Neutral Citation Number: [2006] EWHC 2731 (Comm)

Case No: 2002 FOLIO 899

LLOYD'S NAMES UK GOVERNMENT GROUP LITIGATION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2006

Before :

THE HONOURABLE MR JUSTICE LANGLEY

- -

Between :

FREDERICK THOMAS POOLE and OTHERS (Names Action For Compensation And Defence In Europe)	**Claimant**
- and -	
HER MAJESTY'S TREASURY	**Defendant**

- -
- -

Mr R. Plender QC, Mr H. Mercer and Mr G. Nardell (instructed by **Grower Freeman**) for the **Claimants**
Mr D. Friedman QC, Ms J. Stratford and Mr A. Henshaw (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 3rd to 20th July,
28th and 29th September 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONORABLE MR JUSTICE LANGLEY

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The Hon. Mr Justice Langley :

INTRODUCTION

The Claim

1. By a Claim Form, issued on 2 September 2002, the Claimants, who were underwriting Names at Lloyd's at various times during the period 1980 to 1996, claimed against Her Majesty's Government damages for losses incurred by the Names "in consequence" of the Government's failure to implement Directive 73/239/EEC ("the Insurance Directive") in accordance with its obligations under the Treaty of Accession. The Insurance Directive, 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, was adopted by the Council on 24 July 1973.

2. To quote from paragraph 2 of the Re-Re-Amended Particulars of Claim ("RRAPC"):

> "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 as 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.

2.4 The Claimants, in various years of account:

2.4.1 joined Lloyd's;

2.4.2 continued in membership of Lloyd's; and/or

2.4.3 increased their underwriting capacity at Lloyd's,

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.

2.6 The Claimants have accordingly suffered loss as a result of the Defendant's breaches of the Insurance Directive."

The Breaches Alleged

3. In summary, the breaches of the Insurance Directive alleged are that the Defendant:

i) delegated to Lloyd's the management and superintendence of the affairs of Lloyd's and the power to regulate and direct the business of insurance at Lloyd's and the function of authorising syndicates to engage in the activity of direct insurance;

ii) delegated to Lloyd's aspects of the solvency test and determination of the manner and extent to which liabilities should be reserved for, provided for by the Insurance Directive;

iii) permitted "the accounting system at Lloyd's to be wholly inadequate"; and

iv) failed to verify the state of solvency of Lloyd's syndicates.

4. It is the case of the Claimants that the United Kingdom did not amend its national provisions to comply with the Insurance Directive until, at the earliest, 1 December 2001 when Part XIX of the Financial Services and Markets Act 2000 ("the FSMA") entered into force.

The Loss Alleged

5. The loss claimed in paragraph 99 of the RRAPC (which, of course, varies with each claimant) is or includes:

i) The personal liability "incurred on or about 3 September 1996" to pay the Equitas premium as part of R&R;

ii) "other trading losses" suffered as a member of a syndicate in any underwriting year in which he would not have been a member or would have had a smaller underwriting capacity had the Defendant not been in breach of its obligations under the Insurance Directive;

iii) "Damages consequential upon the enforcement of Lloyd's demands for payment of Equitas premiums or other unpaid trading losses including:

Losses suffered in consequence of the enforcement of such demands upon property held by Lloyd's as security for the Claimant's liabilities to meet Lloyd's demands;

Losses suffered in consequence of the enforcement of such demands upon property held by natural or legal persons other than Lloyd's as security for the Claimant's liabilities to meet Lloyd's demands";

iv) Losses arising as a result of the Claimant having to dispose of assets as a result of Lloyd's demands for payment.

v) Further losses from meeting syndicate liabilities should Equitas be unable to meet its liabilities ("proportionate insolvency" : see para 7.2.1 of the ASF).

6. The original Claim Form, in what the Claimants say is an indicative statement, valued the claims in a sum in excess of £1 billion. There were, at the commencement of the hearing on 3 July, some 1050 Claimant Names.

7. The essence of the claim by the Names is, therefore, that by reason of the failure to implement the Insurance Directive by July 1976, the Defendant failed to require that thereafter there was an adequate system for ensuring that the reserves of syndicates were sufficient to meet liabilities, and in particular reserves for IBNR liabilities inherited under RITC. Had the Defendant acted as it is alleged it should have done

then the existence of "very substantial but unquantified IBNR liabilities" would have been revealed and, it is said, the Names would not have joined Lloyd's or continued as Names or increased their underwriting and so not suffered the loss alleged, "including" the liability to make payment under R&R which, as stated, "related to the 1992 year and earlier years of account".

The Cause of Action

8. The claim is founded on the principles established by the Court of Justice of the European Communities ("the ECJ") in Cases C-6 & 9/90 Francovich and Bonifaci v Italy [1991] ECR I-5357 ("Francovich"); Joined Cases C-46/93 and C-48/93 Brasserie Du Pêcheur SA v Federal Republic of Germany, R v Secretary of State ex p. Factortame Ltd [1996] ECR I-1029 ("Factortame"); and Joined Cases C-178, 179, and 188-190/94 Dillenkofer v Germany [1996] ECR I-4845. Those principles provide that a Member State will incur liability for a breach of Community law where:

   i) The rule of Community law infringed is intended to grant rights to individuals; and

   ii) The breach is sufficiently serious and there was a manifest and grave disregard by the Member State of its discretion; and

   iii) There is a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured party.

The Defendant

9. Responsibility for the obligations imposed upon the United Kingdom by the Insurance Directive has successively been conferred on the Secretary of State for Trade and Industry, Her Majesty's Treasury, and the Financial Services Authority.

The Defence

10. So far as material, and in summary, the Defendant's case is that:

   i) If (which is not conceded) the Insurance Directive entails any grant of rights to individuals, it is limited to a grant to insurers of the right of freedom of establishment and does not grant rights to the Claimants in relation to their claims which do not arise from any infringement of a right to freedom of establishment but from losses incurred in transactions undertaken by the Names as insurers on the insurance market and/or arose from other transactions undertaken as reinsurers or retrocessionaires which fall outside of the scope of the Insurance Directive altogether;

   ii) It is not in any event possible to identify the content of any rights granted to the Claimants on the basis of the provisions of the Insurance Directive;

   iii) No breach of the Insurance Directive occurred since the obligations it imposed on the United Kingdom were properly discharged;

   iv) Any breach was not sufficiently "manifest and grave" as to ground Francovich/Factortame state liability;

v) There is no direct causal link between the alleged breaches of the Directive and the damage alleged to have been sustained by the Claimants;

vi) The claims are time barred.

The Group Litigation Order/Costs Scheme

11. A Group Litigation Order ("GLO") was made on 5 April 2004 and amended on 10 May 2004. Two "Adverse Costs Schemes" have also been agreed under which the potential costs liability of participating Names is capped.

The Issues to be Tried

12. At the first Case Management Conference on 31 March 2004, two issues were identified for determination at this trial known as "the first sub-trial". The two issues, shortly described and as they have come to be known, are the Grant of Rights Issue and the Limitation Issue.

The Agreed Statement of Facts (The ASF)

13. The Order made by Cresswell J on 31 March 2004 also provided for the joint preparation of a Statement of Facts for the purposes of the first sub-trial. That has been done. Where agreement was not possible, the rival contentions have been set out. The ASF is a very substantial document, and I have edited it to some extent for the purposes of incorporating it as an Appendix to this judgment. It forms Appendix I.

The Worked Examples and the Limitation Issue

14. The Statement of Facts included "worked examples" by reference to ten nominated sample names (five nominated by each party) illustrating the parties' cases on two issues material to the Limitation Issue, namely when the alleged cause of action arose and questions of knowledge. I have not included the worked examples in the Appendix.

15. By a further Order made by Cresswell J on 22 February 2005, it was ordered that "so far as it is necessary to determine the position of any particular Claimant in relation to limitation, that question shall (unless the trial judge otherwise directs) be determined for the purposes of the first sub-trial … by reference to the Sample Names identified in the Statement of Facts." Mr Plender QC's strictures about not treating all the Names in the same way must be seen in the context of this Order. The sample Names were intended to be representative of the whole, unless some particular matter raised a real likelihood of a substantive distinction.

Abbreviations

16. A list of the abbreviations most frequently used in this judgment (and the Appendices) forms Appendix 2.

Chronology

17. A chronology of the more important events forms Appendix 3.

The Trial/Evidence

18. The first sub-trial was originally listed for hearing in May 2005. The dates were vacated by Order of 14th April 2005. At a Case Management Conference, held on 27 January 2006, I ordered the trial to commence on 3 July following five reading days.

19. The Grant of Rights Issue was substantially limited to submissions of law. The Limitation Issue also raised complex issues of law and raised the issues of fact identified in paragraph 24 below. It was to those issues that the evidence was directed. Witness Statements were served from all the Sample Names except Mr Davis. With the exception of Mr Davis, who was not required for cross-examination, all were called by the Claimants to give oral evidence. They were, in the order they were called to give evidence, Mr Henderson, Dr Arnold, Mr Thomas-Everard, Mrs Maybury, Mr Harris, Miss Stewart-Smith, Mrs Mahon, Mr Villiers and Mr Kingsley. The sample Names chosen by the Claimants were Messrs Henderson and Thomas-Everard, and Mrs Maybury, Miss Stewart-Smith, and Mrs Mahon. Messrs Henderson, Kingsley and Thomas-Everard were parties to Jaffray.

20. The Claimants also served witness statements from, and called to give oral evidence, a number of other witnesses. Except in the case of Mr Freeman, their statements were relied upon only to the very limited extent that they were marked to that effect. These witnesses were:

    i) Mr Michael Freeman, a solicitor and the partner in the Claimants' solicitors having conduct of this claim. Mr Freeman also made his statement and gave evidence in his "capacity as long-standing legal representative of many groups of Names in relation to their affairs at Lloyds."

    ii) Mr Ian Hay Davison, who was Chief Executive and Deputy Chairman of Lloyd's from 15 February 1983 until February 1986. Mr Hay Davison was asked to take on that role by the Governor of the Bank of England. He said his task was "to clean up the market and to alter the structure of power to prevent a recurrence of the iniquities of the late 1970s".

    iii) Mr James Sinclair who, in 1987, became Managing Director of Willis Faber Members Agency Ltd, a members' agency at Lloyd's. He was a Working Name on the Council of Lloyd's from 1997 to 2000. He is also a Claimant.

    iv) Mr John Jackman, a chartered accountant, who became a Member of Lloyd's in 1977, and was "finance director, secretary and/or corporate adviser to Lloyd's brokers from 1974 to 1997".

    v) Mr Alan Smallbone, who became a Member of Lloyd's in 1959 and worked as a Lloyd's broker from 1955 to 1988 when he retired.

    vi) Mr Frank Attwood, a Chartered Accountant involved in the audit of a number of Lloyd's entities in the period 1984 to 2004.

    vii) Mr Barrington Jervis, employed in the Lloyd's market from 1961 to 1992 as deputy underwriter, claims manager and, from 1989, as syndicate analyst and compliance officer at a members' agent.

viii) Mr Paul Mason who worked in the Lloyd's market in the marine claims departments of brokers from 1954 until his retirement in 2000.

