Neutral Citation Number: [2007] EWCA Civ 1021

Case No: A3/2007/0073

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE LANGLEY
[2006] EWHC 2731(Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2007

Before :

Lord Justice Buxton
Lord Justice Jacob
Lord Justice Moore-Bick

- -

Between :

FREDERICK THOMAS POOLE and others	**Appellants**
- and -	
HER MAJESTY'S TREASURY	**Respondent**

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- -

Mr R Plender QC, Mr H Mercer and Mr G Nardell (instructed by **Grower Freeman**) for the **Appellants**
Mr D Friedman QC, Miss J Stratford and Mr A Henshaw (instructed by **The Solicitor to Her Majesty's Treasury**) for the **Respondent**

Hearing dates : 11,12 October 2007

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Judgment

Lord Justice Buxton:

The background to this appeal

1. This appeal is brought from a judgment of Langley J in proceedings in which a substantial number of insurers or "names" on the Lloyd's market complain of losses suffered by them in the course of underwriting. The focus of their complaint, which has been pursued in other proceedings both against their agents and the persons who introduced them to the Lloyd's market, and against Lloyd's itself, is that the market was inadequately regulated, thus leading to the acceptance of risks that under a proper system of regulation would not have arisen, or which would have been identified in advance.

2. The vehicle through which those failings are sought to be relied on in these proceedings is a complaint that Her Majesty's Government wrongly failed to transpose into UK domestic law Council Directive 73/239/EEC on the co-ordination of national provisions on the taking up and pursuit of the business of what the Directive describes as direct insurance. It is said that had that Community law duty been properly discharged the market would have been properly regulated and the losses of the insuring names would not have occurred, or would have been less in extent.

3. The proceedings raised two preliminary questions. First, whether the assumed failure to transpose the requirements of Directive 73/239 into national law can be the basis of claims against the national government by the present claimants. That was referred to below as the "Grant of Rights" issue, and I will continue to use that label. Second, whether, even if the claimants were the beneficiaries of such rights, they had lost the ability to assert them by reason of the rules of limitation.

4. The appellants had to succeed on both issues in order to succeed in this appeal. At the close of argument on the Grant of Rights issue we concluded that the appellants had not succeeded in dislodging Langley J's dismissal of their case on that point, and we therefore did not hear argument on the limitation issue. This judgment is accordingly solely directed to Grant of Rights, as identified above.

The nature of the case

5. The story of the Lloyd's debacle has been told many times, most fully in the judgment of Cresswell J in *Lloyd's v Jaffray* [2000] EWHC (Comm) 51. Put very shortly, a "name", by joining a syndicate at Lloyd's and thus becoming a person offering the services of an insurer on the Lloyd's market, accepts unlimited liability for his proportion of the obligations of the syndicate incurred in the relevant year of account. These include, in addition to obligations arising during the year in question, obligations incurred by the syndicate's predecessors in earlier years but not yet reported, which the syndicate has accepted by way of reinsurance of the immediately preceding year under the practice known as reinsurance to close. At the beginning of the 1980s it became apparent that persons insured by Lloyd's syndicates were faced with very substantial liabilities, in particular in respect of asbestos-related injuries, many of them incurred many years previously but not until lately identified or reported. In its judgment in *Lloyd's v Jaffray* [2002] EWCA Civ 1101 this court held

that in 1981 and subsequent years the "brochure" issued by Lloyd's to intending underwriters contained a representation that Lloyd's had in place a rigorous system of auditing the accounts of syndicates, which involved the making of a reasonable estimate of outstanding liabilities, including unknown and unreported losses. That representation was found by this court to have been untrue. Relying on that representation, or alternatively or additionally on representations by agents who recruited them to the syndicates or by persons managing the syndicates, the appellants agreed to become underwriting members, or alternatively continued or extended their commitment. Their underwriting experience was, largely because of the unnotified liabilities, disastrous. Heavy losses were suffered not merely in the course of underwriting business, but also in the form of liabilities that they would incur to Lloyd's itself under the "R&R" reconstruction scheme introduced by Lloyd's in July 1996.

6. Quite apart from many actions brought by particular names against leading underwriters and agents, the present appellants, or many of them, sought to resist claims by Lloyd's under the reconstruction scheme on the basis of the misrepresentations by Lloyd's referred to in the preceding paragraph: saying that if the false representations had not been made they would not have started or continued in business as underwriters. Those claims however failed in the proceedings before this court in *Lloyd's v Jaffray*, because Lloyd's enjoys a statutory immunity from suit by its own members save in the case of bad faith; and this court held that bad faith had not been established.

