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Case No: A3/2006/0924, 0924(A), 2403, 2403(A), 0926, 0926(A), 1707, 1707(A)

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM QUEEN'S BENCH DIVISION (COMMERCIAL COURT)**
**Mr Justice Moore-Bick, Mr Justice Tomlinson, Mr Justice David Steel**
**[2004] EWHC 2682 Comm, [2006] EWHC 1705 Comm, [2006] EWHC 3527 Comm**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2007

**Before :**

**LORD JUSTICE BUXTON**
**LORD JUSTICE RIX**
and
**LADY JUSTICE ARDEN**

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**Between :**

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| **R & V Versicherung AG** | **Respondent /Claimant** |
| **- and -** | |
| **(1) Risk Insurance & Reinsurance Solutions SA**<br>**(2) Reass France SARL**<br>**(3) Reass SARL**<br>**(4)Risk Insurance & Reinsurance Solutions Limited** | **Appellants/ Defendants** |

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Mr Hugo Page QC (instructed by Messrs Penlaw SELARL) for the Appellant
**Mr Colin Edelman QC & Mr Charles Dougherty** (instructed by **Messrs Leboeuf Lamb Greene & Macrae**) for the Respondent

Hearing date: 19 July 2007

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# Judgment

**This is the judgment of the Court :**

1. These are applications for permission to appeal arising out of complex litigation, heard by a full court, on notice to the respondent. The facts are well known to the parties, and well paraded in the many judgments to which this litigation has already given rise. After lengthy skeletons from both sides, and a full day's oral argument, the issues are also well defined. Our judgment is urgently required. In the circumstances, we will give our reasons more briefly than might otherwise be the case.

2. The full facts of the litigation may be found in the judgments of Moore-Bick J (18 November 2004, [2004] EWHC 2682, [2006] Lloyd's Rep IR 253, the "main" judgment, dealing with liability), of Gloster J (27 January 2006, [2006] EWHC 42 (Comm), dealing with the principles of quantum), of Tomlinson J (10 July 2006, [2006] EWHC 1705 (Comm) dealing, inter alia, with further aspects of quantum), and of David Steel J (2 November 2006, [2006] EWHC 3527, dealing with the strike-out of the applicants' defence on the taking of an account). We are concerned with applications for permission to appeal from the judgments of Moore-Bick J (0924 and 0926), of Tomlinson J (1707), and of David Steel J (2403). We are not concerned with an application from the judgment of Gloster J. This is because, and it is of the utmost importance to emphasise, the applicants had been given permission to appeal from the judgment of Gloster J, but lost that appeal when they failed and/or refused to meet the conditions imposed on them as a term of their permission. It follows that, in as much as anything in the current applications depends on the need to set aside any part of that judgment, the applicants cannot succeed in gaining the permissions now sought.

3. The applicants are four companies in the Risk group, which carried on business in various jurisdictions as insurance intermediaries ("Risk"). It will only be necessary to distinguish between the four companies in respect of one application (0924), and also to explain some of the facts. Risk is, or has been, under the day to day control of Mr Jean-Claude Chalhoub, described by Moore-Bick J as "a classic entrepreneur". The respondent is a German insurance and reinsurance company ("R+V"). The litigation arises out of the negotiation and operation of two binders, ultimately signed on 28 September 2001, under which R+V purported to authorise Risk to write contracts of reinsurance on its behalf obtained through the London market. The two binders each had an addendum under which Risk was granted an additional commission of 40% of the gross premium written in the first year of the binders. In return, R+V was ceded a 30% shareholding in the fourth applicant, Risk UK. The premium, however, was earned by the first applicant, Risk France, so that the shareholding in Risk UK was worthless. The binders and their addenda were signed on behalf of R+V by Mr Daniel Gebauer, its then chief (non-life) underwriter. Oddly, Mr Chalhoub's and Mr Gebauer's explanations of the 40% and the shareholding differed from each other and at various times.

4. R+V claimed that these binders and addenda were not only unauthorised, but were entered into by Mr Chalhoub and Mr Gebauer as part of a conspiracy to defraud R+V, in particular by the extraction from it of the additional 40% of gross premium ("the 40%") payable under the addenda (but not the binders themselves). At trial, it was Risk's case that the 40% was designed to finance and/or compensate Risk for the start-up expenses of the Risk operation in London. At

trial, Moore-Bick J was to find that Risk's start-up expenses could have been financed by R+V in ways which would have been less one-sidedly to the disadvantage of R+V and the advantage of Risk. He found that the "terms of the binders, including the addenda, were, on the face of it, manifestly to the disadvantage of R+V and in the absence of any satisfactory explanation for them they do in my view provide support for the conclusion that Mr Gebauer was not acting honestly when he agreed to them" (at para 194).