21. Two witness statements were served on behalf of the Defendant. Neither witness was required to attend for cross-examination. They were:

i) Mr Julian Burling, Counsel to Lloyd's since 1995; and

ii) Ms Lorna Robertson, a solicitor employed by the Treasury Solicitor.

22. By way of general comment, whilst many of the External Names may have known little about the specifics of insurance or how Lloyd's worked, they were generally intelligent, inquiring, and resourceful people as the evidence demonstrated. They were of course well able to recognise the losses they suffered and the unquantifiable exposures which put their fortunes at severe risk. Most set about seeing what could be done about it. In their researches and questioning they often showed both more application and intelligence than those who worked at Lloyd's some of whom, of course, felt the chill winds of potential liability upon them.

THE LIST OF PRINCIPAL ISSUES

The Grant of Rights Issue

23. The parties have agreed a List of the "principal issues". The List is annexed to this judgment as Appendix 4. The Grant of Rights Issue (so far as it is the subject of this trial) is addressed in paragraphs 1 to 3A of the List. The Court has been invited to assume (paragraph 2), contrary to the Defendant's case, for the purpose of determining those issues, that the Claimants will establish their pleaded case on causation, in effect that the obligation to implement the Insurance Directive had not been properly discharged, that this failure was sufficiently serious to give rise to an action for damages, and that it caused the loss claimed as alleged in the RRAPC.

The Limitation Issue

24. The Limitation Issue is addressed in paragraphs 8 to 12 of the List. It can be summarised for introductory purposes of this judgment as follows:

i) It is agreed that the applicable limitation period is prima facie that prescribed by Section 2 of the Limitation Act 1980, namely that "an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued".

ii) The Claimants' primary case is that by reason of the European principle of effectiveness as applied in case C-208/90 Emmott v Minister for Social Welfare and Attorney General [1991] ECR I-4269 the point for commencement of the running of the six-year period cannot be earlier than the date on which the Insurance Directive was fully transposed.

iii) Alternatively, and also relying on Emmott, it is submitted that time does not begin to run earlier than the date on which the Claimant knew or was in a position to know of the failure of the Defendant to transpose the Insurance Directive.

iv) Alternatively, even if the six-year period had expired before the proceedings were commenced, as a matter of domestic law and/or by reason of the European principles of effectiveness and equivalence, the court is required to apply section 14A of the Limitation Act 1980, or a rule akin to it, so as to give each Claimant the benefit of an alternative three year period from the date on which he or she knew, or was in a position to know, that he had suffered loss by reason of the Defendant's failure to implement the Insurance Directive. It is said it is for the Defendant to show, which it cannot, on the evidence relating to the ten sample Names, that each Claimant acquired the requisite knowledge more than three years before his or her claim commenced.

v) In the further alternative it is submitted that the principle of effectiveness and the national law of "continuing" breaches causing loss, require that a Claimant cannot be barred from recovering the loss incurred within the six-year period ending with the commencement of the claim, even if earlier losses are properly time-barred.

vi) Finally it is submitted that if it is material to determine when, as a matter of domestic law, each Claimant's cause of action first accrued, it did so at the earliest when each first became liable to pay a contribution to syndicate underwriting liabilities as a result of the Defendant's failure to implement the Insurance Directive and not, as the Defendant contends, on some earlier date on which a Claimant was committed to underwriting or wrote business on a particular year.

25. It is substantially for the purposes of the Limitation Issue that it is necessary to set out the history of the material events, keeping in mind that what is stated is derived largely from documentation not all of which may have been available to or read by the Names.

THE INSURANCE DIRECTIVE

The Long Title and Preamble

26. The Insurance Directive is described in its long title, and in the first paragraph of the Preamble, as being "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".

27. The word "direct" is, it is rightly agreed, used in contrast to reinsurance. The Insurance Directive is concerned with the insurance of original insureds by insurers, albeit, of course, the solvency of an insurer may be influenced by the efficacy of a reinsurance programme.

28. As required by Article 254 EC, the Preamble to the Insurance Directive specifies the reasons on which it was based and identifies the proposals and opinions which were required to be obtained before it was adopted. The material part of the Preamble is as follows:-

> "Having regard to the Treaty establishing the European Economic Community, and in particular Article 57 (2) thereof;

> Having regard to the General Programme for the abolition of restrictions on freedom of establishment, and in particular Title IV C thereof;
>
> Having regard to the proposal from the Commission;
>
> Having regard to the Opinion of the European Parliament;
>
> Having regard to the Opinion of the Economic and Social Committee"

Sources in the Preamble

29. Article 57 (now 47) is part of Chapter 2 of Title III of the Treaty. Chapter 2 is entitled "Freedom of Establishment". Article 57 in its original form read:-

> "1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, on a proposal from the Commission and after consulting the Assembly, acting unanimously during the first stage and by a qualified majority thereafter, issue Directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.
>
> 2. For the same purpose, the Council shall, before the end of the transitional period, acting on a proposal from the Commission and after consulting the Assembly, issue Directives for the co-ordination of the provisions laid down by law, regulation or administrative action in member states concerning the taking up and pursuit of activities as self-employed persons….
>
> 3….."

30. The full name of the General Programme is "the General Programme for the Elimination of Restrictions on Freedom of Establishment". The material parts of the General Programme are set out at paragraphs 4.1.4 to 4.1.5 of the ASF. Title IV.C, to which specific reference is made in the Preamble to the Insurance Directive, stipulated a time table for the removal of restrictions on freedom of establishment for various undertakings, including direct insurance firms.

31. The material parts of the Commission's Proposal are set out at paragraph 4.1.6 to 4.1.9 of the ASF. The Directive as eventually approved was based on the Proposal and thus, unsurprisingly, there is nothing in the Proposal itself which adds to or detracts from such arguments as arise from the wording of the Directive's Recitals and Articles.

32. The material parts of the Opinion of the European Parliament are quoted at paragraph 4.1.14 of the ASF. The Opinion addressed the solvency margin and a minimum guarantee fund to be based on rates for which the Parliament:

> "5. unanimously recognizes that the determining criterion for setting these rates should be the intention to protect insured parties, that is, the own capital endowment of an insurance firm should allow it, permanently and in every case, to execute the insurance contracts that it has concluded."

33. The material parts of the Opinion of the Economic and Social Committee are set out at paragraphs 4.1.11 to 4.1.13 of the ASF. The Opinion contains a discussion of the treatment of financial requirements and of the provisions relating to technical reserves, the solvency margin and the guarantee fund.

The Recitals

34. The Recitals in the Preamble to the Insurance Directive (numbered by me) so far as relevant provide:

> "i) Whereas by virtue of the General Programme the removal of restrictions on the establishment of agencies and branches is, in the case of the direct insurance business, dependent on the coordination of the conditions for the taking-up and pursuit of this business; whereas such coordination should be effected in the first place in respect of direct insurance other than life assurance.
>
> ii) 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.
>
> iii) Whereas a classification of risks in the different classes of insurance is necessary in order to determine, in particular, the activities subject to a compulsory authorization and the amount of the minimum guarantee fund fixed for the class of insurance concerned.
>
> iv) ….
>
> v) Whereas the various laws contain different rules as to the simultaneous undertaking of health insurance, credit and suretyship insurance and insurance in respect of recourse against third parties and legal defence, whether with one another or with other classes of insurance; whereas continuance of this divergence after the abolition of restrictions on the right of establishment in classes other than life assurance would mean that obstacles to establishment would continue to exist ; whereas a solution to this problem must be provided in

subsequent coordination to be effected within a relatively short period of time.

vi) Whereas it is necessary to extend supervision in each Member State to all the classes of insurance to which this Directive applies; whereas such supervision is not possible unless the undertaking of such classes of insurance is subject to an official authorization; whereas it is therefore necessary to define the conditions for the granting or withdrawal of such authorization; whereas provision must be made for a right to apply to the courts should an authorization be refused or withdrawn."

vii)….

viii ix x) The Eighth, Ninth and Tenth Recitals deal respectively with technical reserves, the solvency margin and the minimum guarantee fund. The eighth recital demonstrates that some aspects of coordination were to be reserved for later Directives. It provided:-

"Whereas the search for a common method of calculating technical reserves is at present the subject of studies at Community level ; whereas it therefore appears to be desirable to reserve the attainment of coordination in this matter, as well as questions relating to the determination of categories of investments and the valuation of assets, for subsequent Directives …

xi) ….

xii) Whereas the coordinated rules concerning the taking-up and pursuit of the business of direct insurance within the Community should, in principle, apply to all undertakings entering the market and, consequently, also to agencies and branches where the head office of the undertaking is situated outside the Community ; whereas it is, nevertheless, desirable as regards the methods of supervision to make special provision with respect to such agencies or branches in view of the fact that the assets of the undertakings to which they belong are situated outside the Community.

xiii) ….

xiv) ….

xv) Whereas it is important to guarantee the uniform application of coordinated rules and to provide, in this respect, for close collaboration between the Commission and the Member States in this field."

35. The reference in Recital (ii) to ensuring "adequate protection for insured and third parties" and in Recital (v) to "insurance in respect of recourse against third parties and legal defence" has been the subject of some debate. The Claimants submit that the references demonstrate that the Insurance Directive is not limited in its objectives to freedom of establishment but extends to protection of insureds and "third parties". But I do not think, as the Claimants contend, that "third parties" is used in the sense of anyone at all who may in some way be affected by the matters which are the subject of the Insurance Directive. The third parties are those who are neither insureds nor insurers but may have claims against insureds who provide, for example, liability insurance or parties who are otherwise entitled to the benefit of insurance. The words are also used in Recital (v) in the context of insurance against the legal costs of bringing a claim against a "third party" or defending an action brought by a "third party". It follows that, in my judgment, these Recitals are of no relevance to the Grant of Rights Issue. If it had been intended, which was the target of the Claimants submission, to include insurers (including Names) as amongst those to be "protected", it would not have been done so obliquely in a Directive in which the objectives are clearly stated. Nor is there anything which could be (or is) put forward in the Articles themselves to support the Claimants' submission.

Articles 1 to 5

36. Articles 1 to 5 are "General Provisions". Article 1 identifies the matters with which the Insurance Directive is concerned. It provides:

> "This Directive concerns the taking-up and pursuit of the self-employed activity of direct insurance carried on by insurance undertakings which are established in a Member State or which wish to become established there in the classes of insurance defined in the Annex to this Directive."

37. Articles 2 to 4 deal with the types of insurance and the insurance undertakings covered by the Insurance Directive. Article 5 contains definitions.

Articles 6 to 22

38. Articles 6 to 22 are entitled "Rules applicable to undertakings whose head offices are situated within the Community". Articles 6 to 12 provide for "conditions of admission"; Articles 13 to 21 for "conditions for exercise of business" and Article 22 for "withdrawal of authorisation".