7. The present claim, although brought in respect of the same losses as were in issue in *Lloyd's v Jaffray*, and although springing from the same representations as were complained of in that case, as already explained has a different defendant, and invokes a different chapter of the law. The appellants were names at Lloyd's at various times between 1980 and 1996. Relying on the jurisprudence of the European Court of Justice [ECJ] in Cases C-6/90 and C-9/90 [1991] ECR I-5357 (*Francovich*) they claim damages from the British government to compensate for losses in their underwriting business. They do so by alleging that those losses arose in consequence of the failure of the British government to transpose into English domestic law Council Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance. It is the claimants' case that the Directive obliged the government to make it a requirement of English law that syndicates had adequate reserves to meet liabilities, and in particular liabilities not yet identified. Had there been such a system, the inadequacy of syndicate reserves and the impossibility of assessing outstanding liabilities would have become apparent and the claimants would, again, not have become or continued to act as underwriting members.

8. For the purposes of the present enquiry it will be assumed, though not accepted by the respondents, that English domestic law was not altered so as to transpose Directive 73/239 until the entry into force of Part XIX of the Financial Services and Markets Act 2000, a date well after the last permissible date provided for implementation.

The claimants' case

9. The case made by the claimants was summarised in the Amended Particulars of Claim, as set out by the judge in §2 of his judgment:

> The Claimants' case in outline is that:
>
> 2.1 Each Claimant participated in the writing of insurance Business by Lloyd's syndicates, which are annual ventures acting as insurance undertakings, and in so doing subscribed capital to the venture and placed at risk his entire net personal wealth to meet, if necessary, syndicate liabilities;
>
> 2.2 The liabilities of each syndicate included liabilities incurred but not reported ("IBNR") in respect of insurance business written in previous years, acquired on supposedly commercial terms under a system known as reinsurance to close ("RITC") which involved, among other things, fixing reserves at a level sufficient to meet all liabilities including IBNR;
>
> 2.3 Contrary to the requirements of the Insurance Directive, the Defendant failed to implement in the domestic law of the UK, or to achieve the result prescribed by, the provisions of the Insurance Directive relating to (among other things) the conditions to which the authorisation of insurance undertakings at Lloyd's was to be subject, and the monitoring of same; the classes of insurance business such undertakings are permitted to write; requirements at to technical reserves and solvency margin of such undertakings; and the verification of such requirements.
>
> 2.3A The Defendant failed to ensure, as at the date of each annual RITC exercise after the Insurance Directive came into force, that there was in place at Lloyd's any adequate system of accounting reasonably capable of ensuring that syndicate assets (including reserves) were sufficient to meet known and IBNR liabilities, including those inherited through successive RITC exercises.

10. These errors were, as the pleading says, caused by the failure of the government to put in place in English domestic law various requirements of the Directive. The nature of the loss that that caused to the claimants is explained in a further passage from the pleadings also set out by the judge in his §2, without complaint by the appellants. The claimants became or continued as names or increased their underwriting liability

> when the IBNR liabilities inherited by many syndicates were, unbeknown to them, far greater than was revealed by the information available to them and than the assets available to meet those liabilities. Each Claimant has, in consequence, suffered the other loss and damage pleaded in paragraphs 99 to 103, including, in many cases, personal liability incurred on or about 3 September 1996 to pay a substantial sum as part of Lloyd's "Reconstruction and Renewal" ("R & R") exercise (which related to the 1992 and earlier years of account), and

> additionally facing the prospect of future demands as a result of the proportionate insolvency of Equitas.
>
> 2.5 Had the Defendant, as at the date of each material RITC exercise, ensured compliance with the requirements of the Insurance Directive, the existence of very substantial but unquantifiable IBNR liabilities, and an ineffective accounting and auditing system, would have been revealed and the Claimants would not, variously, have joined Lloyd's, continued in membership or increased their underwriting, and to that extent would not have suffered the loss and damage pleaded in paragraphs 99 to 103.

Francovich *in the ECJ*

11. In Cases C-6/90 and C-9/90 the ECJ had to consider claims arising out of the failure of the Italian state to implement the provisions of Directive 80/987, on the protection of employees in the event of the insolvency of their employer. By that Directive member states were obliged to create "guarantee institutions", protected from the consequences of the employers' insolvency, which would guarantee the payment of wages outstanding from an insolvent employer over a period to be calculated by the member state in accordance with guidance provided by the Directive. Italy made no such provisions, and employees who had lost outstanding wages because of their employers' insolvency claimed damages equivalent to the amount of those wages from the Italian state.

12. The claimants in *Francovich* first argued that the Directive had direct effect, and therefore they could in domestic law enforce against the state the rights that it required the state to create, under the principles recognised in Case C-213/89 [1990] ECR I-2433 (*Factortame*). The ECJ however held that although most of the obligations placed on member states by the Directive were unconditional and sufficiently precise to create a direct obligation in those terms by the state to the intended beneficiaries, the provisions in relation to the guarantee institutions' organisation and functioning conferred sufficient discretion on the member state to make it impossible to identify from the terms of the Directive a sufficiently precise right on the part of the employees to protection by a particular institution.