5. Moore-Bick J also found that the terms of the addenda had been hidden from R+V. No copies of them were to be found in R+V's files. Numerous opportunities for Mr Chalhoub or Mr Gebauer to inform senior members of R+V of the 40% (and the 30% shareholding) were passed up. Risk did allege that Mr Gebauer had told the head of the reinsurance department and a member of the board of directors at R+V, Mr Wolfgang Kernbach, of the addenda, but the judge, who heard, among many other witnesses, from Mr Gebauer and Mr Kernbach, found that Mr Kernbach had not been told. For present purposes the judge's critical conclusions are probably these:

> "246. Although his motives may not ultimately be of great importance, I think that the explanation for Mr Gebauer's actions lies to a large extent in a desire to obtain a foothold for R+V in the London market as a means of reinvigorating its reinsurance operations generally. On his own admission, however, it is clear that he was well aware that he did not have authority to enter into a three-year contract of any kind without the express approval of Mr Kernbach. He was also well aware that he had no authority to conclude a contract which involved the purchase by R+V of shares in another contract. For the reasons given earlier I am satisfied that Mr Gebauer did mention his discussions with Mr Chalhoub to Mr Kernbach in a general way at an early stage, but thereafter I am satisfied that he was determined to pursue it without further reference to Mr Kernbach or anyone else at R+V. He did not obtain Mr Kernbach's approval to the terms finally agreed with Mr Chalhoub, nor did he obtain Mr Kernbach's agreement before he signed the binders, either in July or September 2001. It follows that he must have known when he signed them that he was exceeding his authority, even if one disregards the terms contained in the addenda…
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> 248. In the event, however, Mr Gebauer was prepared to agree that R+V should provide the whole of the funding that he thought would be needed to set up the project and carry it through to the end of its first year. Indeed, he was willing to go beyond that and agree terms that might result in Risks's receiving much more than was needed for that purpose if the first year's premium exceeded his estimate, as turned out to be the case. On top of that he did not insist on obtaining any clear undertaking from Risk that would

ensure that R+V had a right to recover the whole or even a share of that funding at a later date. The only security R+V obtained was a shareholding in Risk UK which was of doubtful value, to say the least. In effect, therefore, the agreement committed R+V to making a significant payment to Risk to fund the operation with no clear entitlement to recover it. Mr Gebauer knew that he did not have authority to make a contract of that kind without Mr Kernbach's approval and I am satisfied that he was well aware that neither Mr Kernbach nor the board would have approved an arrangement of that kind. Indeed I think he must have been aware that the board would not have approved such an arrangement with any prospective partner, even with proper safeguards, in view of the tight financial restrictions it had imposed…

251. Financial support of some kind was an essential part of the arrangement since without it Mr Chalhoub would not have been willing to undertake the London operation at all, but the terms of the addenda went far beyond anything that could be justified, as did Mr Gebauer's later agreements to allow business written under other contracts to be routed through the London binders in order to enable Risk to obtain the additional 40% commission. In my view there is no escaping the conclusion that in entering into, and subsequently implementing, the London binders Mr Gebaur deliberately participated in a scheme that was designed to enable Risk to obtain as much as possible by way of commission during the first year of underwriting contrary to the interests of R+V. In doing so he acted dishonestly and in disregard of his duty to the company…

254. In the light of all the evidence I am satisfied that the addenda to the London binders were the result of a dishonest conspiracy between Mr Gebauer and Mr Chalhoub which began in the spring of 2001, led to the signing of the binders and their addenda in July and September 2001 and was pursued throughout the remainder of 2001 and 2002 in the ways described earlier in this judgment. Having proposed a form of close cooperation between their two organisations, Mr Chalhoub was able to take advantage of Mr Gebauer's obvious enthusiasm for the London operation by persuading him to agree to terms that were very advantageous to Risk and manifestly disadvantageous to R+V. Since Mr Gebauer was willing to cooperate, they were able to agree without any serious negotiation on the terms that were subsequently put into the addenda in order that their existence and their true nature could be concealed. The effectiveness of that step is apparent from the fact that between them Mr Gebauer and

> Mr Chalhoub were able to suppress the existence of the addenda until the audit in March 2003 made it impossible to do so any longer. If the relationship between R+V and Risk had not broken down for other reasons and if Mr Gebauer had taken over Mr Kernbach's position in May 2003, it is quite possible that the addenda would not have come to light until very much later, if at all. I am satisfied that Mr Chalhoub was well aware that Mr Gebauer had no authority to commit R+V to agreements on these terms and that he was in breach of his duty to R+V in purporting to do so.
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> 255. In these circumstances when R+V discovered the existence of the addenda it was in my view fully justified in treating both agreements as terminated with immediate effect and is entitled to recover damages for conspiracy. The precise nature and scope of the remedies to which it was entitled will be the subject of argument on a later occasion."

*Application 0926: dishonesty*

6. This is Risk's main application for permission to appeal from the judgment of Moore-Bick J, and his order dated 16 December 2004 that (i) Risk was liable in damages (to be assessed) for the tort of conspiracy to defraud; and (ii) that Risk was liable to pay to R+V "all sums due" under the binders.

7. On behalf of Risk, Mr Hugo Page QC (who was not counsel at the trial) first of all submits that the finding of dishonesty made against Risk was unjustified. He approaches this difficult task by making two points about the involvement of Mr Gebauer. He totally ignores the position of Mr Chalhoub and of Risk itself. As for Mr Gebauer, he first highlights the absence of any evidence that Mr Gebauer was bribed and the judge's finding (at para 246) that his motive was to obtain a foothold for R+V in London. Secondly, he says that the judge was in error in finding that Mr Gebauer did not inform Mr Kernbach in full about the binders and their addenda. If Mr Gebauer had informed Mr Kernbach, then he was not dishonest and the claim in conspiracy failed.