39. Article 6 imposes the requirement that Member States shall make the business of direct insurance subject to authorisation. Article 7 deals with the ambit, territorial and otherwise, of an authorisation.

40. Article 8.1(a) deals with the entities which can be authorised in the various Member States. It refers to "Lloyd's underwriters". This was corrected in 1978 to "the association of underwriters known as Lloyd's". Article 8.1(b), (c) and (d) direct that Member States are to require insurance undertakings to limit their business activities, submit a scheme of operations and possess the minimum guarantee fund. It is apparent from the Article, and the material in the ASF (4.1.17 to 4.1.21) that the "very

particular" nature of Lloyd's was recognised in the drafting of the Insurance Directive.

41. Articles 9 and 11 detail what the scheme of operations is to cover. Article 10 deals with agencies and branches of undertakings whose head office is in the territory of another Member State. Article 12 deals with refusal to grant authorisation.

42. Article 13 requires Member States to "collaborate closely in supervising the financial position of authorised undertakings". Article 14 deals with verification of solvency. Article 15 deals with technical reserves. Article 16 deals, in considerable detail, with the solvency margin. It contains references in that context to reinsurance. Article 17 deals with the guarantee fund. Article 18 deals with assets which constitute the technical reserves. Article 19 deals with the provision of accounting documents. Article 20 deals primarily with undertakings which are in financial difficulty. Article 21 deals with the assignment of policies.

Articles 23 to 29

43. These Articles deal with undertakings whose head office is outside the Community.

Articles 30 to 32

44. These are transitional provisions.

Article 35

45. Article 35 requires implementation of the Directive within 18 months of its notification (i.e. by January 1975).

Other Travaux Preparatoires

46. Other material said to be *travaux preparatoires* is referred to in the ASF. The material comprises:-

i) a report of the Economic and Social Committee dated 13 March 1967 (ASF para. 4.1.10);

ii) an amendment, in the event accepted, proposed by the Working Group on Economic Matters (ASF para. 4.1.15);

iii) a Commission working document referred to at para. 4.1.16 of the ASF;

iv) internal Commission notes relating to Lloyd's (ASF para. 4.1.17);

v) a Commission note dated 27 December 1972 relating to Lloyd's (ASF para. 4.1.18);

vi) a Working Party note dated 26 February 1973 relating to Lloyd's (ASF para. 4.1.20);

vii) various other notes referred to at paras. 4.1.21 to 4.1.25 of the ASF.

47. These materials were included at the request of the Claimants. In the event no particular reliance was placed on any of them.

AMENDING AND OTHER DIRECTIVES

48. The Insurance Directive has been amended on numerous occasions. Amending Directives specifically mentioned in the Claim and the ASF are 88/357 ("the Second Non-Life Directive") and 92/49 ("the Third Non-Life Directive").

The Second Non-Life Directive – Directive 88/357

49. The Second Non-Life Directive (dated 19 December 1991) is described in its long title and in the Preamble as being "on the coordination of laws, regulations and administrative provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC". The Preamble refers to Article 57(2) (now 47(2)) and to Article 66 (now 55) of the Treaty. The latter concerned the freedom to provide services.

50. The Claimants rely on the Second Non-Life Directive only in their case on breach and not in connection with grant of rights. The Recitals demonstrate that the primary purpose of the Second Non-Life Directive was coordination of laws, regulations and administrative provisions for the purpose of facilitating freedom of establishment, that the supervision and regulation of insurance undertakings was an important consideration relevant to that coordination, and that the need to protect policy holders, which is mentioned in a number of Recitals, was also an important consideration.

The Accounts Directive – Directive 91/674

51. Directive 91/674 ("the Accounts Directive") is described in its long title and in the Preamble as being "on the annual accounts and consolidated accounts of insurance undertakings". The Preamble refers to Article 54 (now 44) of the Treaty which is concerned with freedom of establishment.

52. The Claimants rely on the 1991 Accounts Directive not only in connection with breach but also in connection with grant of rights. The relevant paragraphs of the RRAPC read:

> "83 Moreover the Insurance Directive must be read with the 1991 Accounts Directive on the annual accounts and consolidated accounts of insurance undertakings, which amended the Insurance Directive and assists in its interpretation. Article 4 of the 1991 Accounts Directive provides that it shall apply to Lloyd's subject to the adaptations set out in the Annex to that Directive, the said Annex requiring Lloyd's accounts to show, *inter alia*, inter-syndicate business and provision for IBNR.
>
> 84 The purpose of the 1991 Accounts Directive is set out in the recitals thereto, which include:-

> "Whereas Article 54 (3) (g) of the Treaty requires coordination to the necessary extent of the safeguards which, for the protection of the interests of members and others, are required by Member States of companies and firms within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community;
>
> …
>
> Whereas such coordination is also urgently required because insurance undertakings operate across borders; whereas for creditors, debtors, members, policyholders and their advisers and for the general public, improved comparability of the annual accounts and consolidated accounts of such undertakings is of crucial importance."

53. Paragraph 5.2 of the ASF contains further information about the 1991 Accounts Directive. The relevance of the Accounts Directive was not, however, the subject of much debate. Rightly so, in my judgment. Not only is it somewhat of a stretch of the ordinary rules of construction to rely on a later Directive to construe an earlier one, but I see nothing in the Accounts Directive to assist to that end in any material respect, save perhaps that the only specific stated purpose of the need for coordination of 'safeguards' is not one of any relevance to the Grant of Rights Issue.

The Third Non-Life Directive – Directive 92/49

54. The Third Non-Life Directive is described in its long title and in the Preamble as being "on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239 EEC and 88/357/EEC". The Preamble refers to Article 57(2) (now 47(2)) and to Article 66 (now 55) of the Treaty. There are 33 Recitals.

55. The Claimants rely on the Third Non-Life Directive only in their case on breach and not in connection with grant of rights.

COMMENT

56. I do not think it difficult to identify from this material what was the purpose and objective of the Insurance Directive whether viewed on its own or as amended. It was to enable direct insurers (other than life insurers) to carry on their business throughout the EC without discrimination either in favour of a home state of establishment or otherwise based on their place of establishment. Unsurprisingly, it was recognised that to achieve that objective it was necessary to co-ordinate the existing provisions in member states applicable to authorisation to carry on insurance business to avoid differences between provisions applicable to insurers in the home state and those established in other states. Again unsurprisingly, it was also recognised that to achieve equality or uniformity of opportunity the supervisory powers, including powers to withdraw authorisation, over insurers had to be co-ordinated so far as at the time was achievable.

57. The existence of authorisation and supervisory powers in Member States was, of course, the result of the perceived need to protect so far as possible insureds from the failure of insurers to honour their commitments. It is therefore also no surprise to find references to the protection of the interests of insureds (not reinsureds). But even if Names can be said to have had a unique status, the status cannot in my judgment be equated with or even considered to be analogous to the position of insureds. I think the primary analogy is to an insurer with perhaps a secondary analogy to a shareholder or investor in an insurance company or firm. As a matter of basic impression, I think it is improbable that the Insurance Directive was intended or is to be construed as granting rights to insurers or shareholders or investors: that would be to describe the subject of supervision as having a right to be supervised.

THE LLOYD'S ACT 1982

58. The expressed purpose of the Lloyd's Act was to establish a Council at Lloyd's, to define the functions and powers of the Council and to amend and repeal certain provisions of the Lloyd's Acts 1871 to 1951. The Council was given powers to "regulate and direct the business of insurance at Lloyd's" and to make bye laws (section 6), to regulate admission to the Society, and for the host of purposes expressed in Schedule 2 to the Act. There was an exclusion of liability for damages (save for fraud) in favour of the Society of Lloyd's at the suit of a "member of the Lloyd's community" (Section 14). It is not necessary to say more about the Lloyd's Act, (further detail can be found in section 2.2 of the ASF), save to note that I think it understandably gave rise to the oft-quoted description of Lloyd's as "self-regulating".

THE INSURANCE COMPANIES ACT 1982 ("The ICA 1982")

59. The ICA 1982 made detailed provisions for the authorisation and regulation of Insurance Companies. By Section 2(2)(a) insurance business carried on by a member of Lloyd's was expressly excluded from the authorisation provisions of the ICA 1982 and by Section 15(4) of the Act it was excluded from the regulation provisions "provided that … the requirements set out in Section 83 … are complied with…."

60. Section 83, so far as material, and as amended, provided that:

> "(1) The requirements referred to in 15(4) above are as follows.
>
> (2) Every underwriter shall, in accordance with the provisions of a trust deed approved by the [Treasury], carry to a trust fund all premiums received by him or on his behalf in respect of any insurance business.
>
> (3) Premiums received in respect of long term business shall in no case be carried to the same trust fund under this section as premiums received in respect of general business, but the trust deed may provide for carrying the premiums received in respect of all or any classes of long term business and all or any classes of general business either to a common fund or to any number of separate funds.

(4) The accounts of every underwriter shall be audited annually by an accountant approved by the Committee of Lloyd's…

(4A) The Council of Lloyd's and the [Treasury] shall be furnished with a certificate from the accountant who audits the accounts of an underwriter which –

(a) is in the prescribed form; and

(b) contains the statements mentioned in subsection (5) below.

(5) The statements so required in relation to the accounts of an underwriter are statements that in the opinion of the auditor-

(a) the value of the assets available to meet the underwriter's liabilities in respect of insurance business is correctly shown in the accounts; and

(b) the value of those assets is sufficient to meet the liabilities calculated-

(i) in the case of long term business by an actuary; and

(ii) in the case of other liabilities, by the auditor on a basis approved by the [Treasury].

(6) Where any liabilities of an underwriter are calculated by an actuary under subsection (5) above, he shall furnish a certificate of the amount thereof to the Committee of Lloyd's and to the [Treasury], and shall state in his certificate on what basis the calculation is made; and a copy of his certificate shall be annexed to the auditor's certificate.

(7) The underwriter shall, when required by the Committee of Lloyd's, furnish to them such information as they may require for the purpose of preparing the statement of business which is to be deposited with the [Treasury] under section 86 below."

61. Section 84 (as amended) provided:

"84 Lloyd's underwriters – financial resources

> (1) Subject to such modifications as may be prescribed and to any determination made by the [Treasury] in accordance with regulations, sections 32, 33 and 35 above shall apply to the members of Lloyd's taken together as they apply to an insurance company to which Part II of this Act applies and whose head office is in the United Kingdom.
>
> (2) The powers conferred on [the Treasury or] the Secretary of State by sections 38 to 41, 44 and 45 above shall be exercisable in relation to the members of Lloyd's if there is a breach of an obligation imposed by virtue of subsection (1) above."

62. The effect, in general but sufficient terms, of this provision was to apply to "the members of Lloyd's taken together" (in effect all Syndicates) the requirement applicable to insurance companies to maintain a minimum margin of solvency (sections 32 and 33) and to keep assets in such a manner as might be prescribed (section 35). A breach of those obligations gave rise to powers in the Treasury to require Lloyd's to take such action as appeared to be appropriate "for the purpose of protecting policy holders or potential policy holders … against the risk that [Lloyd's] may be unable to meet its liabilities…."