13. The ECJ then turned to the different question of whether rather than asserting a direct Community right, enforceable in the national court, the subject could claim *damages* for the state's failure to pass the legislation required by the Directive: that failure having deprived him of rights that could have been asserted in the national court simply as part of the national legal order. The ECJ held that damages were in some circumstances recoverable in the case of failure to implement Directives. The terms in which the ECJ expressed itself are sufficiently important to require the quotation of §§ 32-37 of its judgment:

> [32]….it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals….

> [33] The full effectiveness of Community provisions would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.
>
> [34] The possibility of obtaining redress from the Member State is particularly indispensible where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action individuals cannot enforce before the national courts the rights conferred on them by Community law.
>
> [35] It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be responsible is inherent in the system of the Treaty.
>
> [36] A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 65/60 *Humblet v Belgium* [1960] ECR 559).
>
> [37] It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals caused by breaches of Community law for which they can be held responsible.

14. The ECJ then went on to specify more directly the conditions upon which liability of the State would arise. It said at its §§ 39-40:

> [39] When, as in this present case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
>
> [40] The first of those conditions is that the result required by the Directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

> [41] Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

15. In *Francovich* itself the content of the right was established by the provisions of the Directive because, as the ECJ explained in its §44, the result required by the Directive entailed the grant to employees of a right to a guarantee of payment of their unpaid wage claims. The member state was therefore required to compensate the employees for the loss that they had suffered by reason of the failure of national law to confer that right upon them.

Directive 73/239

16. As its title indicates, Directive 73/239 concerns the coordination of national rules relating to the pursuit of the business of direct insurance. Its basic objective is further set out in the recitals, and in particular that

> Whereas in order to facilitate the taking-up and pursuit of the business of insurance, it is essential to eliminate certain divergencies which exist between national supervisory legislation; whereas in order to achieve this objective, and at the same time ensure adequate protection for insured and third parties in all the Member States, it is desirable to coordinate, in particular, the provisions relating to the financial guarantees required of insurance undertakings.

17. Articles of Directive 73/239 then set out, in broad terms, a requirement that all member states should make the taking up of the business of insurance the subject of state authorisation, and as part of that authorisation to impose various conditions, broadly stated, on the authorised insurers. Before Langley J, it was contended that those requirements, or at least some of them, could be translated into rights held by the appellants against the national government.

The decision of Langley J

18. The judge took these claims fairly shortly. He considered that he was in any event bound by authority, a matter to which we will have to return. Confining himself for the moment to principle the judge said that the test was whether it was possible to identify a right in domestic law that it was necessary to grant to these claimants in order to achieve the results required by the Directive. He pointed out, at his §191:

> If it were otherwise, there would be liability in damages for any failure to implement a Directive which could be shown to have caused sufficiently serious loss to a claimant who would have benefited from its implementation.

19. The judge then continued, at §193:

> It would also, to my mind, be a surprising conclusion that a directive granted the <u>same</u> rights to insurers and insureds to have insurers regulated. As the Claimants' submissions were developed they were

> revealed to be a claim to a right to be regulated or to equality of regulation. The loss claimed arose from losses in the syndicates of which the Names were members. In my judgment regulation of others is of no relevance (nor indeed is there any suggestion that some syndicates or Names were regulated differently from others and, as I have already said, the notion of a grant of a right to be regulated is, as Mr Plender QC acknowledged, an abuse of language or "nonsensical". The purpose of regulation is not to protect the regulated but those to whom they supply their services or products. It is, of course, conceivable that different rights might be granted to insurers (say, to establish) and to insureds (say, to compensation for failure of an insurer), but that is of no relevance in this case.

Necessity

20. It will be noted that the judge formulated the test in terms of whether it was necessary, in order to achieve the objective of the directive, to confer the asserted rights upon the claimant. He was right to approach the claim in those terms. That can be demonstrated from two cases in the ECJ.

21. First, *Francovich* itself. The directive in issue in that case required member states to create institutions to make payments to the workers of insolvent employers. The creation of rights to those payments on the part of the workers can easily be seen as being necessary for the effective implementation of the directive's requirements in the national legal order.

22. Second, in Case C-222/02, *Peter Paul*, harmonising Directives in the banking field imposed supervisory obligations on national authorities in regard to credit institutions, and stated the protection of depositors as being among their objectives: a structure, it will be seen, very like that of Directive 73/239. The claimants in that case sought compensation from the Federal Republic of Germany for losses allegedly incurred through defective supervision of a bank, supervision that they said would have been in place had the banking directives been properly transposed. The ECJ accepted, at its [39], that the directives did impose supervisory obligations on national authorities, but continued:

> [40] ….it does not necessarily follow either from the existence of such obligations or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities…
>
> [42] …the harmonisation under [the directives in issue], since it is based on Article 57(2) of the Treaty, is restricted to that which is essential, necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision.