8. Mr Page's approach reflected the way in which the argument proceeded at trial, as reflected in the judgment. There were no sophisticated arguments, apparently no argument at all, about the nature of, or conditions for, the tort of conspiracy. Moore-Bick J's lengthy judgment barely referred to any authorities, and none on which there was any controversy. The essence of the way in which the matter was argued at trial is contained in the following passage of the judgment:

> "111. Although R+V's primary case was that there was in this case a straightforward conspiracy between Mr Gebauer and Mr Chalhoub to defraud R+V for personal gain, Mr Edelman submitted that it was sufficient for R+V to establish an agreement between Mr Gebauer and Mr

> Chalhoub to a course of conduct that they both knew involved a breach of duty on the part of Mr Gebauer towards R+V regardless of their motives. I think he was right about that inasmuch as the tort of conspiracy consists in the formation and implementation of an agreement to commit a wrongful act of any kind against another person. It is worth reiterating, however, that in order to establish the existence of a conspiracy it is necessary for R+V to show that Mr Chalhoub knew that the course of action which they had agreed upon involved a breach of duty on Mr Gebauer's part. In the context of this case that really amounts to proving dishonesty.
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> 112. These principles were not seriously disputed…"

9. The parties therefore joined issue on whether or not the agreement between Mr Chalhoub and Mr Gebauer, going back to before July 2001, when their negotiations first gave rise to the signing of the July binders which preceded the ultimate September binders, was honest, even if unauthorised, business, or dishonest, at least in the sense that both Mr Chalhoub and Mr Gebauer knew that Mr Gebauer was in breach of his duty to his employer, R+V. It was on that essential issue of honesty or dishonesty that the case was fought. It was for that reason that the judge accepted that, if Mr Gebauer had told Mr Kernbach about the binders and their addenda, R+V's case of dishonesty might well fail. As the judge said:

> "116. Mr Schaff submitted with some justification that this is one of the central issues in the case. Although R+V has criticised Mr Kernbach for allowing Mr Gebauer too much freedom of action and failing to keep proper control over his activities, it was never suggested that Mr Kernbach was involved in a dishonest scheme of any kind or that he withheld from the management board of R+V of which he was a member information which he ought to have drawn to its attention. It follows that if Mr Gebauer kept Mr Kernbach properly informed about the existence and terms of the London binders, including the addenda, he can hardly be found to have acted dishonestly. On the other hand, if Mr Gebauer did withhold important information from Mr Kernbach, it becomes necessary to ask why, and one obvious explanation is that he knew that what he was doing was wrong. I propose to begin my analysis of the evidence, therefore, with this question."

10. The judge then proceeded to consider that question over an extended section of his judgment (paras 117/153). In doing so, the judge was fully conscious of certain difficulties in Mr Kernbach's evidence. Indeed, he found that Mr Kernbach had

lied in stating that he had known nothing at all, until much later, of the Risk operation in London, and in suppressing the fact that he had accepted a seat on the board of one of Mr Chalhoub's companies (UFA). The judge said:

> "127. The criticisms that can fairly be made of Mr Kernbach as a witness make it doubly necessary to examine critically his evidence in relation to any contentious issue, particularly any issue in relation to which he might himself be open to criticism…

11. The judge also referred to a letter written by Mr Kernbach on 11 April 2002 confirming that Risk had authority to underwrite on behalf of R+V and described Mr Kernbach's evidence about that, to the effect that he believed that Risk's authority was limited to introducing business to R+V underwriters in Wiesbaden, as "wholly incredible" (at 144). The judge found that Mr Kernbach "was quite happy for R+V to grant binding authorities in what he considered to be appropriate circumstances, with or without board approval…" (*ibid*).

12. The judge said he had to balance the evidence of the three central witnesses (Mr Chalhoub, Mr Gebauer and Mr Kernbach) and to test their evidence against the contemporaneous documents. It is clear that he came to his conclusions about Mr Kernbach's evidence only after taking account of not only matters which might be said to support Risk's case (see para 144), but also matters corroborating Mr Kernbach (*eg* para 138). Of great importance among the latter was Mr Gebauer's own account of his understanding of the addenda (at para 151). Thus the judge said:

> "152. It follows from Mr Gebauer's own account of his understanding of the addenda that he did not make it clear to Mr Kernbach that the agreement provided for R+V to become a shareholder in Risk UK. In my view, however, he was well aware of what was involved and deliberately concealed this aspect of the agreement from Mr Kernbach. It does not necessarily follow that he also concealed the agreement for the 40% first year's commission, but since the two were intimately connected, it makes it much more likely."

13. Ultimately, the judge concluded that "all this evidence points firmly" to his view that Mr Gebauer –

> "did not at any stage make it clear to Mr Kernbach that R+V was expected to provide Risk with funding in the form of a 40% commission on the first year's premiums or that R+V would obtain a holding, or, for that matter, an interest of any kind, in the share capital of Risk UK. I am also satisfied that Mr Gebauer failed to inform Mr Kernbach of

> the final terms agreed with Mr Chalhoub and did not inform him that contracts had been signed, either in July or September" (para 153).

14. When the judge came to deal with other aspects of R+V's case of dishonesty against Mr Chalhoub and Mr Gebauer in their dealings with R+V, there was a wealth of further evidential material which pointed in the same direction: that neither of them had been open with R+V about the critical aspects of the addenda, viz the 40% commission and the 30% shareholding in Risk UK, but on the contrary had persistently deployed a policy of concealment or obfuscation; that the addenda were manifestly disadvantageous to R+V in circumstances where Risk's interest in financing and/or mitigating the risk of a start-up operation could plainly have been dealt with in other, more even-handed ways; and that other business, outside the scope of the binders, was routed through them in order to maximise the off-take of the 40% commission.