63. Section 86 (referred to in sub-section (7) of Section 83) provided:

> "(1) The Committee of Lloyd's shall deposit every year with the [Treasury] a statement in the prescribed form summarising the extent and character of the insurance business done by the members of Lloyd's in the twelve months to which the statement relates.
>
> (2) Regulations made for the purposes of this section may require the statement to deal separately with such classes or descriptions of business as may be specified in the regulations."

64. A new Section 96A was inserted in the ICA 1982 by Regulations made in 1990 which expressly referred to the Insurance Directive.

65. Statutory Instruments, both specific to Lloyd's and of wider application but referring to Lloyd's, made in 1979, 1981 and 1994 also referred to the Insurance Directive in Explanatory Notes.

THE LIMITATION ACT

66. Section 2 of the Limitation Act 1980 is quoted in paragraph 24.i) above. Section 14A of the Act was inserted by Section 1 of the Latent Damage Act, 1986. So far as material it provides:

> "(1) This section applies to any action for damages for negligence … where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either-

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the Plaintiff … first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both-

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are-

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that

person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

CHRONOLOGY AND FACTS

The Insurance Directive

67. The Insurance Directive should have been transposed into national law by 27 January 1975 and should have been in force no later than 27 July 1976.

Decisions in America

68. By the early 1980s, courts in America had established the strict liability of employers for asbestosis and the "triple trigger" test for the liability of insurers: see section 6.1 of the ASF.

The Brochures

69. Applicants for membership of Lloyd's were issued with Brochures which spelt out the unlimited but several liability of a Name. The Brochures also contained paragraphs 5 and 13 which addressed regulation and the Lloyd's solvency test in these terms:

"5 REGULATION.

5.1 Underwriters at Lloyd's are subject to regulation in the United Kingdom and in certain other countries ….

Whilst the Secretary of State has responsibility for overseeing and monitoring insurance business within the United Kingdom, the Lloyd's Acts, together with the Insurance Companies Act, specifically give the Council and Committee of Lloyd's full powers of self-regulation of the Lloyd's market. The Council is, however, accountable to the Secretary of State

for Industry (and hence to the United Kingdom government) and is required to lodge various statutory returns and other information with the Secretary of State for Industry.

5.2….

13. LLOYD'S SOLVENCY TEST

13.1 Pursuant to the United Kingdom Insurance Companies Act (under which Lloyd's operates) each Member's underwriting accounts must be submitted annually, as at each 31st December, to a rigorous solvency test conducted by a firm of chartered accountants approved by the Council of Lloyd's. This test is carried out in accordance with the "Instructions for the Guidance of Lloyd's Auditors" (referred to as the "Instructions") issued annually by the Council of Lloyd's and approved by the Secretary of State. If, after taking into account all assets, … a Member's accounts do not conform to the standard of solvency required, he will be obliged to provide sufficient additional funds or to cease underwriting. In conducting the annual solvency test, the managing agent and active underwriter of the syndicate must determine the reserves necessary to be created on the syndicates accounts including the amount required to close the account at the end of its third year….

13.2 The Instructions which are reviewed annually by the Council of Lloyd's set out the responsibilities placed upon auditors in connection with the annual solvency test of members of Lloyd's, including in particular, the method to be adopted in calculating the value of the assets and the estimation of the outstanding liabilities as at the year end.

13.3 The Instructions require that the assets taken into account for the solvency test are valued at the year end. In the case of the Premiums Trust Fund, these may include cash with approved banks and discount houses, certain types of investments specified in the British Trustee Investments Act and their equivalent where the funds are invested in non UK obligations. Premiums Trust Fund Monies may also be invested in other securities which are readily realisable. These latter securities may not, however, exceed 40% of the Trust Fund plus net amounts due from Lloyd's Brokers. Other assets which may be taken into account include balances due from Lloyd's Brokers and the Members' personal funds, e.g. Special Reserve Fund, Personal Reserves and Lloyd's Deposits, but, in the case of the Lloyd's Deposit,

subject to the restrictions referred to under "description of securities", 8.3.

13.4 Minimum requirements are prescribed in the Instructions for calculating the estimated future liability. In carrying out this exercise the managing agent must ensure that all factors are taken into account and, in many cases, the required figure will be higher than the prescribed minimum. For the purpose of estimating liabilities, underwriting accounts are divided into categories representing sub-divisions of the business underwritten in the four main markets, i.e. Marine, Non-Marine, Motor and Aviation, and scales of reserves, expressed as percentages of premium income, are set out in the Instructions for each of these categories. These percentage reserves, which are based on the general claims experience of the markets, are an absolute minimum requirement and if the claims experience for a syndicate demonstrates that a higher provision is needed, then it must reserve that higher figure. In addition, an alternative test based on the syndicate's estimate of the outstanding liabilities as at the previous 31st December (which must include a provision for unknown and unnoted losses) is prescribed in respect of the third and subsequent years of account should this prove to be higher than the percentage reserves.

13.5…."

70. Thus, any Name who read the Brochures, would have read that Lloyd's had "full powers of self-regulation" but also that it was "accountable" to the Government. The Brochures were key documents alleged in Jaffray to contain the representations on which the Names relied in their Defence and Counterclaim: see paragraph 157 below.

The Fisher report

71. The Fisher report into Self-Regulation at Lloyd's was published in May 1980. It was a substantial document. Chapter 2 was entitled "Statutory Control over the Insurance Industry". It included the following paragraphs:

"2.01 In this chapter we seek to demonstrate the extent to which Lloyd's is subject to statutory regulation, and how its freedom to regulate itself is thereby limited. We do not consider it to be the duty of this Working Party to consider the sufficiency or otherwise of the measures of statutory regulation which exist, or to suggest changes to them. The area with which we are concerned is that in which, by definition, there is no statutory regulation and Lloyd's is left free to regulate itself. We are not, for instance, concerned with the adequacy of the regulations governing the Audit, in so far as these are regularly

approved by the Secretary of State. We are however concerned with the effectiveness, or otherwise, of the steps taken by the Committee to ensure that statutory requirements are carried out by Members.

2.02 The Insurance Industry, both in the United Kingdom and in the many countries and states in or with which Members of Lloyd's do business, is governed by legislation. In the United Kingdom the principal statute governing the Insurance Industry is the Insurance Companies Act 1974 but, in addition, by virtue of the European Communities Act 1972, the Insurance Industry in the United Kingdom is subject to the Treaty of Rome and to Regulations and Directives made under the Treaty…. Both in the United Kingdom legislation, the EEC legislation and in the legislation of many other countries special provision is made for members of Lloyd's by virtue of the fact that Lloyd's is recognised to be a unique institution. The exemptions from control which are accorded to Members of Lloyd's are dependent on the proper exercise by the Corporation of Lloyd's of its responsibility to regulate the Market, to maintain standards and to ensure compliance by the Members with the requirements of the various regulatory bodies. This fact alone provides a powerful argument for a constitutional system which will enable this responsibility to be carried out effectively.

2.08 As a result of an EEC Directive, a statutory instrument (S.I.1979 No. 956) was brought into operation in 1979 which applies to Lloyd's as a whole the same solvency requirements as apply to insurance companies. Further, it empowers the Secretary of State to intervene in Lloyd's affairs if it is unable at any time to meet these requirements. It enables the Secretary of State to exercise in relation to Lloyd's certain of those powers of intervention he is granted in respect of insurance companies in the Insurance Companies Act 1974.

2.11 There are a number of EEC Directives which affect Members of Lloyd's in so far as they are operative as part of the law of England and Scotland, or of any other EEC country in which Members of Lloyd's transact business-

Reinsurance Directive	25/2/64	64/225/EEC
Co-ordination of Laws Directive	24.7.73	73/239/EEC
Freedom of Establishment Directive	24/7/73	73/240/EEC
Co-insurance Directive	30/5/78	78/473/EEC

> Directive re Freedom of Establishment
>
> and Freedom of Services for
>
> Insurance Intermediaries 13/12/86 77/92/EEC
>
> The European Commission has also made proposals for further Directives which, if and when adopted, may affect the conditions under which Members of Lloyd's are free to provide insurance services throughout the community. We shall not find it necessary in this report to refer further to these Directives and draft Directives. However it is important for Lloyd's to bear in mind that any rules and regulations which the Society may impose on its members, any requirements which Lloyd's imposes as a condition for admission in any capacity, and any disciplinary rules and procedures must comply with European Community law and in particular with the Rules on Competition (articles 85-90 of the Treaty) which are administered by the European Commission (Directorate-General IV). We have had this in mind in the recommendations which we make in this report."

72. Thus, any Name who read the Fisher report would have known that there were a number of European Directives, including the Insurance Directive, which affected them, and that there was statutory regulation of Lloyd's. The report, of course, ante-dated the ICA 1982. The provisions of the Insurance Companies Act, 1974 are summarised in section 3.3 of the ASF.

The Neville Russell Letter

73. On 24 February 1982, the Chartered Accountants, Neville Russell, wrote to "The Manager" of the Audit Department at Lloyd's, on behalf of themselves and five other firms of panel auditors. The letter stated:

> "A substantial proportion of our Syndicate clients have losses, or potential losses, arising from asbestosis and related diseases.
>
> It appears that although, in respect of direct insurance of the main carriers and reinsurance of American insurers, Syndicates have received some notification of outstanding claims, they are unable to quantify their final liability with a reasonable degree of accuracy for the following reasons:
>
> (i) You have informed us that there have been approximately 15,000 individual claimants. Total exposure to the problem appears to be considerably in excess of this figure.
>
> (ii) The Courts have not yet finally decided on whether the exposure or manifestation basis is applicable.
>
> (iii) The losses are being apportioned over carriers on an "industry" basis. If one of the carriers has losses in excess of its insurance cover (as seems likely) then it could go bankrupt. It

> appears that its share of the industry loss could be apportioned over the remaining companies.
>
> (iv) Most Syndicates are not very certain of their reinsurance recoveries.
>
> (v) Most Syndicates will incur losses on their own writings of re-insurance business. Very little of this has been advised so far.
>
> The Audit Instructions (Clause 3) require that if there are any factors which may affect the adequacy of the reserves, then the auditor must report to the Committee and obtain their instructions before issuing his Syndicate Solvency Report.
>
> We consider that the impossibility of determining the liability in respect of asbestosis falls into this category and we accordingly ask for your instructions in this respect."

