for the insured on a breach of such a duty by the insurer is avoidance of the insurance policy and recovery of the premium. In the House of Lords Lord Templeman at 280B and Lord Jauncey at 281F agreed that a breach of the duty of disclosure does not sound in damages.

B. Duty of Disclosure under section 47

It is contended that, even if there has been no breach of the common law duty to disclose the Information Regarding Impending Losses, there is a wider duty of disclosure under section 47 which is not confined to insurance policies i.e. the duty arising from the creation of the offence of dishonestly concealing material facts in relation to investment agreements. It is submitted that the section creates a duty which is not qualified by the necessity for a pre-existing general law duty of disclosure and that, on the facts, which at this stage are assumed to be true, there has been a breach of that duty. "Dishonestly" concealing the facts is an element of the duty and that involves a consideration of a person's state of mind. That is a question of fact which can only be decided at trial.

I agree with Rix J and Rimer J that section 47 does not create a new wider duty of disclosure than that existing at common law or in equity. Unless there is a pre-existing duty under the general law to speak there can be no "dishonest" concealment under section 47 by not speaking. "Concealment" of a fact means not disclosing a fact when there is a duty to disclose it.

The position under the general law is as stated in Clerk & Lindsell on Torts (17th Edition) at

14-06: non-disclosure of the truth does not amount to the tort of deceit. Save in a limited class of case, such as a contract of insurance where there is a duty of utmost good faith, the general rule is that there is no duty on a party to a contract to disclose facts material to the decision of the other party whether to enter the contract. The reference in the pleaded case to "dishonest" concealment adds nothing, as no liability can arise unless there is a duty to disclose and if there is such a duty the liability is strict and is not dependent on proof of dishonesty.

C. Civil Causes of Action and Remedies under section 47

It is contended by the Names that it is reasonably arguable that section 47 created a private civil law action for damages for breach of statutory duty actionable at the suit of an investor. On consideration of the scope and purpose of Chapter V of the 1986 Act, it is apparent that the criminal offence thereby created was enacted for the protection and benefit of the members of a class of particular persons who are the target of operators or organisations carrying on investment business ie. private investors. It is submitted that it would be anomalous if a contravention of the section which caused loss to a private investor did not give him a common law action for breach of statutory duty. As appears from section 61 there are civil consequences of a contravention which are expressly made enforceable by the civil courts on the application of the Secretary of State and the individual investors' rights are expressly preserved by section 61(9).

In my judgment this submission was rightly rejected by Rix J and Rimer J. The section does not expressly create a statutory duty enforceable in civil proceedings for damages by individual investors nor does it expressly confer on individuals civil law remedies for breach of the section. It does not spell out any civil law consequences flowing from the contravention of the section. It is not possible to gather from the language of the section itself or from the context a legislative intention to create such private law rights, remedies and consequences. Where that was intended the Act specifically provided for it. For example, section 62 provides for a remedy in damages in specified cases but they do not include section 47. Section 61 provides a collective civil remedy for contravention of certain provisions, including section 47, but it can only be enforced by the designated

authority, not by individual private investors. Section 61(9), which expressly preserves an individual's rights to bring proceedings other than under section 62, does not assist the Names as it is clearly referable to the preservation of common law rights and remedies.

The true position is as stated in Gower's Principles of Modern Company Law (5th Edition by Professor Gower) at p. 350: section 47 says nothing about civil liability. A victim cannot sue under section 47(1) for breach of statutory duty. The Act specifically provides for a civil remedy where one is intended. No such provision is made in the case of section 47(1). See also Securities & Investment Board v. Pantell [1993] Ch 256 at 259F-G, 260C, 270A-B and 272F.

D. Causation

Norwich Union contends that,even if section 47 created a right to claim damages for breach of statutory duty, the loss claimed by the Names in these proceedings was not caused by any breach of any duty by Norwich Union. It was caused by independent investment decisions of persons, who were all existing members at Lloyds and for whom specialist advice was available, to continue to underwrite at Lloyds with particular syndicates. It was not caused by the conduct of Norwich Union which, at the highest, only provided the occasion for losses suffered by the Names at Lloyds to occur. See Galoo v. Grahame Murray [1994] 1 WLR 1360. Norwich Union did not sell participation in the Lloyds market and it did not assume any responsibility to advise on it. The involvement of Norwich Union was in a different and separate investment decision i.e. the endowment policy. That did not cause any loss to the Names. The Names have received from Norwich Union what they contracted to receive.

The contrary argument is that, if Norwich Union had told the Names of the Information Regarding Impending Losses, they would have ceased underwriting activities at Lloyds altogether or with those syndicates known to be affected by the Impending Losses and thus avoided losses. But for their subscription to the Plans the Names would have avoided or mitigated losses suffered by them at Lloyds. Those losses can properly be said to have been incurred as a result of the breach of the duty of utmost good faith and of the breach the duty not dishonestly to conceal material facts contended for under section 47.