15. Mr Page submitted that the judge had failed to apply the correct standard of proof in dealing with an allegation of dishonesty in a civil suit. This is the only context in which authority was here cited by Mr Page in his skeletons. However, the judge cited (at his para 108) the modern leading case of *In re H (Minors)* [1996] AC 563, emphasising that cogent evidence is required to establish such an allegation. He applied the correct standard of proof. He was expressly and particularly careful in the evaluation of Mr Kernbach's evidence. He allowed for the fact that his motives were different from those of Mr Chalhoub. As for the submission that there could have been no dishonesty where the outcome of the underwriting and the submission of accounts would have revealed the real position, especially about the 40%: we refer to the judge's cogent conclusions about the near-success of the policy of concealment in his para 254 quoted above.

16. Mr Page was unable to point to any aspect of Moore-Bick J's judgment which he could say demonstrated an error of fact or of logic, or reliance on irrelevant material, or the omission to take relevant material into account. On the contrary, the judge has plainly deployed immense care in his lengthy and cogent judgment. We are unable to see where this court, on appeal, could begin to pick apart the factual findings the judge has made on the evidence with the help only he has had, over an eight week trial, from seeing the witnesses give their evidence at first hand.

17. In sum, we see no real prospect of success on appeal on this critical aspect of dishonesty, and therefore refuse Risk's application in this regard.

*Application 0926: other aspects*

18. Mr Page submits that when R+V came to terminate the binders on 17 April 2003, it thereby ratified them, and did so with full knowledge of the matters complained of which the judge found amounted to a dishonest conspiracy. Since the binders and their addenda were part of the same (two) contracts, the ratification of the

binders amounted to ratification of their addenda too. One cannot ratify part only of a contract. The judge had failed to see that the binders and their addenda were inseparable, having been entered into on the same day and as part of the same deal. Since therefore R+V had chosen to take the benefit of the binders up to their termination date, and had not opted to rescind them from the first (ab initio), it followed: (a) that the purported terminations were themselves in unlawful repudiation of the contracts, since ratification involved a total waiver of the matters complained of; (b) that Risk had therefore no liability either in tort for damages, or to account under the contract or otherwise; and (c) that even if such liability survived these submissions, the quantum of such liability had to reflect (i) Risk's prima facie entitlement to the fruits of its contracts, at any rate up to the termination date, and (ii) by way of set-off, the profit which R+V itself had earned under the contracts up to their termination dates. For Risk maintained that its underwriting on behalf of R+V had been successful and profitable. Thus, Moore-Bick J's errors at the time of trial of liability ((a) and (b)) had their consequences ((c)) when it came to assessing quantum or taking an account. These submissions therefore depended on an allegation of *ratification*, with alleged consequences of *repudiation* by R+V, and effects in any event on quantum, namely a *set-off* of sums earned under the contracts and a *net loss* approach to R+V's proof of damages for the tort of conspiracy.

19. It will be seen below that aspects of these arguments surfaced before Gloster J when she came to consider the principles on which quantum had to be assessed or accounted for. For the present, it has to be considered whether these matters can properly give rise to an appeal against Moore-Bick J's judgment in respect of liability.

20. In our judgment, they cannot. Whatever the validity of these submissions may be, it will be clear from a reading of the judgment of Moore-Bick J that he was not concerned at all with such arguments as affecting liability. Mr Page has not suggested that these arguments are to be found deployed in Risk's pleadings for the trial on liability: nor, unaided, can we find sign of them in Risk's amended defence and counterclaim. It is true that Risk pleads that the terminations of the binders/addenda were unlawful and thus counterclaims damages for repudiatory loss. That, however, is on the basis that R+V's primary attack on the making of these contracts is resisted and fails. There is no alternative defence to the effect that, even so, the contracts were ratified and the tort was waived.

21. Subject to any illumination on such matters to be derived from the judgment of Gloster J, the inference to be derived is that liability was tried on the basis that, if the tort of conspiracy was made good, R+V was entitled to terminate the binders and the addenda prospectively ("R+V…was…justified in treating both agreements as terminated with immediate effect", para 255 quoted above), and in addition was entitled to damages for conspiracy. We can see no prospect of success on appeal for submissions otherwise.

*Gloster J*

22. Gloster J dealt with the principles (but not the actual assessment) of quantum. There is no application for permission to appeal from her judgment. That is because permission to appeal had been sought, and granted, but on terms that security for costs be provided for that appeal, and that £0.5 million out of the orders for costs against Risk amounting to over £1 million (plus interest) be paid: see the judgment of this court of 25 July 2006, [2006] EWCA 1234. Those conditions were not met, and the appeal was dismissed. It follows that anything that turns on the necessity for an appeal from the judgment of Gloster J cannot now be made the subject matter of an application from some other judgment in this litigation. It does not assist to say, as Mr Page has at times submitted, that Gloster J erred in what she found or determined about the trial before or judgment of Moore-Bick J. Any such error would be binding on the parties, subject to an appeal from Gloster J.

23. A major issue before Gloster J was whether the 40% commission payable to Risk in the first year of the binders was recoverable by R+V, either as damages for the tort of conspiracy or as damages for breach of contract or in some other way. Risk submitted that it was not, on the grounds canvassed above that the binders and the addenda were integral parts of their respective contracts, and that those contracts had been ratified. The refined sub-issues to which those submissions gave rise can be seen identified at para 17 ("Issue A: the recoverability of the 40% Deduction") of Gloster J's judgment: eg "(i) Are the respective Binders and Addenda separate or single agreements? (ii) Has R+V ratified the Addenda…? (iii) If R+V has ratified the Addenda…does such ratification exonerate the defendants from the breaches of duty…? (iv) Should the account between the parties take into account the 40% Deduction? (v) Are the defendants estopped from asserting that they are not liable for the tort of conspiracy and/or to repay the 40% Deduction (whether as damages or otherwise)?...(vii) Does the 40% Deduction constitute loss and damage to R+V as a result of the conspiracy?...".