The Murray Lawrence Letter

74. On 18 March 1982, the Deputy Chairman of Lloyd's, Mr Murray Lawrence, wrote to all underwriting agents and active underwriters, with "copies for information" to all panel auditors, on asbestosis and the Lloyd's audit at 31 December 1981. The letter stated:

> "Potential claims arising in connection with Asbestosis represent a major problem for insurers and reinsurers. It is therefore all the more important that the reserves created in the Lloyd's Audit at 31 December, 1981, fairly reflect the current and foreseeable liabilities of all syndicates.
>
> I should stress that the responsibility for the creation of adequate reserves rests with Managing Agents who will need to liaise closely with their Auditors. Clearly, individual circumstances will vary, but it is felt that the following broad guidelines may be helpful to Underwriters, Managing Agents and Auditors in agreeing equitable reserves as at 31st December, 1981, and ensuring, so far as possible, a reasonably consistent approach to this problem.
>
> 1. Reserves for Asbestosis liabilities should be separately identified and disclosed to Auditors. This applies for both the closing and open years.
>
> 2. Substantial information has been built up in the LUNCO Office regarding direct business ….
>
> 3. It is in the area of reinsurance writings that the information available may be least complete. Nevertheless, the Committee believes that some information is now available within the

Market and Underwriters and Managing Agents should discuss with their Auditors the steps they have taken to quantify and reserve for losses which may arise on an Excess of Loss or Pro Rata basis as a reinsurance of American or other insurers. In this connection, Underwriters should attempt to identify reinsureds on whom Asbestosis claims are likely to fall and to seek their opinion as to the basis on which contracts together with the reserves which they are carrying at the present time and an estimate of possible future liabilities.

4. The Committee is aware of the legal argument whether liability arises on the basis of "exposure" or "manifestation". It is not, however, for the Committee to express an opinion as to which is correct. For the purpose of reserves at 31st December, 1981, Managing Agents are strongly advised to carry a reserve which is the higher of the alternatives.

5. An IBNR "loading" should be carried for those claims not specifically advised but which could come to light in the years ahead. The decision regarding the appropriate IBNR percentage is a matter for the Agent and his Auditor to resolve dependent on the circumstances of each case. It would be inappropriate for the Committee to lay down a minimum loading but, it appears that this loading should be substantial to reflect unreported cases on the direct account and incomplete information on the reinsurance account. Credit may, of course, be taken in respect of reinsurance recoveries, but Agents should verify, so far as possible, that reinsurers have been identified and have agreed to accept claims on the basis submitted. In the event that there are disagreements with reinsurers these should be discussed with Auditors. (The normal guidelines regarding the admissibility of reinsurance recoveries obviously will apply).

6. A syndicate which has written a run-off or stop loss in respect of an Asbestosis account which has been signed into an open year, should advise the details to its Auditors and where appropriate, the open year reserves should be increased.

7. A syndicate underwriting London Market Excess of Loss business should make particular and comprehensive efforts to ascertain the extent of its possible liability going beyond those claims which have been advised at 31st December, 1981, and these should be fully disclosed to and discussed with Syndicate Auditors. The same requirements should apply to specialist Personal Stop Loss syndicates.

8. Where the reserve for Asbestosis represents a material proportion of the total reserves of the syndicate, Agents should consider whether or not to leave the account open. It is

> the Agent's responsibility to ensure that the reserves provided for Asbestosis are sufficient to meet the Syndicate's liabilities regardless of whether the account is closed or left open.
>
> 9. Managing and Members Agents are strongly advised to inform their Names of their involvement with Asbestosis claims and the manner in which their syndicate's current and potential liabilities have been covered."

The ICA 1982 and Lloyd's Act

75. Both Acts were in force by the end of January 1983. Their relevant provisions are set out above.

Open Years

76. In 1985 the Outhwaite 1982 year of account was left open because the liabilities were not capable of assessment such as to justify a RITC.

The Neill Report

77. The Neill Report was published in January 1987. It was a very substantial document. Chapter 12 was entitled "The Constitution". It included the following:

> "12.3 In chapter three we outlined the arrangements implemented under the 1982 Act for governing the Society. If the comparison is made between this structure and the regime envisaged under the Financial Services Act (outlined in chapter two), there can be little doubt that Lloyd's will be less subject to external monitoring than the SROs which will be supervised by the SIB. This contrast is not as extreme, however, as some observers have suggested. Both the Department of Trade and Industry and the Bank of England have statutory functions in relation to Lloyd's which give rise to a certain degree of external accountability. Moreover, the composition of the Council was specially designed so as to provide a check on the power of the working members.
>
> 12.4. The Department of Trade and Industry's role arises from its responsibility for the authorisation and subsequent prudential supervision of insurers. One important element of this is the monitoring of their compliance with statutory solvency requirements. With regard to Lloyd's the Department's role is much more limited than it is in relation to insurance companies since the Society has statutory powers to regulate its own affairs. The Department has to approve the deed governing the premiums trust fund and the guidance provided by Lloyd's to auditors as to the basis on which members' non-life insurance liabilities are calculated. It also receives auditors' certificates in relation to the accounts of all underwriting members and a statement of business covering the

> market as a whole submitted annually by the Council of Lloyd's. The purpose of these documents, which are reviewed by the Department, is to confirm the solvency of individual members of Lloyd's and to show that collectively they satisfy each year the solvency margin requirements laid down in legislation. The Department's memorandum, produced at Appendix 14, explains its role in more detail and describes the residual powers available in the event of non-compliance with the statutory conditions. These important functions, which have their most recent basis in the Insurance Companies Act 1982, are, however, limited in scope and directed towards the protection of the interests of policyholders rather than Names, though the latter may derive some incidental benefit from them. It needs to be stressed that the Department's statutory responsibility is concerned exclusively with the protection of policyholders; it has no duty to protect the interests of Names. Thus, although officials have commented on various aspects of the consultative documents issued by Lloyd's in the process of regulatory reform, the Department has not attempted to develop any special role in that connection. For the future, section 59(1)(a) of the Financial Services Act will confer on the Secretary of State a power (which can be transferred to the SIB) to prohibit any individual whom he judges to be not fit and proper from being employed in connection with investment business by 'authorised persons or exempted persons'. The Society of Lloyd's and those permitted by the Council to act as underwriting agents are within the definition of exempted persons (section 42).
>
> 12.5 The Governor of the Bank of England has a statutory responsibility to confirm the appointment of the nominated members of the Council under section 3(2)(c) of the Lloyd's Act. This responsibility carries with it no right to intervene in the regulation of the Society, but, in the difficult circumstances that existed in the latter part of 1982, the then Governor took the initiative in persuading Lloyd's to create the new post of Chief Executive to which Mr Ian Hay Davison was appointed (see paragraph 3.14)"

78. The Appendix (Appendix 14) to the Neill Report, referred to in paragraph 12.4, contained the DTI's submission "on its functions in relation to Lloyd's". It contained an accurate description of the relevant provisions of the ICA 1982.

79. Thus, any Name who read the Neill Report would be aware that the DTI had statutory functions in relation to Lloyd's in particular in relation to solvency of individual Names and of Lloyd's "collectively". They would also have learnt of the author's view that these powers were directed towards the protection of the interests of policyholders rather than Names "though the latter may derive some incidental benefit from them".

ALM News

80. By way of illustration, in the June 1989 issue of ALM (Association of Lloyd's Members) News there was an article on "Reinsurance to Close". The article noted that "it was rare for a syndicate to leave open a year of account" but "the 1982 Account changed all that" because of the problems created by thousands of asbestosis claimants in America. The article continued:

> "Syndicates were dealt a further blow as environmental pollution claims threatened to dwarf the asbestosis losses. At the end of 1988, 76 syndicates had, between them, a total of 120 open years as a result of these claims and other market problems. Inability to compute the RITC's for those years has resulted in a marketwide problem affecting most of the members of Lloyd's. None of the syndicates with these problems is in a position to close its open years of account. Indeed, the situation has deteriorated further this year with more syndicates reporting that they have had to keep open their 1986 Accounts."

81. The August 1989 issue of ALM News reported on the 1986 year of account ("exceptionally good") which would have been even more profitable but for the deterioration on prior years' closed accounts. The article described the deterioration in these terms:

> "This is a sombre reflection of the fact that long tail asbestosis and pollution claims are hitting reinsurance to close brought forward from 1985 and earlier closed years of account nearly as hard as they are hitting the syndicates with open run-off years of account. The deterioration, during calendar year 1988, of syndicates with open run-off years amounted to £179 million."

82. The February 1990 issue of ALM News included an article which, albeit stating the obvious, opened with the words:

> "Over recent years money has been flooding out of Lloyd's in order to pay claims relating to policies written decades ago. These claims which relate to asbestosis and pollution losses were, until recently, completely unanticipated and therefore Lloyd's syndicates were caught without adequate reserves. This is causing a strain on the current membership and is resulting in many Names paying for losses arising on policies written before they were born. This has occurred at the same time as Lloyd's Syndicates find their reserves coming under heavy fire from the Inland Revenue resulting in Names being attacked on two fronts."

83. These statements are, I think a fair reflection of the widespread nature of the crisis that enveloped Lloyd's and of the timing of its revelation. Anyone who was then a member of a syndicate which was exposed to such mounting losses on RITC written in earlier years, or a member of a syndicate which had been unable to close its

account for the same reason, would be all too aware of the losses to which he or she was already exposed and the continuing but unknown losses to which such Names remained exposed and from which they had no means of escape.

The Task Force Report

84. In January 1991, Lloyd's set up a Task Force to investigate and report on its long term future. The Chairman of the Task Force was David Rowland. He submitted the final report of the Task Force to the Chairman and Council on 31 December 1991. On 11 January 1992 the Chairman sent a copy to all Names under cover of a letter stating that it would repay careful study.

85. In Section 6 of the report ("reforms to current syndicate structure") and sub-section 6c ("additional reserving") at paragraph 67, the report stated:

> "At present, if it is to be allowed for tax purposes in toto, a managing agent is required by the Inland Revenue to set the syndicate RITC on a 'no profit/no loss' basis. The agent also has a duty to set the RITC at a level which is equitable to both the reinsuring Names and the Names on the closing year. This approach presupposes that the RITC can be set with a certain degree of precision. In some cases it can, for instance for short-tail business, but in many cases it cannot. The RITC can often only reflect a subjective judgment arrived at after considering a wide variety of factors. Consequently, an RITC can, with hindsight, often be seen to have been wrong. It will have been set in good faith, drawing on all relevant information and using appropriate reserving techniques, but it can still prove insufficient. Thus the receiving Names must carry a risk that the RITC will prove inadequate (likewise they have a potential upside should the RITC prove more than adequate). The reality of this risk is emphasised in the 1988 Global Accounts which show a deterioration of £365 million in respect of prior closed years, following a deterioration of £1295 million in 1987. At present the tax regime encourages many underwriters and their advisers to set and agree an RITC premium which is likely to be allowed by the Revenue as not containing a profit element or risk premium."

86. In Section 7 of the Report ("managing old and open years") under the sub-heading "Background to old years problem" at paragraph 7.8 it was recorded that:

> "The size of the old years problem first became apparent in the first half of the 1980s, and its impact on Names has steadily increased since then. Over the past 4 years, the cumulative prior year underwriting result has been a loss of £1.6 billion; each year has seen a steady rise (Exhibit 52). The impact of these prior year losses, coupled with the cyclical downturn in current underwriting profits, lies at the heart of the market's current difficulties."