> [43] However, the coordination of national rules on the liability of national authorities in respect of depositors in the event of defective supervision does not appear to be necessary to secure the results described in the preceding paragraph.

23. The court therefore looked to the objectives of the directives, acknowledged in paragraph [40] of *Peter Paul* to include the protection of depositors, and asked whether the grant of a right to individuals in the national legal order is necessary to achieve those objectives. That, demanding, test must be kept in mind when addressing any *Francovich* issue. It did not however feature much in argument before us, because the judge had held that the appellants failed at what was in effect a prior stage. He concluded, on the simple wording of Directive 73/239, that it was not intended to protect insurers, and for that reason could not in any event be read as requiring the creation in the national legal order of a right for the claimants, in their activities as insurers, to protection from the incompetence, or worse, of people whom they appointed to act for them in the course of administering their insurance business.

The appellants' case in this court

24. The basis on which that conclusion is attacked in this appeal is set out in the appellants' skeleton:

> [43] The learned judge approached the issue of Grant of Rights on the premise that it was necessary for the Appellants to show that the Insurance Directive was intended to bestow rights upon individuals in the particular situation of the Appellants. In his view the Appellants had to show that the Insurance Directive was intended to bestow rights on the Names as insurers or as reinsureds or the beneficiaries of policies designed to limit their exposures as insurers (Judgment [192-193]. He should not be blamed for adopting that premise since it is not far removed from the Appellants' original submission, which was that "the rule of law infringed must be intended to confer rights on persons in the position of those advancing a claim for damages for failure to implement it". But the Appellants subsequently modified their submission on the issue so as to rely on the precise words of the Court of Justice in *Francovich*, and on the explanation of those words given by Judge Geddes in his book in *Protection of Individual Rights under EC Law:*
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> > "A directive will as a general rule confer rights on individuals where on its proper construction it is intended *to protect natural or legal persons as regards their health, safety or economic welfare.* Where a provision in a directive is not intended to confer rights on individuals (as for example in the case of many directives designed to protect the environment) no such right of action will arise even though the State is in breach of its Community obligation, such as by failing to implement the directive in due time"
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> **44.** In other words, also quoted in the Appellants' original skeleton argument (those of Brealey and Hoskins) there is a grant of rights under a directive when a claimant can point to a right which

> would have been granted to him by the national legal order if the directive had been implemented. If the Insurance Directive had been properly implemented, the Appellants would have derived identifiable and enforceable rights from the implementing legislation (as indeed they did when the Insurance Directive was finally implemented by FSMA 2000).
>
> **45.** Consistently with the Appellants' revised submission, the learned judge should simply have asked whether the Insurance Directive is intended to protect natural or legal persons as regards their economic welfare rather than being designed for the advancement of the indivisible public good. To that question the answer is plainly "Yes".

25. The case therefore goes as follows. First, although they contend, for the reasons set out below, that even on the judge's approach their claim satisfies the *Francovich* test, the appellants reject the argument that under that test it is necessary to show that the implementation of the directive was intended to confer on this claimant or class of claimants the right that they assert against the state, and for the absence of which they seek damages. I will call that argument Argument A. In place of Argument A they submit that the grant of rights under a Directive that is envisaged by *Francovich* is satisfied in either of what appear to be two alternative situations. First, as stated in §44 of the skeleton, and set out in §§ 1b-c of the Grounds of Appeal, if *some* right, not necessarily the right in respect of which the proceedings are brought, would have been granted to the claimant by the national legal order if the directive had been implemented. I will call that argument Argument BI. Second, as stated in §45 of the skeleton, and set out in § 1a of the Grounds of Appeal, if a directive is intended to protect subjects in relation to their economic welfare, rather than being simply directed at the general public good. Or, in a slightly different expression of the argument, that all that the ECJ meant by the first condition identified in [40] of *Francovich* was that the directive must be capable of giving rise to claims by individuals. I will call that argument Argument BII.

26. This change of position must be characterised as remarkable. *Francovich* has been the subject of detailed analysis and criticism amongst those specialising in Community law. The claimants had the benefit of the advice of such specialists in the proceedings before Langley J. Yet this court is now asked to accept that the true state of Community law was so misunderstood that it was only late in the argument before Langley J that its correct terms became apparent. And that the judge, not appreciating that the goalposts had shifted since the opening of the case before him, proceeded on a false basis. And that the effect for this court is that we have to ignore most or all of what the judge said, and in effect to start all over again. I will, of course, conscientiously address the case as it now stands before us, whilst permitting myself the indulgence of expressing mild surprise that, if the effect of *Francovich* is what is now contended, that did not become apparent until July 2006, nearly fifteen years after that judgment was handed down.