24. It will be immediately obvious that many of these sub-issues directly and explicitly involve questions of liability antecedent to any question of quantum; and that others of them involve or at any rate arguably involve such questions of liability inherently and implicitly.

25. Gloster J answered all these questions in a manner adverse to Risk. In doing so, she referred in her judgment to passages in the written and oral submissions before Moore-Bick J from which it is apparent that, whatever be the state of the pleadings at the trial on liability, there was at any rate reference at that trial to questions of ratification and the consequences of such an argument. However, what emerges is *not* so much that ratification was in issue at that trial (although perhaps it might have been potentially), but that it became *common ground* between the parties that, if there was a dishonest conspiracy, then arguments about ratification were of no avail and could not affect R+V's recoverability in one form or another of the 40% commission.

26. Gloster J considered Risk's submissions before her from every angle: both to the extent that they turned on issues of liability and to the extent that they concerned issues of quantum pleaded before her. Thus one argument of quantum was what

we have described as the net loss argument. As developed before Gloster J it amounted to the submission that R+V, in proving its damages in tort, could not simply rest on the recoverability of the 40% but would have to prove, because of its ratification, that the overall transaction resulted in a loss, and would have to prove the extent of that loss, and furthermore as part of that exercise, would have to prove that it could have set up a London project for writing reinsurance at less cost than the binders with their addenda led to. Whereas, submitted Risk, the exercise had in fact been profitable. Thus, because of ratification, Risk had been prima facie entitled to its 40%, and R+V's claim to its recovery only extended so far as it could prove an overall net loss, either in fact or in abstract comparison with another such operation.

27. Gloster J held that all such arguments, whether of pure liability or of principles of quantum, were barred to Risk: they were inconsistent with the common ground or concessions reached before Moore-Bick J; they included arguments which if they were to be raised at all were arguments of pure liability and therefore had to have been pressed to a conclusion before Moore-Bick J which they were not, and therefore Risk was estopped from raising them before her; and it would be an abuse of process to attempt to raise them anew or for the first time before her. In coming to her conclusions Gloster J took account not only of the submissions before Moore-Bick J at trial, where Mr Schaff QC appeared for Risk, but also of discussions before Moore-Bick J after trial at a time when Mr Onions QC was representing Risk. It is clear to us that Gloster J considered all aspects whether of liability or quantum which Risk sought to build on the ratification argument, including the set-off and net loss arguments. The following is a selection of what Gloster J said:

> "27…If, as Mr page for Risk now submits, damage had only been caused by the deliberate choice of R+V to ratify the agency contract (by treating it as in existence until terminated on 17 April 2003), and not by the dishonest conduct of Mr Gebauer and Mr Chalhoub, then one of the necessary elements of the tort of conspiracy, namely damage, could not have been made out. Accordingly, in my judgment, it would not only be an abuse of process for Risk now to run that causation argument, but also it is precluded from doing so, on the grounds of issue estoppel, by the judgment of Moore-Bick J, who clearly concluded that R+V was entitled to damages for fraudulent conspiracy in respect of the 40% Deduction. However, that conclusion does not address the further point made by Mr Page that (irrespective of the causation issue) the quantum of any damages for the conspiracy was to be calculated by reference to the following factual and legal propositions:
>
> iii) that Risk was contractually entitled to deduct the 40% commission;
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> iv) that, accordingly, the damages R+V had suffered as a result of the dishonest conspiracy had to be calculated by reference to the loss (if any) which R+V had suffered by

being subject to agency contracts which provided for the 40% Deduction;

v) that this involved R+V proving that:

(a) it would have been able to underwrite all the risks that it did in fact underwrite under the Binders through another reinsurance intermediary and without paying the 40% Deduction, or, alternatively, establishing that it would have paid some lesser commission than the 40% Deduction; and

(b) that it would in fact have entered into such business…

31. In my judgment, having carefully considered all the materials to which I was referred, including relevant passages from various statements of case, and the precise way in which Risk conducted its defence at trial, I consider that it would be an abuse of process for Risk now to seek to argue a case based on ratification of the Addenda as being allegedly part of one transaction with the Binders, so as to reduce the quantum of R+V's claim below the value of the 40% Deduction and so as to require R+V to prove the quantum of its loss as the full 40% Deduction, as well as the points listed in sub-paragraph 27(v) above…

35. I reject Mr Page's submission that the judge treated the Addenda as part of the same transaction or contract as the Binders in the passages in the judgment upon which Mr page relied. Likewise, I reject Mr Page's submission that the judge expressly found that there had been ratification of the Addenda. Neither of these two issues…needed to be addressed by the judge in the light of Mr Schaff's concession as to the agreed position between the parties at trial; namely that it did not matter whether or not the Addenda were separate or severable from the Binders and were made without authority (and therefore not contractually enforceable by Risk), since, even in the event that the Addenda had been ratified and were not separate or severable, the full amount of the 40% Deduction would be recoverable as damages for conspiracy. No reservation, either express or implied, was made by Mr Schaff at that time to the effect that R+V would have to prove the actual amount of its loss because of the ratification of the Addenda…A trial now, before me, of Issues A(i), A(ii) and A(iv) would in reality amount to a relitigation of issues that were before the judge at the liability hearing and which counsel for both parties agreed did not arise for determination in the event of a dishonesty finding. In my view it would be abusive in the extreme if new counsel for Risk were entitled to run such arguments at this stage, given the basis upon which the litigation was fought before

> Moore-Bick J. It follows that I also reject Mr Page's submissions as identified above."