87. Chapter 14 of the Report contained a set of proposals for a new structure of governance at Lloyd's. The chapter included paragraphs on "The Role of Regulation" two of which should be quoted:

> "14.22 The regulatory change effected by the Council following the Lloyd's Act 1982 has been substantial. The Neill Committee commented, "the Council have acted with energy and determination in using their powers. They have transformed self-regulation at Lloyd's. We know of no profession or equivalent organisation which has accomplished such a major programme of reform in such a short timescale". Other perspectives however offer a less positive view: the market's reputation has suffered in some respects over the past decade and certain Names feel that the regulatory system at Lloyd's has not protected their interests; the market sees some aspects of regulation as more detailed and expensive than is warranted. A number of the submissions we received suggested that Lloyd's would do well to pass regulatory responsibility to the DTI or some other outside government body.
>
> 14.23 The two main purposes of regulation at Lloyd's are to protect policyholders on the one hand and members of Lloyd's on the other. The first of these roles is achieved primarily by complying with statutory solvency requirements of the DTI, under the Insurance Companies Act 1982, and the requirements of other insurance regulations throughout the world. We cannot see how the DTI could be expected to take on a greater role in this aspect of regulation than they already perform."

88. The Task Force Report, therefore, stated that "in many cases" an RITC could not be set with precision and could often, with the benefit of hindsight, be seen to be wrong. It also spelt out the "statutory solvency requirements of the DTI under" the ICA 1982 and, echoing the Neill Report, that they were for the protection of policyholders but not Names.

89. Mr Thomas-Everard was sent on 20 January 1992 a document, from a source which has not been identified, commenting on the Task Force Report. The document stated that the "very large losses being suffered by many Names" were

> "to a significant extent due to:
>
> The failure to reserve adequately for risks assumed in the past and for which no time limit was placed on claims.
>
> The failure of the Council of Lloyd's to monitor the market and its practices adequately.
>
> The failures of Members' Agents to recognise the risks inherent in the spiral reinsurance of reinsurance market, their decision to place Names on such syndicates …."

Meeting with John Redwood

90. A Mr Mantle and Mr Thomas-Everard met with Mr Redwood, then Minister for Corporate Affairs at the DTI, on 26 January 1992. Mr Thomas-Everard's evidence was that at this meeting Mr Redwood told them that Parliament had denied to the DTI the power to regulate Lloyd's unless Lloyd's was found to be insolvent.

91. There is a Note of the meeting prepared by Mr Mantle and sent to Mr Thomas-Everard at the time. The subject of the meeting appears from the Note to have been about the powers of the DTI, Serious Fraud Office and Lloyd's itself to intervene if issues of fraud or crime were involved, which Mr Redwood said he had no reason to suspect. The Task Force Report was also discussed. The meeting ended with Mr Redwood asking to see the evidence Mr Mantle and Mr Thomas-Everard had to support the matters they raised. The Note itself does not contain any reference to the regulatory powers of the DTI in the terms of which Mr Thomas-Everard gave evidence. He was adamant that someone at the DTI had also taken a note of the meeting (as one might expect) but no such note has been found despite what I accept has been a thorough and entirely appropriate disclosure exercise carried out by the Defendant. The first written reference to Mr Redwood's words appears in another note of Mr Thomas-Everard written over 3 years later: paragraph 137 below.

The April 1992 Fax

92. Mr Thomas-Everard also disclosed part of a fax sent to him in April 1992 which contained lists of "current and expected allegations against" respectively the Council of Lloyd's, "my members agency" and "various managing agencies". The former were said to include:

> "1. fraudulently and or negligently inducing my initial and continuing membership by wilful non-disclosure of material matters.
>
> 2. failure, wilful and continuing, to disclose a wide variety of material matters to me at the appropriate time or at all, including the following failures.
>
> 3. failure to regulate members agencies, and ensure that they at all times observe their fiduciary duties to Names in preference to their duties to managing agencies, Lloyd's and the Council.
>
> 4. failure to regulate managing agencies, and ensure that they at all times observe their fiduciary duties to Names in preference to their duties to Lloyd's and the Council.
>
> 5. failure to regulate the LMX market, and in particular the LMX spiral.
>
> 6. failure to regulate the cash call process.

> 7. failure to regulate syndicate accounting for reserves, profits, surpluses, losses and deficiencies.
>
> 8. failure to regulate the composition of syndicate years of account.
>
> 9. failure to regulate brokerage commissions.
>
> 10. failure fraudulently and or negligently to disclose the above and other material matters.
>
> 11. making fraudulent demand under my guarantee."

93. In the course of cross-examination, Mr Thomas-Everard said this seemed to be a reasonably good list of "what most people considered" in 1992 to be the failures of Lloyd's which had led to the enormous and continuing losses to which Names were exposed.

The Morse Report

94. In June 1992, a Working Party chaired by Sir Jeremy Morse reported to Lloyd's on "A New Structure of Governance for Lloyd's". The Report records that the Council of Lloyd's had rejected the proposals of the Task Force but "in the light of the extensive discussion and support which they generated" the Working Party had been asked to look at them again: see the ASF at 6.2.19.

"Euro Law"

95. The Daily Telegraph of 8 September 1992 reported on the response of "cash-strapped Lloyd's Names" to the Writs brought against them by Lloyd's for payment of their liabilities. The article referred to some 200 Writs and to the "Writs Response Group" (paragraph 6.2.29 of the ASF) and to the Names "appealing to European law to skirt the immunity that is granted to Lloyd's under British legislation so that the group can include a counterclaim against Lloyd's in its defence". The proposed complaint to the European Commission was to be based on EC competition law.

The Boswood/Moriarty Opinion

96. On instructions from Richards Butler, Mr Anthony Boswood QC and Stephen Moriarty wrote an Opinion dated 26 October 1992 addressing the question whether Names who became members of Merrett Syndicate 418/417 for the first time for the 1984 and 1985 underwriting years had valid claims for damages arising from the closing into the 1984 or 1985 years of account of earlier years. If the earlier years had been left open those Names would not have been exposed to the vast losses that confronted them. The Syndicate had written run-off protections for US casualty exposures of other insurers whose concerns about their exposure had led them to pay the very large premiums demanded for the run-off cover. The Opinion included the following passages:

> "For reasons which will appear, we entirely fail to understand how Mr Emney, Mr Merrett, or any other underwriter at the relevant times could possibly have reached the conclusion that

> he was better able than the cedant syndicate or company to predict the outcome of such claims on their accounts – or to make any such prediction at all with any degree of confidence that it would turn out to be right.
>
> The material which we have seen, and which was deployed in open court during the Outhwaite trial, fully supports the conclusion that, well before any of the run-off contracts was written, and therefore long before any question of closing the 1982 year of Syndicate 418/417 arose, the asbestos problem was perceived to be of the utmost severity, and to constitute the gravest crisis ever to confront the insurance industry. Moreover, the impact of asbestosis claims on the industry generally, and on the accounts of particular insurers and reinsurers was perceived to be completely incalculable.
>
> This perception was not confined to US insurers: on the contrary, it was, or should have been, shared by anyone working in the London market having anything to do with the insurance or reinsurance of non-Marine risks emanating from the United States."

97. Mr Thomas-Everard was a member of Syndicate 418/417. But regardless of who may have had access to the Opinion, it reflects, I think, on the evidence, a general perception at the time amongst anyone working in Lloyd's or indeed concerned with the losses they were suffering as Names.

Europe Again

98. On 27 October 1992 the Daily Telegraph reported that a group of Names calling themselves the "Lloyd's Deposit Defence Group" had filed a 100-page complaint with the European Commission under the competition rules then found in Articles 85 and 86 of the Treaty of Rome on the basis that Lloyd's was obliged but had failed to supervise the market adequately or to establish rules that would ensure proper working practices.

The Chatset Guide

99. As stated in paragraph 6.2.22 of the ASF, in November 1992, Chatset published a guide to syndicate run-offs and commented on serious under-reserving for syndicates with books of US casualty business, stating that it was not in question, being found not only at Lloyd's but right throughout the insurance industry. It was said that no one could make anything better than an educated guess at the final outcome. Tables were published of the increase in reserves made by the largest 10 syndicates in the years 1987, 1988 and 1989.

The LNAWP

100. In a Lloyd's Names Association Working Party ("LNAWP") document, dated January 1993, reference is made to 25 Action Groups which were "up and running" and to the "asbestos time bomb" which was affecting the Lloyd's Market. The document refers

to the Neville Russell letter, the closure of the 1979 account, despite the letter, and the alleged knowledge of Lloyd's from 1979 onwards of the depth of the problem which had not been disclosed to the 19,000 Names who had joined since: para 6.2.23 of the ASF. The Neville Russell letter (paragraph 73) had, of course, referred to the "impossibility" of determining the liability for losses arising from asbestosis. Plainly the letter was by now widely known and was the subject of publicity.

The Names Asbestos Working Party

101. The Names Asbestos Working Party met on 11 January 1993 (the record of the Meeting is wrongly dated 1992). Mr Stockwell was present as Chairman of LNAWP. Mr Dinkel represented the Writs Response Group. 10 other Names were present. Mrs Mahon was sent the record of the Meeting. She readily and rightly agreed in cross-examination that no one could read the record without realising that there was a problem which affected the whole of the Lloyd's market and that reading it no one could fail to draw the conclusion that there was and had been a regulatory failure at Lloyd's; a failure she described in re-examination as "a general failure to regulate".

102. The record of the meeting concluded by stating that the "useful pool of information … could only act as a spur to further investigation and the formation of a specific case against Lloyd's". Those attending or to be supplied with the record were also "reminded … of the need for confidentiality in order to maintain the flow of information from the market". Again, as Mrs Mahon said in cross-examination, it was obvious "at this stage" that further investigation was both necessary and appropriate.

The Open Years Panel Report

103. Paragraph 6.2.24 of the ASF records that by March 1993, Mr Stockwell of the LNAWP and Chairman of the Panel on Open Years which was appointed to report on the problem to Lloyd's, reported that half of Lloyd's Names were now in law suits against Lloyd's agents and underwriters, trying to recover damages for what they considered to be the failure of regulation and lack of professional standards. The Open Years Panel identified six major causes for the ever-increasing number of open years. Latent liabilities were the single largest cause, responsible for 42 per cent of open years by number and 60 per cent by stamp capacity. 26,000 Names were exposed to open years with asbestos and pollution liabilities and, as Mr Stockwell wrote to the Chairman of the Market Board in a letter dated 15 March 1993, some 15,000 to 17,000 Names were by then engaged in litigation against Lloyd's agents and underwriters. Reference was made to "unquantifiable and potentially under-reserved liabilities" in the context of RITC and the inability of the Panel to ascertain the full extent of the future liabilities facing the Market and the Names. The Report remarked that, given the widespread nature of the problem, the severity of Names' losses and the inadequacy of Lloyd's responses, it was unsurprising that at least 12 of the actions under preparation were directed squarely at the question of run-offs caused by latent liability and alleged historic under-reserving, with further cases being planned. The Report recommended the formation of NewCo (ie. an entity of the kind eventually established as Equitas – see below) to take over the historic liabilities of syndicates pre- 1985. [*The Claimants say:* the Report was treated as confidential to the Council of Lloyd's and was not circulated to Names. *The Defendant says:* the report was not treated as confidential to the Council, and was made available to all Names to review in the Lloyd's library following its publication in March 1993].