Individual welfare contrasted with general protection

27. Before embarking on the rest of the case it will be convenient to dispose of Argument BII. The antithesis between the economic welfare of the subject and the general public good, which is suggested in §45 of the skeleton as the only principle that the judge should have applied, appears to have as its only authority the passage from Judge Geddes' book that is quoted in §43 of the same skeleton. It is certainly a *necessary* condition for the application of the *Francovich* doctrine that the directive should not merely make provision for, in the example given in the book, general welfare issues such as the protection of the environment. But it is quite inconsistent with the approach of the ECJ in *Francovich* to argue that it is *sufficient* to attract that jurisprudence that the directive can be read simply as protecting natural or legal persons, as opposed to merely advancing the general public good. If that were indeed the only question that the judge had to ask himself, there would be no test for him to apply in deciding whether and on what terms these claimants were entitled to the benefit of the particular rights of which they claim to have been deprived.

28. Argument BII also carries the difficulty that it renders Argument BI redundant, because it does not require the condition imposed by Argument BI that the directive should be designed to confer *some* right on the claimant, even if not the right on which the claimant's present case is based. And it is plainly inconsistent with binding authority, as I shall demonstrate at the end of this judgment.

Some observations on the appellants' formulations

29. I now turn to Argument BI, but before doing that I must say something more about the content of that argument as deployed before us by the appellants. I need to do so because the appellants' oral argument before us at times appeared to contend for different positions from the position advanced in the skeleton and Grounds. That position, it will be seen from §44 of the skeleton, set out in §24 above, is that the claimant must be able to point to *some* right that would have been granted to *him* by the national legal order if the directive had been implemented. That formulation is however narrower than two other formulations that were advanced.

30. First, Mr Plender at times seemed to argue that it was enough to found the point of departure of a case under *Francovich* simply to show that the directive had not been implemented. Under fundamental principles of Community law referred to in *Francovich*, and also founding the *Van Gend* and *Factortame* line of cases, the subject, if injured by that serious breach of the member state's obligations, was entitled to reparation. On that view, causation (the third condition in the formulation in [40] of *Francovich*, see §14 above, which is not in issue in these proceedings though it is in issue later in the case) does all the work. I mention this only to make clear that, in the event, this was not the appellants' case. Mr Plender specifically said in reply that, as the formulations of Argument BI emphasised, it was not enough that the implementation of the directive in question would have been in the interests of the claimant, so that he necessarily suffered loss if the directive were not implemented. What was required in addition was that the directive created rights. And that concession was inevitable in the light of the *Francovich* judgment itself. The ECJ, at its [33], certainly saw as the basis of state's liability the general principles of effectiveness of Community law on which Mr Plender relies; but it then went on, in the crucial [40], to apply those principles in terms of the need to find a grant of rights.

31. Second, however, whose rights? We have seen that the formulations of the argument in the Grounds and in the appellants' skeleton rest on the need to show a grant of rights to the actual claimants, even if not including the particular right breach of which he asserts. Some part of the discussion however suggested that the requirement of grant of rights might be fulfilled if the directive created rights for *anyone*, even if not for this claimant. That has some attraction for the appellants because it is arguable (though in the light of *Peter Paul*, §22 above, no more than arguable) that the regulatory provisions of the insurance directive at least require the member state to create rights for insured persons. If a grant of rights to anyone is sufficient to ground a *Francovich* claim the insurer claimants can rely on the insurance directive's protection of their insureds.

32. For ease of exposition in what follows I will assume (contrary to the defendant's case) that Directive 73/239 does confer on insurers a right to establish themselves in a particular member state, so that the appellants can assert that the Directive does confer some right on them, even if not the right on which their present claim to damages is based. I will also assume that the position described in §31 above, based on a grant of rights to anyone at all, remains open. With appropriate apologies for adding to the lexicon of this judgment I will call that Argument BI [rights of others]. But inspection of the *Francovich* jurisprudence shows that any version of Argument BI is unfounded, as I shall now demonstrate.