28. Mr Page showed us a passage in Risk's defence to points of claim in relation to quantum, at para 5, where Risk pleads as follows:

> "Risk's position, in summary, is that Risk expects and believes that a net sum will be owed to Risk by R+V on the taking of an account between the parties, that the UNL, SHTTL and ING agreements have generated profits and not losses for R+V and/or that they would have generated profits and not losses for R+V had they not been terminated prematurely by R+V in April 2003 and that, overall, R+V has suffered and/or would have suffered no loss arising out of the alleged conspiracy and/or attributable to the alleged conspiracy."

29. He submitted that this showed that the net loss argument had been raised before Gloster J: but, he said, had not been considered by her. However, it is plain from the passages to which we have referred from Gloster J's judgment that it, like all other arguments of quantum (and repeated arguments of liability), had been comprehensively dealt with by her. So Mr Edelman persuasively submitted to us, and we agree. There was no reply on this point from Mr Page.

30. It follows that there is nothing in the proceedings before Gloster J which alters the inference we have already drawn, in the absence of all the additional material considered by her, to the effect stated above under application 0926. On the contrary, that material, and the decisions reached by Gloster J in her judgment, confirm that the ratification and repudiation arguments, and all proof of loss or quantum arguments based upon them, are doomed in the light of the dismissal of Risk's appeal from that judgment.

*Application 0924*

31. Application 0924 requires us to make a distinction between individual Risk defendants and applicants. It is an application made by the second and third defendants only, namely Reass France SARL and Reass SARL, to the effect that Moore-Bick J was in error in giving judgment against them. It is said that they were neither parties to any conspiracy, nor were they parties to the binders and addenda. They were only added as defendants out of caution and uncertainty on the part of the claimant R+V. Their liability was always in issue. In fact, there was no evidence at all of their involvement. Whatever error or oversight may have led to judgment being entered against the four defendants without differentiation, justice now required that the substantive error be corrected. (It is convenient, but

unnecessary, to mention here that application 0926 is formally made only on the part of the first and fourth defendants, Risk France and Risk UK.)

32. It is true that there is no mention in Moore-Bick J's judgment of any evidential basis to implicate the third defendant; and that the only matters there mentioned to implicate the second defendant were that it had signed the binders (on behalf of Risk France, the first defendant) and that its gerant, M. Tannous, had taken the binders in September 2001 to Wiesbaden for signature by R+V, but it is not said in which capacity. On the other hand, it is perfectly clear that the liability trial was conducted from beginning to end before Moore-Bick J on the basis that any liability, whether in tort or otherwise, was shared equally by all four defendants. His judgment and orders were against all four defendants. His orders of December 2004 and February 2005 were drawn up with the assistance of Mr Onions, Risk's new leading counsel. As Moore-Bick J said in the very first paragraph of his judgment: "for most purposes it is sufficient simply to refer to the group as a whole as "Risk"." He later recorded (at para 106): "R+V contended that the two London binders were the outcome of an unlawful conspiracy between Mr Gebauer and Mr Chalhoub in which all four Risk defendants participated".

33. Whatever may have been the position if there had been an immediate or timeous complaint that the position of the second and third defendants had been dealt with as a result of a venial oversight, leading the judge into error, there was no complaint on the part of Risk or these particular defendants until shortly before 27 January 2006, on which day Gloster J handed down her judgment on the principles of quantum, when it was said for the first time that judgment should not be entered against all four defendants. Therefore, the order made by Gloster J that day was stated to be without prejudice to any application to be made by the second and third defendants to set aside the judgment and orders made against them by Moore-Bick J. On 8 February 2006 there was an application by the second and third defendants to that effect, pursuant to CPR 3.1(7) and the slip rule, CPR 40.12. That application was not heard for another year, until 12 January 2007, when it was rejected for the reasons contained in a further judgment of Gloster J handed down on 29 January 2007, [2007] EWHC 79 (Comm).

34. In the meantime, on 14 March 2006 Moore-Bick J had heard submissions in support of Risk's applications for permission to appeal from his judgment on liability. He had adjourned the time for making such applications pending the decision on the principles of quantum. On 14 March 2006 Moore-Bick J refused the second and third defendants' application for permission to appeal from his judgment. In his written reasons he stated:

> "It was accepted at trial that the first to fourth defendants inclusive were all parties to any conspiracy that may have existed. In those circumstances, I do not consider it appropriate to give the second and third defendants permission to appeal merely on the assertion that they were not."

35. Mr Page submitted that the judge erred in his recollection on that occasion, fifteen months after his judgment on liability; and that in any event his remarks did not deal with the question of liability in contract or to account.

36. In our judgment, the trial was clearly conducted on the basis that no differentiation was to be made between the four defendants. If objection was to be made, then the judge should have been asked to reconsider the position before he handed down his judgment formally, and before his orders pursuant to his judgment were entered. Alternatively, immediate permission to appeal ought to have been sought: and that remains the case even though the time for making permission applications was adjourned. Come January 2006, when this large-scale litigation had continued for over another year, including a further substantial trial before Gloster J, it was far too late to seek to withdraw an erroneous concession of this kind, if erroneous it was. There is no real prospect of success on this application, and we refuse it.

*Application 1707*

37. This application is for permission to appeal from the judgment and order of Tomlinson J, dealing with a series of outstanding points of quantum, and an application by Risk to commit R+V and the head of its legal department, Dr Andreas Hasse, for alleged contempt of court. Mr Page has put four particular issues before us.