I would not strike out the claims against Norwich Union on this ground alone. In Barrett v. Enfield Borough Council [1999] 3 WLR 79 Lord Slynn said at 99 that "...causation is largely a question of fact" and refused to strike out the claim in that case on the ground that causation could not be established. Lord Hutton expressed a similar opinion at 115E. If there is a reasonably arguable case for the existence of a duty of disclosure it would be premature in this case to conclude in advance of full argument on the existence and scope of that duty and in advance of discovery and oral evidence that a breach that duty, if established, did not cause or contribute to the loss suffered by the Names.

E. Illegality

It is contended that, on the assumed facts, Norwich Union has committed criminal offences under section 47; that the consequence of committing an illegal act is that the transaction to which the illegal act gives rise is unlawful and unenforceable at the suit of the wrongdoer; and that, in the enforcement of its rights against the Names in these proceedings, Norwich Union relies on its own illegality. The plea in the amended statement of claim in the Aldrich case is in these terms:-

> "19a. Alternatively, the Defendant's breach of section 47 (1)...of the Act directly facilitated the marketing of the Guarantee Scheme to the members of NUAG with the result that (to the extent that any such obligation remains unperformed) any obligation on the part of the Name under the Collateral Security is unenforceable on the ground of illegality and/or by reason of its creation having been tainted by the breach of the said statutory provision."

The reference to "Collateral Security" is to the security provided by the Names to Norwich Union.

On the hearing of the Qureshi appeal Mr Leolin Price QC applied for leave to amend the defence and counterclaim to plead as follows:-

> "19C. Further, by reason of the Plaintiff's breach of section 47 (1)....(which amounted to a criminal offence on its part) it is averred:-
>
> (i) that the First Defendant entered into the Plan pursuant to the Plaintiff's illegal conduct;
> (ii) in the premises, the Plaintiff's claim against the First Defendant hereunder is founded upon its illegal act;

> (iii) pursuant to the principle ex turpi causa upon which the First Defendant will rely, the Plaintiff is not entitled to claim enforcement of the Plan or any part thereof, including, in particular, the Mortgage."

This defence has no real prospect of success. I would not allow the amendment and I would strike out the plea of illegality in the Aldrich action.

Norwich Union denies having committed any offence or offences under section 47 of the 1986 Act. There has been no prosecution against it for such offences. But, even if it has committed such offences, that would not prevent Norwich Union from enforcing its vested security rights to recover the sums secured on real property by mortgage or on policies assigned as security. In Tinsley v. Milligan [1994] 1 AC 340 at 366E-G Lord Jauncey said

> "...a completely executed transfer of property or of an interest in property made in pursuance of an unlawful agreement is valid and the court will assist the transferee in the protection of his interest provided that he does not require to found on the unlawful agreement."

For the purpose of reimbursement of the sums admittedly paid to Lloyds for the benefit of the Names Norwich Union is entitled to exercise its rights on the property and policies provided as security by the Names.

Section 47 is aimed at conduct calculated to result in an investment agreement. Norwich Union is neither seeking to enforce an investment agreement nor to enforce against the Names any such agreement or other contract prohibited by the 1986 Act or illegal at common law. Norwich Union does not seek to enforce any contract against the Names. It is, or will be, relying simply on its proprietary interests under the charge securing payment of the principal sum admitted to have been paid by Norwich Union to Lloyds under the guarantee.

Conclusion

I would dismiss both appeals.

Supplied by Smith Bernal Reporting Ltd for Lawtel

LORD JUSTICE WARD: I agree

LORD JUSTICE EVANS: I also agree that the appeals must be dismissed.

I agree entirely with Mummery L.J.'s analysis of the issues and with his conclusions that section 47 of the 1986 Act creates neither a civil law duty of disclosure where none exists at common law or in equity, nor a private law cause of action for damages for breach of statutory duty when an offence is committed under the section.

As regards the latter, the fact that section 62 omits any reference to section 47 raises an insuperable barrier to the contention that Parliament intended to create such a right. I cannot help feeling that the draftsmen, and the disembodied concept of the Parliamentary mind itself, may well have supposed that there was already a common law right to claim damages for dishonestly concealing "any material facts", and this could explain why no statutory right was included in section 62. But as Mummery L.J. has explained, there is no general right to claim damages even for "dishonest" non-disclosure. If the Act fails to create one, no such right exists.

I also find myself in reluctant agreement with Mummery L.J.'s conclusion that Norwich Union was under no duty to disclose to the Names who entered into the Plans the facts which are alleged under the heading "Information Regarding Impending Loss" in Mr Qureshi's Amended Defence and Counterclaim. The alleged facts are striking: that subsidiary or associated companies of Norwich Union were already adversely affected by the kinds of losses which later escalated with catastrophic effects for the Lloyd's syndicates of which the Names were members. Put more colloquially, that Norwich Union already had inside knowledge of the pending disaster at Lloyd's. But the question is whether these facts were material to the contract of insurance which the Names were induced to enter into, or are arguably so. If they were not, then the law did not require Norwich Union to disclose

them.