The Francovich *doctrine*

33. The exposition that follows must be read against the background of the contrast between Argument A and Argument BI.

34. The obligation of the member state, which it is responsible for not having fulfilled, is to take measures to achieve the result prescribed by a directive: *Francovich* at §39. The result referred to, it is important to note, is the creation of rights in domestic law. What that result is required to be will be found in the terms of the directive. *Francovich* §40, explaining the conditions to be applied in that enquiry, has already been set out, but it is important in understanding the doctrine, and is claimed by the appellants to be the foundation of Argument BI:

> The first of those conditions is that the result required by the Directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

35. The first of these conditions is stated in terms the generality of which, read out of their context, support Argument BI. However, the second and third conditions show that argument to be misconceived. The second condition requires the content of the rights to be specified. If the conferment of any right, even though not the right on which the claim is based, were sufficient to impose the *Francovich* liability, then it would be difficult to understand why so much attention was paid to the content of a right that, on that approach, is merely the threshold condition to the assertion of some other right. Rather, the reason for the second condition becomes clear from the third

condition. The failure of the state to transpose into domestic law the right granted to individuals by the directive must cause the loss and damage of which the subject complains. In order to know whether the subject has suffered a relevant loss we must know the content of the right that should have been created in domestic law. We need to know that because the failure of the member state only causes the subject loss if that failure deprives him of the right that he would wish to assert in domestic proceedings. It is that right that must be found in the terms of the directive. If it is not there, the failure of the member state to transpose that directive has not caused the subject any relevant loss.

36. There is another reason why Argument BI [rights of others] cannot be correct, both as a matter of principle and as applied in this case. We have seen that the test for recognition of a *Francovich* right is that the existence of such a right is necessary for the achievement of the objectives of the directive. If one group of persons is accorded the right to sue in the national court in order to support the objectives of a directive, it is very unlikely indeed that a different group of persons needs to be given such a right as well. That can be illustrated from the present case. We are here concerned with the Directive's requirements as to regulation; not with its requirements as to establishment. The judge, at his §192, indicated that he did not think that Directive 73/239 created rights for insureds in respect of regulation. But on the assumption that he was wrong about that (a question on which this judgment expresses no opinion), once insureds have been given rights in order to promote the cause of regulation of the insurance market it is impossible to think that it is *necessary* for insurers to be given such rights as well. And if it is not necessary for *insureds* to be given rights by the Directive, it follows *a fortiori* that that is not necessary for insurers.

A new argument

37. Mr Plender opened his oral argument, and indeed closed it, with a submission as to the proper construction of *Francovich* that had not been made to the judge and found no place either in the Grounds of Appeal or in the skeleton argument in this court. This argument had as its point of departure an article by Dr M-P Granger, Assistant Professor at Budapest University, (2007) 32 EL Rev 157. It contended that the first condition in *Francovich*, stated in terms of requiring the grant of rights to individuals, had been formulated in order to avoid the effect, in a national legal order, of a provision such as paragraph 839 of the German Civil Code, which limits rights against the state to the breach of obligations specifically formulated in favour of a particular party. Accordingly, if I understood the argument correctly, the formulation in *Francovich* in terms of grant of rights to individuals must be wider than that of paragraph 839 in order to secure the local effect of Community law.

38. Out of regard for the (as it is now) 933 appellants, who claim to have lost very large amounts in their dealing on the Lloyd's market, we permitted this point to be raised, despite its having been mentioned for the first time when Mr Plender rose to his feet, and despite the court having been given no opportunity to include consideration of the argument in the extensive pre-reading that it engaged in before the opening of the appeal. Equally out of regard for the appellants I comment on the new argument; but I have to say that I find it impossible. There was no such suggestion in argument in *Francovich* or in the judgment in that case; nor, so far as we were told, in the mountain of learned comment that has followed *Francovich*. To the extent the

Professor Granger advances the argument (and out of courtesy to her I should say that I do not myself find it in her article) it is based on her reference to the concern expressed about paragraph 839 in the subsequent Case C-46/93 [1996] ECR I-1131 (*Brasserie du Pecheur*). But that goes to a completely different point. *Brasserie du Pecheur*, unlike *Francovich*, was a direct effect case, in which the ECJ held that if paragraph 839 were applied in the *national* legal order to a provision already held, for different *Community* reasons, to be of direct effect, that would render the assertion in the national legal order of the directly effective provision impossible or excessively difficult, under Community jurisprudence as to the national treatment of directly effective provisions that reaches back at least as far as Case 199/82 [1983] ECR 3595 (*San Giorgio)*. *Brasserie du Pecheur* says absolutely nothing about the conditions for recognition of rights under the *Francovich* jurisprudence.

Conclusion on the meaning of Francovich

39. For all these reasons I am of opinion that the interpretation of *Francovich* originally urged before Langley J by the claimants, Argument A, was correct, and that new and second thoughts, for which there is no significant support in the jurisprudence, are misconceived. In addition, as will be described later in this judgment, Langley J was in any event compelled to that conclusion by binding authority, both domestic and European.

40. The appellants however contended that even if Argument A is the ruling law Langley J should have found in their favour. That claim is considered in the next section of this judgment.

Does Directive 73/239 entail the grant of rights to the appellants?