38. *The assessment of R+V's expenses of investigating the conspiracy.* Tomlinson J assessed such expenses, one of R+V's two main heads of loss caused by the conspiracy, at £2,298,867. Gloster J had already held that R+V was entitled in principle to recover as damages for conspiracy the expense of managerial and staff time spent in investigating and mitigating the conspiracy and in handling the run-off of claims after termination of the binders. It was common ground before Gloster J that R+V was also entitled in principle, subject to quantification, to recover as damages for conspiracy the external costs and expenses incurred as a result of it. Under these claims R+V sought to exclude costs attributable to work in connection with the London litigation. There was an issue as to the extent to which it had been successful in that endeavour. R+V deployed a considerable body of evidence in support of this claim, including twenty-two statements from its staff members. Tomlinson J found that there was a very strong case for saying that R+V's approach to this exercise had been conservative. He also regarded as unsustainable the suggestion by Risk that the only costs which fell for assessment as being recoverable were those which had been incurred in investigation *after* the addenda to the binders had been discovered in March 2003.

39. Tomlinson J considered in detail the evidence before him, and adjudicated the two main issues which had been debated, viz, whether investigations could be said to be caused by the conspiracy before the addenda had been unearthed, and whether the expenses claimed were properly attributable to the conspiracy rather than to the litigation. Mr Page's skeleton argument went back over the detailed factual ground covered by the judgment. In our view, the submission that there is any real prospect of success on appeal in showing that the judge's assessment was flawed or erroneous is hopeless. We refuse this aspect of the application.

40. *The set-off or net loss quantum argument.* Tomlinson J held that this was a rerun, this time in connection with the expenses claim, of the argument that had been unsuccessfully run before Gloster J in respect of the 40% claim. We agree. The judge added some further arguments of his own, which may take the matter no further, but that is beside the point. We refer to the discussion of this argument above under the heading of "Gloster J". We refuse this aspect of the application as having no real prospect of success on appeal.

41. *The status of the funds in the London accounts.* There was an issue as to whether part of the funds in certain London accounts which had been opened was beneficially owned by Risk as representing commission earned by it under the binders. These accounts had been set up to receive R+V premium. It was nevertheless submitted that, because Risk had a right to withdraw its commission from these accounts, therefore, by analogy with the effect of the Solicitors' Accounts Rules discussed in *Sheikh v. Law Society* [2005] EWHC 1409, a sum equal to the commission due may cease to be held in trust for R+V and become instead beneficially owned by Risk. The judge held however that Risk never had more than a contractual entitlement to any commission due, and that all the monies in the accounts remained in trust for R+V. Mr Page renewed this submission on this application, but, in our judgment, without any real prospect of success on appeal. There is no analogy with the code for solicitors and their clients.

42. *Contempt of court.* Risk wished to bring contempt of court proceedings against R+V and Dr Hasse, on the ground that they had attempted to intimidate or interfere with Mr Kernbach as a witness in the proceedings. The basis of the application was (disputed) evidence that R+V had first promised to pay Mr Kernbach for his evidence before Moore-Bick J and had then refused to make good the payment until after the close of the proceedings; and that it had forestalled Mr Kernbach's desire to give evidence for Risk at the quantum hearings by threatening him with "repercussions", viz the loss of pension rights.

43. Tomlinson J said that he could not resolve the factual issues between the parties, even if he struggled to understand what evidence Mr Kernbach could have given in relation to quantum. He also observed that it was common ground, by the time of the hearing before him, that Risk's application suffered from such multiple deficiencies that Risk could not resist its being struck out. However, R+V held out for a ruling on substantive and not merely procedural grounds, to the effect that any renewal of the application in better form could not prevail: seeing that the contempt of court alleged was a criminal contempt to interfere with or obstruct the course of justice (as distinct from a civil contempt such as may be involved in disobedience to existing orders of the court) and thus there was no jurisdiction over criminal acts which had taken place abroad. The judge accepted that submission in relation to both Dr Hasse and R+V.

44. However, the position seems to us to be realistically arguable on appeal, at any rate so far as R+V is concerned. R+V was properly before the court in respect of litigation in which it was the claimant and had itself invoked the jurisdiction of the court. Although any improper pressure imposed on Mr Kernbach may have taken place abroad, it would have been designed to take effect within this jurisdiction where Mr Kernbach gave evidence for R+V at the liability trial and would have

wished, it is said, to have given evidence for Risk at the quantum hearings. We would therefore be prepared, subject to the consideration of possible conditions, to give permission to appeal on this aspect of Tomlinson J's judgment. We would not however give permission in respect of an application to commit Dr Hasse, who is not before the English court.

45. R+V has submitted, in applications before the court in response to Risk's applications, that no permission to appeal should be granted save subject to an order for security for costs and payment of the outstanding costs orders against Risk. It is not disputed by Risk that it must give security for the costs of any appeal, subject to the determination of the quantum of such security. However, it disputes the making of any costs condition on the ground that Risk is known to be without funds and that any such condition would stifle its appeal. This issue will have to be debated and considered following the publishing of this judgment to the parties: we certainly do not anticipate the result of such debate and consideration. We would merely remark, for the guidance of the parties, that the free-standing question of contempt of court, which does not impact directly upon any of the other judgments and orders which have been given and made in this litigation, raises a serious question of the utility of such an appeal. If it were to succeed and contempt of court proceedings were to be launched against R+V, they would undoubtedly be treated seriously and lead to further considerable expense. However, even if such proceedings were successful, where would that take Risk? No application to appeal Moore-Bick J's judgment (or any other judgment) has been made on the basis of the alleged contempt.