Whichever party is right about the dissemination of the Report, its factual contents as recorded in the ASF are plain and were hardly a secret at the time.

The Role of Mr Stockwell

104. In a letter to Mr Middleton, the Chief Executive Officer of Lloyd's, dated 10 April 1992, the Chairman of the Lloyd's Names Asbestos Working Party wrote:

> "Please understand that on all general matters Christopher Stockwell speaks for all Action Group Chairmen and thus represents some 16,000 Names."

105. Mr Stockwell was present in Court during at least most of the trial. He has played a pivotal role in seeking redress for Names.

Lloyd's Business Plan

106. Paragraph 6.2.25 of the ASF records that in April 1993, Lloyd's circulated a Business Plan to all Names because of the "problems of the past". The accompanying letter from the Chairman of Lloyd's pointed out that the current results were the worst in Lloyd's history, that many members had been brought to the brink of financial ruin, that others were fearful for the future, that confidence in the Society had been shaken and that radical action was required. The alternative was said to be bleak. If the membership and the Market would not unite behind the plan, then Lloyd's itself might have no future. The extent of the crisis was apparent to anyone looking at this document. The plan was to act swiftly to end the uncertainties of open years and old liabilities and to build a new Lloyd's with new independent regulation and higher professional standards, with lower costs and a strong growing capital base. The restructuring which would take place would "ring fence" the problems of the past.

107. Paragraph 6.2.26 of the ASF states that in Chapter 3 of the Business plan, the plan for managing the old year problems was spelt out. The continual inadequacy of reserving and RITC had led to the need for Lloyd's to propose that "we will develop the system and control necessary to improve the objective testing of the adequacy of the reserves for these liabilities" and the reinsurance of the liabilities for 1985 and prior years into a properly capitalised reinsurance company.

108. This, if it was not already all too apparent, was a clear recognition that reserving and RITC for the relevant liabilities had been inadequate and that the systems and controls for testing them required to be "improved".

109. The Business Plan carried forward the Task Force's proposal for the introduction of corporate, limited liability capital into the market. The proposal to manage the old years problem through an adequately capitalised reinsurance company (called the 'NewCo Project') eventually came to fruition with the establishment of Equitas as part of the R&R Plan with the scope of the scheme expanded to cover liabilities for 1992 and all earlier years: para 7.1.1 of the ASF.

Clementson and Mason: Saville J

110. On 16 December 1993 Saville J delivered judgment on preliminary issues in the cases of The Society of Lloyd's v Clementson and The Society of Lloyd's v Mason reported at [1994] CLC 71. The issues arose out of actions concerning claims by Lloyd's for reimbursement from members of sums paid out of the central fund to meet the Names' liabilities. One of the issues was whether Lloyd's had been guilty of anti-competitive practices contrary to the EC Treaty. Saville J held that the answer to this issue was "No". Both in the pleadings and the judgment reference was made to the Insurance Directive. Saville J held that in exercising its powers to seek reimbursement for sums paid out of the central fund the Society was not engaged in activities which were subject to Article 85 of the EC Treaty and nor was Section 14 of the Lloyd's Act capable of infringing the Treaty. In the course of his judgment, and addressing a submission by the Defendant Names about the Insurance Directive, Saville J said, at page 86 B to C:

> "It seems to me to be clear beyond argument that the UK has a continuing obligation to comply with the directive. How it does so is a matter for the national government. In the case of Lloyd's this country has chosen to permit the Society a large degree of self-regulation. If this self-regulation fulfils the requirements of the directive (and no one suggested before me that it did not) then the UK has performed its Community obligations in this regard. Thus on any view there is a close connection between the directive and the Lloyd's Act 1982. It is true that only member states are bound by the directive, but that seems to me to be neither here nor there, for the question is whether the section in question is capable of being in breach of Community law, not whether the society itself is bound by the directive."

The First Settlement Offer

111. The first Lloyd's proposal for an overall settlement of the litigation in the market was in the form of a settlement offer document sent to approximately 22,000 Names. This offer was rejected early in 1994. See para 7.1.3 of the ASF.

Mason: The Pleadings

112. In the Mason Case, the Defendant had instructed Mr Freeman. Mr Freeman instructed counsel who, following the decision on preliminary issues, settled, on 15 April 1994, Further and Better Particulars of Mr Mason's Re-Amended Points of Defence and Counterclaim.

113. Answer 1(i) stated:

> "All Lloyd's officials, at all relevant times, were well aware that the whole basis on which the Lloyd's market operated was as set out in paragraph 4 of the Re-Amended Points of Defence and Counterclaim. Such officials knew, at all material times, that it was difficult or impossible to determine with any, or any

> reasonable, certainty, the degree of risk assumed by syndicates, or the extent of the potential liabilities of syndicates, because of the particular features of the Lloyd's market referred to in paragraph 4 of the Re-Amended Points of Defence and Counterclaim…."

114. Mr Thomas-Everard agreed in cross-examination that these allegations were very similar to the allegations of a failure to regulate made both in the Jaffray litigation and in this case, albeit directed against Lloyd's and not the DTI as they are in this case. In re-examination, despite Mr Plender QC's best efforts, essentially he confirmed those answers referring to the Neville Russell letter as the basis of the case that it was impossible to determine the risks being taken by the syndicates.

115. The same evidence was given by Mr Thomas-Everard in relation to Request and Answer 3 which included the following:

> "3. Insofar as the Defendant intends at trial to make any positive case as to what Lloyd's should do, whether in its regulatory function or otherwise, in order to seek to assess or control the exposures assumed by Lloyd's syndicates, then give full and precise particulars of the Defendant's case.
>
> ANSWER
>
> 3. Lloyd's should have taken the following steps:
>
> (1) Lloyd's should have devised, and introduced, an effective premium income monitoring scheme which:
>
> (a) gave an early warning of overwriting by syndicates;
>
> (b) took account of the adequacy of insurance rates;
>
> (c) differentiated between the riskiness of different classes of business being written;
>
> And/or
>
> (2) Lloyd's should have developed a categorisation of the riskiness of different types of business for the purposes of its solvency requirements, with higher risk business requiring higher solvency margins; and/or
>
> (3) Lloyd's should not have permitted 100% credit to be taken for reinsurance ceded to other Lloyd's syndicates, for the purposes of its solvency requirements; and/or
>
> (4) Lloyd's should have set limits to the proportion of high risk business (including, in particular, LMX business) that Names were permitted to write; and/or

> (5) Lloyd's should have introduced requirements for managing agents of each syndicate to:
>
> (i) maintain reliable and up-to-date records of aggregate exposures (on both gross and net bases), as part of the syndicate's accounting records; and/or
>
> (ii) prepare, and obtain board approval of, proper and accurate underwriting plans for each year; and/or
>
> (iii) disclose to Names the level of aggregate exposure assumed,…."

LNAWP and the DTI

116. Mr Stockwell, writing on behalf of the LNAWP, wrote to a Mr Hobbs at the DTI on 11 August 1994 (the letter was mistakenly dated 1984). The first two paragraphs of the letter read:

> "My attention has been brought to two matters fundamental to Lloyd's solvency this year and I would appreciate your comments. I am aware that David Rowland says solvency is settled and in the bag but I still have questions!
>
> Firstly you will doubtless have seen Mr Grossman's letter to The Times concerning directive 91/674/EEC and the Francovich decision. My attention was drawn to these some months ago in a "learned dissertation" (!) but they have only acquired a new relevance in the light of my second point. I would be grateful to know if you agree that the Government will be liable for the losses of Names and Policyholders arising from passing Lloyd's for solvency if that proves to be subsequently incorrect. If you do not accept the government will become liable, what are your reasons?"

117. The letter to The Times referred to had been printed on 9 August. The letter included the statements:

> "If the DTI certifies Lloyd's solvency this year and Lloyd's is later shown to have been insolvent, then based on the EC Insurance Accounts Directive (91/674/EEC) in force from January 1, 1994, and the 1991 Francovich decision of the European Court of Justice, the British Government might well be liable for any ensuing losses suffered by both names and policyholders."

118. The target of these letters was the DTI's responsibility for the solvency of Lloyd's in 1994/5 in the context of the Accounts Directive. Plainly, however, the possible relevance of European Directives and the existence of Francovich liability were

matters under consideration by some (including Mr Stockwell) who were seeking to address the losses of Names.

Clementson and Mason: Court of Appeal

119. The Court of Appeal (Sir Thomas Bingham, MR, Steyn and Hoffmann LJJ) delivered their judgments on appeal from Saville J on 10 November 1994. The decision is reported at [1995] CLC 117. The Court allowed the appeal. It decided that, to quote the headnote:

> "Lloyd's was capable of being regarded as an association of undertakings within the meaning of art. 85 of the EC Treaty. Certain decisions taken by Lloyd's … had the potential to affect trade between member states and to distort competition in the common market. It followed that the issue of whether Lloyd's had infringed art. 85 could not be determined as a preliminary point of law but should proceed to trial to be decided on the evidence."

120. In the course of his judgment, at pages 123 to 125, Sir Thomas Bingham referred to "the Regulatory background" including the Insurance Directive. He described the ICA 1982 as "enacted in part to give effect to the obligation of the UK under the directive". Although, in his evidence, Mr Freeman asserted that Sir Thomas Bingham had said that the ICA 1982 properly transposed the Insurance Directive into national law, I do not think he did. It was not before the court as an issue; Saville J had expressly declined to say more than I have quoted at paragraph 110 above, and I think Sir Thomas Bingham meant no more than he said as quoted in this paragraph. Indeed, if it were otherwise, it would be a nice question as to whether or not the issues of breach and relating to Government statements were ones which this court should, and the Defendant was entitled to, approach as authoritatively addressed, even if not decided as a matter of precedent, unfavourably to the Claimants.