The meaning of "material fact" and the scope of the duty to disclose all material facts has been established by two recent judgments: Banque Kayser Ulmann S.A. v. Skandia (U.K.) Insurance Co. Ltd [1990] 1 Q.B. 665 (C.A.) and [1991] 2 A.C. 249 (H.L.) and Pan Atlantic Insurance Co. Ltd v. Pine Top Insurance Co. Ltd [1995] 1 A.C. 501. "Material" means relevant to the risk which is the subject-matter of the insurance (see St Paul Fire and Marine v. McDonnell [1995] 2 Lloyd's Rep. 116) or to the assessment of premium or the recoverability of claims. It includes facts relevant to what is termed the moral hazard, meaning "circumstances [which] would influence [the insurer's] judgment in determining whether he will take the risk "(Reynolds v. Phoenix Assurance [1978] 2 Lloyd's Rep. 440 at 457-8, and see The Law of Insurance Contracts by Malcolm A. Clarke (3rd ed. p.602) and First Supplement p.62).

In the present case, in my judgment, two things are clear. First, the alleged facts were relevant to the Names' decisions whether or not to enter into the complex of agreements with Norwich Union known as the Plan. I would go further and say that they were relevant to the subject-matter of the Plan, the purpose of which was to enable the Names to continue with their membership of Lloyd's and to increase their participation there. Secondly, however, they were not relevant to the risk under the endowment policy which formed part of the Plan; they were not material to the risk which was insured. This assumes that the premiums charged by Norwich Union under the endowment policy were fixed by reference to that risk alone, and we were told by counsel, upon instructions, that they were. The amount of the cover, of course, depended upon the size of the Guarantee, and that in turn was determined by the Name's underwriting requirement. Once the amount was fixed, as I understand it, the premium was assessed by reference to the endowment risk alone. If account was taken, for example, of the risk of the Guarantee being called in during the endowment period, then in my view the necessary link between the two contracts would be established and the duty of disclosure would be

extended accordingly. It seemed to me at one stage of the argument that the cases should be permitted to proceed at least to the stage of disclosure of documents, so that the way in which the premiums were assessed could be verified. But leading counsel's assurance makes it unnecessary for these further costs to be incurred.

The Court of Appeal held in Banque Kayser Ullman that a fact is not material (to be disclosed by insurers) merely because it is relevant to the insured's decision whether or not to enter into the contract of insurance. Their judgment on this issue was approved by some members of the House of Lords. (On this basis, the `moral hazard' cases depend upon the relevance of the insured's personal history or characteristics to the insurer's assessment of the risk, rather than upon the insurer's reluctance to deal with him.) It is not sufficient, therefore, for the Names to prove that they would not have embraced the Plan if the alleged facts had been disclosed to them.

Given that the insurance policy was one of the contracts forming the Plan, the question is, whether the duty extends to facts relevant to the Plan as a whole, or to other contracts forming part of the Plan, though not to the insurance contract itself.

I have considerable sympathy with the appellants' submission that the duty does, or should, extend so far. Norwich Union marketed the Plan in order to obtain the insurance business. It was the main if not the only attraction of the Plan for them. Objectively, the insurance policy was an integral part of the Plan, as were the Guarantee given to Lloyd's and the charge over property or securities which was also required. All three aspects had to be taken into account by both parties when they assessed its merits or demerits for them. As insureds and insurers, the parties dealt with each other on the basis of utmost good faith. The law is unattractive if it restricts the scope of that duty to part only of what was, for both parties, one composite transaction. The insurer offers the insurance contract as one who is acting in utmost good faith but retains the right to act as a commercial animal in all other

Supplied by Smith Bernal Reporting Ltd for Lawtel

aspects.

In my judgment, however, it is not open to this Court to hold that the duty of disclosure goes beyond facts which are relevant to the insurance contract. This is because of the limited meaning given to "material" in Banque Kayser Ullman and also because in my view the component parts of the Plan must be regarded as separate contracts. I do not know of any authority which extends the duty of disclosure, or the definition of material fact, outside the insurance contract to some other contract linked with it.

Mr Goldblatt Q.C. advanced an attractive argument based on the link between the sums payable under the endowment policies and the extent to which these would be retained by Norwich Union to indemnify them against payments made to Lloyd's under the Guarantees, and so not paid to the Names themselves. This, he submitted, shows that the risk of Lloyd's requiring payment under the Guarantees was relevant to the recoverability of claims under the polices. In my view, however, this merely restates the problem. The risks at Lloyd's did not affect the amount due under the policy or the Name's right to receive that sum. How the sum was apportioned depended upon the separate contract of Guarantee.

As regards the insured's right to recover damages for what is alleged as "dishonest concealment" of material facts, I express no concluded view. If alleged and proved, then in principle, it seems to me, damages could be recovered. But there is no sufficient allegation of fraud.