*Application 2403*

46. Finally, there is an application for permission to appeal from the judgment of David Steel J given on 2 November 2006, whereby that judge struck out Risk's defence to R+V's claim for an account because Risk failed to meet an order of the court for the payment of 50% of the costs of a joint quantum aspect. Some £114,000 of costs were then in question. The judge gave Risk a further two weeks to meet its obligation, but there was no response. The judge considered the course of this litigation as a whole, including the important circumstances whereby this court had ordered the payment of £0.5 million as a condition for appealing from the judgment of Gloster J.

47. The judge cited Tuckey LJ in this court saying this:

> "There is no convincing evidence that Risk does not have access to resources which would enable it to pay the costs as ordered. Risk has provided inadequate information about its financial affairs and gives the court no confidence that what has been provided is anything near the truth."

48. The judge went on to say this:

> "22. In short, I am wholly unpersuaded that there is any difficulty whereby the defendants will be precluded from paying such bills as they have yet to pay. I conclude that funds will be forthcoming, and those funds will come from a source which has been funding this litigation throughout and against which there is unlikely to be an order under s. 51 which might not be pursued solely on the basis that it was difficult to exercise rights of recovery against the persons concerned.
>
> 23. That in effect deals with the two major issues in the application, the outcome being that I am unpersuaded that it is appropriate to relieve the defendants from the obligation to fund half the costs of the expert and unpersuaded by the defendants that they are not in a position to pay the 50% [of the joint quantum expert] that they are obliged to pay. In short, the defendants are simply refusing deliberately to pay these costs in contempt of the order that the court has made."

49. Mr Page submits that David Steel J erred as a matter of principle in the exercise of his discretion, on the basis that the appeal from Gloster J was stifled for the very reason that Risk was insolvent and had no funds. The same should not have happened to the account proceedings. He relied on authority to the effect that the court will only refuse to hear a party in contempt if "the contempt itself impedes the course of justice and there is no effective means of securing his compliance" (*X Ltd v. Morgan-Grampian Ltd* [1991] 1 AC 1 at 46, approving the observations of Denning LJ in *Hadkinson v. Hadkinson* [1952] P 285 at 298; and see *CIBC Mellon Trust Co v. Mora Hotel Corp NV* [2002] EWCA Civ 1688 *per* Peter Gibson LJ). It is unjust to presume that some third party will pay for costs which are not that person's liability: the judge was wrong to say that Risk's funders were amenable to an order that they should so pay. Moreover, no allowance was made for Risk's genuine dispute with R+V and the joint quantum expert over the reasonableness of his fees and the whole reasonableness of his approach to the question of an account. R+V had made the work of the joint quantum expert unnecessarily complex, and the expert had just fallen into line. When the order for a joint expert and his funding on an equal basis had been made, it had never been contemplated that his costs would rise as high as they had. In any event, the striking out of Risk's whole defence was disproportionate. It would have been a sufficient vindication of the orders of the court if the judge had merely struck out those parts of the defence to which the report of the expert was relevant.

50. In our judgment, however, there is no real prospect on appeal of showing that David Steel J was not entitled to form the view that he did, in the exercise of his discretion. He observed that the expert was afforded complete liberty by the court and that it was simply not open at that stage to say that an unnecessary course had been pursued. He pointed out that there was nothing in the evidence to support the submission that the fees being claimed were excessive or unreasonable. He

underlined the telling observations of this court in dealing with the conditions imposed on the appeal from Gloster J that whoever was funding the allegedly impecunious Risk companies was doing so "not only in the long and expensive liability trial but also in extensive additional litigation which had taken place both here and abroad" (at para 20).

51. This court has no evidence as to the means by which the Risk litigation, here and abroad, is being funded, or by whom. The judge was prepared to assume that the funder was probably Mr Chalhoub, who has been made personally liable by Moore-Bick J to pay the liability trial costs on an indemnity basis by reason of his dishonest evidence in that trial. It may be true, as Mr Page submits, that Moore-Bick J was not in a position to say that Mr Chalhoub had also been Risk's funder, and there is evidence that he is no longer a shareholder in Risk: nevertheless in the absence of evidence as to the identity and source of Risk's funding, the court is entitled to assume that funds are available and that the commitment of the necessary resources are a matter of choice. The funds in question in relation to the fees of the joint quantum expert are not so large in comparison to the scale of the litigation as a whole. David Steel J was unpersuaded that Risk was unable, by itself or through its funders, to pay the 50% of the fees that it was obliged to pay and that there was a deliberate contempt of court. As Tuckey LJ had said: "Where the money to do all this has come or will be coming from is entirely unexplained by Mr Page. What has happened to the £3 million is not satisfactorily explained." The position remained the same before David Steel J, and remains the same today. The dragging out of this litigation by Risk, which has been adjudged to have been dishonest, starting from its principal, Mr Chalhoub, with the aid of unexplained funding while at the same time refusing to meet its obligations on the ground of impecuniosity, is indeed impeding the course of justice. Therefore this application is refused.

*Disposal*

52. In sum, all applications for permission to appeal are refused, save for that part of the application 1707, relating to the judgment of Tomlinson J, which deals with the question of whether R+V may be amenable to the jurisdiction of this court for an alleged contempt of court with respect to Mr Kernbach. The question of the quantum of security for costs and the further question whether any costs condition should be imposed on Risk as a term of such an appeal will be dealt with promptly.