41. As its title indicates, Directive 73/239 is concerned with the co-ordination between the laws of the various member states of conditions for the taking up of insurance business. In Community practice, such co-ordination is seen as important because different requirements as between different member states are a barrier to freedom of establishment: as indicated by the citation at the start of Directive 73/239 of the General Programme for the abolition of restrictions on freedom of establishment. And that objective is taken up in the recital to Directive 73/239 set out in §16 above. But, as that recital also makes clear, the detailed respects set out in the Directive in which national laws should make provision are intended for the protection of the *insureds*. And that is clear not only from the recitals, but also from the terms of the requirements themselves. An insured may under Directive 73/239 have a right to expect that his government will, before allowing his insurer to do business, require him to have, for instance, an adequate solvency margin. But to say that the *insurer* has a right that the government will ensure that he or the other insurers in his syndicate will have an adequate solvency margin is to assert a right to be regulated: which the judge in his §193 characterised as (and the claimants at least on the judge's understanding agreed to be a nonsense.

42. The judge therefore rejected, and in my respectful view correctly rejected, any suggestion that Directive 73/239 entailed the grant of rights to the appellants as *insurers*. That conclusion is subject to one argument that I address in §46 below. Before that, I deal with the names' contention that, within the formulation adopted by Langley J, they were indeed entitled to rights as *insureds*.

The insurers' rights as insureds

43. First, the recital set out in §16 above refers to protection for "insured and third parties". But whatever definition is applied to the last part of that phrase (and the appellants offered none) it is impossible for insurers to be regarded as *third* parties in respect of insurance contracts, as the judge with respect correctly held in his §35.

44. Second, it was suggested that the appellants could take the benefit of rights created by Directive 73/239 for insureds either because they carried stop-loss insurance; or because they were in some parts of their business reinsureds. Quite apart from the difficulty that Directive 73/239 is confined in its terms to direct insurance, and does not address reinsurance, the judge with respect gave an effective answer to this argument in his §192:

> Nor do I think it sustainable, simply on an appreciation of the terms of the Insurance Directive, to contend that it was intended to bestow, let alone necessarily did bestow, rights upon the Names as reinsureds or the beneficiaries of policies designed to limit their exposure as insurers. The Directive assumes regulation is in place and assumes its purpose is indeed to protect insureds and third parties (in the sense I have indicated: paragraph 35). But, whether or not any rights are necessarily granted to insureds (and, as will be seen, I think not) and whatever the technicalities of the meaning of "reinsurance", I think it fanciful to suggest that rights are necessarily granted by the Directive to insurers who seek cover for their exposures as such, nor is that the basis of the claims, which are for losses resulting from the Claimants' own underwriting.

Both the stop-loss contracts and the reinsurance contracts were part of, or an incident of, the business of insurance; and the claims made in the present case are not in respect of losses incurred either as the beneficiaries of stop-loss contracts or as reinsureds.

The insurers' rights of establishment

45. One of the aims of Directive 73/239, indeed at this stage of his argument Mr Plender said that it was the Directive's primary aim, is to facilitate "the taking up and pursuit of the business of insurance": see §16 above. I have accepted, at least for the purpose of this judgment, that that requires the grant by the member state of a right of establishment to anyone reasonably seeking to enter business as an insurer. Mr Plender argued that a person seeking to establish himself as an insurer in a given country was entitled to expect to enter an orderly and viable market in that country. That was supposed to be achieved by governmental regulation, such as had not been present in the disorderly Lloyd's market. Lack of regulation was therefore an impermissible deterrent to exercise of the right of establishment.

46. This argument was only before the judge in a modest form, and no complaint was raised either in the Grounds or in the skeleton about his failure to deal with it in his judgment. That however did not prevent the argument from achieving considerable prominence in the appellants' oral submissions; but analysis shows the argument to be misconceived. First, there is no suggestion that the United Kingdom has in fact

infringed any Community requirement as to rights of establishment in the insurance market. Second, the appellants do not claim as persons prevented or handicapped in establishing themselves in the United Kingdom market. Indeed, quite the reverse: all of the losses that the appellants seek to recover were incurred when they were fully established and functioning participants in that market, as the statement of the categories of losses for which they claim that is reproduced in §10 above clearly shows. Third, while it may be argued that in order to achieve the Directive's aim of freedom of establishment it is necessary, in the terms discussed in §§ 20-22 above, to give individuals a right to complain of national rules breaching that freedom, it is impossible to say that an individual right of complaint about failures of regulation within the national market is necessary to achieve freedom of establishment.

Authority

47. I would therefore hold, as did the judge, that the claims fail simply on the construction of Directive 73/239. The judge however additionally founded his conclusions on two cases of high authority, which I now address.

48. In *Three Rivers DC v Bank of England (No3)* [2003] 2 AC 1 depositors who had lost money in the collapse of BCCI sought damages from the Bank of England as beneficiaries of rights granted to them under the First Banking Co-ordination Directive, 77/780/EC. Mr Plender rightly agreed that this authority, to the extent that it decided matters relevant to our case, bound us, as it had bound the judge. The House held that the purpose of Directive 77/780 was indeed, as it said, the co-ordination of supervision of credit institutions. The protection of savings was a matter to which regard had to be given in the co-ordination process, but the duties placed on members states were duties of co-operation and not duties of supervision. The terms of the Directive could not be read as entailing the grant of rights to individual depositors.

49. Langley J, at his §205, regarded *Three Rivers* as effectively a complete fit with the present case. The appellants point to differences between Directive 77/780 and Directive 73/239, in particular that Directive 73/239 has the objective set out in the recital quoted in §16 above, and deals with supervision in some detail, whilst as the House emphasised Directive 77/780 imposes no duties of supervision. However, Mr Friedman QC was able to demonstrate from the speech of Lord Hope of Craighead, whose analysis of the Community law issues was agreed by Lords Steyn, Hutton and Hobhouse, that the House had committed itself to an approach to the construction of directives that entirely undermines the appellants' case.

50. First, Lord Hope confirmed at p 203B that the critical issue is indeed the grant of rights. It was recognised that implementation of the Directive would have benefitted depositors, in that it would have reinforced already existing constraints on the provision of banking services in the interests of depositors: see p207D. And it should also be noted that in §40 of its judgment in *Peter Paul*, §22 above, the ECJ specifically held that the objectives pursued by the directives in that case included the protection of depositors. Those directives included Directive 77/780, the directive addressed in *Three Rivers*. The House held, and the ECJ in *Peter Paul* subsequently confirmed, that that fact was not sufficient to engage *Francovich* by entailing the grant of rights to those depositors.

51. Second, Lord Hope recognised that the Directive conferred rights, of establishment, on credit institutions, but said, at p208C, that the claimants

> must be able to demonstrate that the result to be achieved by the Directive entailed the grant of rights to depositors and potential depositors as well as to the credit institutions operating in several member states whose activities were to be authorised and supervised by the competent authorities.

52. Mr Friedman pointed out the following implications of that approach. First, Argument BI[rights of others] must be wrong. The Directive was specifically held to entail the grant of rights, to the credit institutions, but that did not mean that the depositors could complain of the failure to implement it. Second, although the issue was not so directly raised by the facts or analysis in *Three Rivers*, it is really inconceivable that when Lord Hope spoke repeatedly of the need to show the grant of rights to the depositors he meant anything other than that the depositors must establish out of the Directive the rights asserted in the instant proceedings; so Argument BI is wrong as well. Third, Lord Hope's analysis plainly shows that Argument BII is wrong. The Directive did intend to protect subjects, the credit institutions, in relation to their economic welfare, as opposed to being simply directed at the general public good; but it was not suggested for a moment, and Lord Hope's analysis is completely inconsistent with any suggestion, that that was enough to give the claimants relief.

53. The second case referred to by the judge was *Peter Paul*, see §22 above. Mr Plender criticised what the judge said about this case, and Mr Friedman did not much rely on that passage in the judgment. However, he was able to demonstrate that the analysis of the ECJ was, again, completely inconsistent with the appellants' case.

54. The ECJ accepted in its §39 that the Directives in issue imposed on national authorities an obligation to supervise credit institutions; and in its §40 that the objectives of the Directives included the protection of depositors. As will be recalled from the passage already quoted in §22 above, the ECJ then continued:

> it does not necessarily follow either from the existence of such obligations or from [those objectives] that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.

First, therefore, a mere failure in the supervision required by the Directives does not ground a *Francovich* claim. What is necessary is the grant of a *right* to the depositors. That right must be one to be protected against the failure of supervision that has caused their loss: that is, a right in the terms envisaged by Argument A.

55. The judge was therefore right to think that *Three Rivers* and *Peter Paul* strongly support the conclusion that he had reached of his own motion.

Reference to the ECJ

56. Both sides said that we could decide the appeal without making any reference. We however requested the appellants to indicate what questions they thought should be

referred, in the event of a reference proving necessary. Those questions reflected the course of the appellant's argument before this court. As will be clear from the foregoing parts of this judgment, my view is that the European jurisprudence gives only one answer. I do not think that a reference is required, or permissible.

Disposal

57. These and the other proceedings referred to in §1 above have been pursued with the greatest determination by people who have very strong feelings about the factual history from which the proceedings emerge. It is for that reason that I have sought to address all of the appellants' arguments in some detail. I fear, however, that scrutiny of those arguments shows that they are all unfounded. I would dismiss this appeal.

Lord Justice Jacob:

58. I agree.

Lord Justice Moore-Bick:

59. I also agree.