The Stance of the DTI

121. Complaints by Names about the role of the DTI in relation to Lloyd's developed throughout 1994. There are numerous examples in the documents. Largely because Mr Freeman described it as "the best précis of the DTI's position as at 1994" that he had been able to find, I shall refer to a letter from a Mr Brebner of the Insurance Division of the DTI to a Mr Bingham dated 10 November 1994. Mr Brebner wrote:

> "On *solvency* the position remains as I described it in my previous letter, ie that subject to the completion of the detailed checking, Lloyd's has met the statutory requirements. We do not anticipate any problem completing the scrutiny, but I am sure you will understand that the checking of the certificates for over 33,000 Names does take some time.
>
> I share your hope that the *Equitas (alias NewCo)* project will indeed be successful, but decisions on the authorisation of the company will naturally depend on the outcome of work still to

> be completed, and I would not wish in any way to prejudge the outcome.
>
> With regard to the *Neville Russell letter*, it seems to us that there is a great danger that in looking back on the events of 1981/92 with the benefit of twelve years hindsight, one will impute much more sinister motives than are reasonable. As we see it, Lloyd's acted within a month of receiving the letter to alert the market to the problems. Lloyd's also advised agents to inform the Names concerned of the potential problems. That does not seem to be an unreasonable way of proceeding.
>
> In this connection you enquired about the *DTI's actions* at the time. I should perhaps remind you that the Department's duties relating towards Lloyd's are laid down specifically in what is now the Insurance Companies Act 1982. These duties are aimed mainly at policyholder protection and monitoring the solvency of Lloyd's. In particular the Department is responsible for
>
> (i) the receipt of certificates relating to the accounts of every underwriter and the approval of the basis for calculating certain liabilities (s 83(4) & (5));
>
> (ii) the receipt of the Statutory Statement of Business (s86), with which is associated the prescription of the application of sections 32, 33, and 35 of the Act (s84), and (should the situation arise) the exercise of any appropriate powers referred to in s84(2) in the event of a breach of s84(1);
>
> (iii) the approval of the deed governing the premiums trust funds (s83(2));
>
> (iv) the exercise of powers relating to the transfer of business (s85).
>
> On the other hand, Lloyd's is charged (under the Lloyd's Act 1982) with the "management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's." The Department discharged its duties in full throughout the period in question. In particular, in the light of emerging data about the size of asbestosis and environmental pollution claims, DTI ensured that the level of reserves for the relevant class of business was increased – though it was only with the passage of time that the full magnitude of the claims became apparent, so the increase in reserving was spread over a number of years."

122. It is, in my judgment, hard to criticise this letter as a description of the role of the DTI; certainly it does not in any way seek to obscure the role of the DTI in monitoring the solvency of Lloyd's which, in substance, is the role of which

complaint is made in these proceedings. The letter does assert that the DTI discharged its duties, including ensuring an increase in the level of reserves (a point itself the subject of criticism as the next reference demonstrates) but that should hardly have surprised the reader or anyone else who was advancing, or might be seen to be considering whether or not to advance, a claim against the DTI.

LNAWP Submission to TCSC

123. On 1 December 1994, LNAWP made a substantial written submission to the TCSC on Self-Regulation at Lloyd's. The submission included a preface, signed by Mr Stockwell. The preface included the following:

> "This submission was started several months ago when the Treasury Select Committee announced its intention to investigate self-regulation at Lloyd's. During the last few months, the Names have won some important legal victories and it has become clearer to the General Public and the Press that they are the victims of one of the worst regulatory failures the City has ever seen. The Appeal Court has ruled there must be a trial of the Names allegations that Lloyd's has been in breach of European Law since 1982 and that some of its fundamental arrangements are illegal. If the Names win their case then they will be eligible to pursue substantial claims for damages against the Society, which would have no immunity from suit in that eventuality, and against the government which had approved the arrangements complained of.
>
> ….
>
> US regulators have expressed concern at the "hands off" attitude of the DTI regulators, and damning criticism of the methods of regulators in general, in the report of the House of Representatives Sub-Committee on Oversight and Investigations entitled "*Wishful Thinking*". (Extracts are appended to this report). The New York Insurance Commissioners have also announced they are investigating the solvency of the Society and the management of Lloyd's American Premium Trust Fund.
>
> Rarely can so many people have suffered so much damage as the regulatory failure at Lloyd's has caused…."

124. The text of the submission itself included the following:

> "Names perceive the present structure of regulation at Lloyd's has tended to view the protection of policy holders as being more important than the protection of Names and question the close relationship between the DTI and the Corporation of Lloyd's."

"The Government has had a role in permitting the under-reserving of the Society and in failing to maintain protection for Names. The DTI in pursuit of its objective of protecting policy holders has colluded in a systematic misrepresentation of the adequacy of the Society's reserves to the Names."

"The Names losses in the last few years are the result of a systematic failure of self-regulation at Lloyd's over the last decade."

"The protection of policy holders has been interpreted as complying with the statutory solvency requirements of the DTI under the Insurance Companies Act of 1982. The experience of the last 4 years would suggest that this was inadequate to ensure proper protection for policy holders, since we stand on the brink of a significant default. The lack of any apportionment of capital in relation to risks has meant that the market has taken on a disproportionately large amount of long tail high risk business for which it is totally unsuited. The poor standards of underwriting, management and professionalism that have been evidenced in a succession of Loss Review Committee reports, have also demonstrated the vulnerability of policy holders as the solvency of the market progressively collapses as a consequence of past regulatory failures.

It is worth mentioning who the Policy Holders are in Lloyd's. Half the policy holders are other Lloyd's syndicates due to the excessive re-cycling within the market. Most of the remainder are large Multi-national corporations. Very little of Lloyd's business is small personal lines for UK subjects. It follows that a default by some Names has the effect of causing bad debt write-offs for other Names and therefore mutualises a substantial part of any resulting loss before the balance falls principally on large American companies.

It must also be questioned whether the close relationship between the DTI and the Corporation of Lloyd's is in the interest of anybody. The willingness of the DTI to defend the apparently indefensible in Lloyd's in the last year has been remarkable, with many letters from Ministers giving the appearance of having been drafted by the staff of the Corporation.

Action Group Investigations

There are now over 40 action groups at Lloyd's all set up to investigate the circumstances of particularly large losses that have now arisen for Names. Without exception these investigations have uncovered appallingly low underwriting standards and most of them have found a great many other malpractices. Several have found evidence of fraud. These

investigations are usually leading to litigation though the absence of any resources to pay compensation is causing some of the more recent groups to simply assemble information which is unlikely to lead to recovery litigation. The losses arising on syndicates covered by the action groups are over £5 billion. This is less than half the losses that the market will have made. This does not mean that the remaining losses are considered to be "acceptable" trading losses. In many cases they result from the same failures to reserve adequately in the past, or to rate properly, or to make adequate reinsurance arrangements which are the main problems bedevilling syndicates where litigation is in progress. One of the proofs of the failure of self-regulation is that these other situations are not being investigated and are being treated as "acceptable" market losses. Our evidence is that the causes of almost all the losses investigated are the same. Low underwriting standards, poor reinsurance programmes, failure to maintain adequate records, failure to monitor aggregate exposures, unwillingness to withdraw from uneconomic business because of the loss of commission and brokerage that would result for the working members, and all these reflect poor and unacceptable standards across the market as a result of the lack of proper regulation.

The Responsibility of Her Majesty's Government

The Government's attitude has been that Lloyd's is a self regulatory body under its own Act and therefore the Government has no responsibility for the way in which it has conducted its affairs or for the losses which Names have suffered. The Government has sought to argue that its sole responsibility has been to ensure that policy holders are protected.

In two important ways however the Government has been directly involved in creating the present debacle. Firstly throughout the mid and late 1980s the Inland Revenue took a great interest in the RITC and sought to challenge it on the basis of being a tax avoidance scheme. The poor standard of record keeping and the inadequate methods of calculation employed by underwriters in setting the RITC meant that in many cases underwriters were not able to justify their RITC calculations adequately with the result that substantial amounts of RITC were disallowed by the Revenue for tax purposes. In many instances underwriters were probably not unhappy about this since like the Revenue they had the same vested interest of wishing to maximise short term profitability. The long term damage is all too clear now to everybody, and particularly to those Names who have been ruined in the last three years.

The second Government department involved has been the DTI. The DTI is responsible for the protection of policyholders.

> It has no responsibility for the protection of Names which is exclusively the responsibility of the Lloyd's Council. In pursuit of its primary objective of protecting policy holders, the DTI has been concerned to increase the level of reserves at Lloyd's. Since 1983 it has involved the Government Actuary's Department in the setting of reserves and has agreed a programme of "stair stepping" the minimum reserve percentages which it sets for Lloyd's in order systematically to increase the reserves. The process agreed between Lloyd's Council and the DTI has been effective in increasing the reserves many more times than the annual turnover originating from outside the market. There is real danger of creating the best reserved insolvent institution in the world. At no time do the DTI or Lloyd's appear to have given consideration to their obligations to Names where these have conflicted with their obligations to policy holders. At no time have the 20,000 Names who joined since 1982 been told that a policy of increasing reserves was being pursued, which would inevitably have the effect of reducing the profits payable to Names. In a company it is a reasonable policy to pursue to pay historic losses out of present or future profits, and provided this is disclosed to the market in the annual profit forecasts the effect on the capital base is fully taken account of in the variations on the share price. The capital base at Lloyd's renews itself annually and at no time are Names obliged to carry on. **By being kept in ignorance of the agreement between the DTI and Lloyd's to increase reserves names were misled and believed that their underwriting would be more profitable than it was in fact going to be.**"

125. Mr Stockwell, as Chairman of LNAWP, was here asserting in a document addressed to the TCSC that Names had a number of potential claims against the DTI in respect of its conduct and their losses.

The LNAWP and the TCSC

126. At a public hearing before the TCSC on 30 January 1995, Mr Stockwell informed the Committee that the LNAWP brought together "the majority of action groups concerned with litigation at Lloyd's and that is now some 34 or 35 which are associated with us; there are half a dozen who are not. We are circulating a newsletter each month to some 23,000 Names". Although the size of the circulation figure came as a surprise to Mr Sinclair, there is, as he acknowledged, no reason at all to doubt its accuracy.

The LNAWP Newsletter February 1995

127. The Newsletter addressed the prospect of a new settlement offer. It asked the question: "Would Names also give up their right to litigate against Lloyd's and the DTI for further compensation or the recovery of their deposits?"

128. Mrs Mahon said that if those in charge of the action groups thought it was worthwhile to bring an action against the DTI she would have expected them to tell her and do it.

129. The Newsletter also stated that:

> "The evidence now exists that the cover-up of asbestos liability goes beyond negligence and incompetence. Members of the Council were involved with syndicates where the reserves were not being set to provide for ultimate liability. They knew that attorney's reports were coming in to the Society advising of huge future asbestos liabilities."

"Inside Eye" March 1995

130. "Inside Eye" was an independent monthly news magazine from the Lloyd's market sent to Working Names. In the March 1995 issue it contained an article by a Mr E. Harborne, on a hearing before the TCSC on 16 February 1995, entitled "Can we sue the DTI?". The article included the following:

> "I attended the hearing of the above on 15th February at which three men from the DTI gave oral evidence. Their spokesman was a Mr Spencer.
>
> My prime motivation for attending was to discover whether any guide might be given as to whether the DTI could be sued successfully by Names/Names action groups for failure to carry out their duties as regulators….
>
> **Regulation of Lloyd's by DTI**
>
> Mr Spencer made it very clear that he interpreted his responsibilities under the Insurance Regulation Act as concern for the policyholder only. He was pressed on this at some length, one line taken being that Names were also policyholders. An astute lawyer would be required to argue that they have a retrospective responsibility which they have failed to discharge.
>
> After the meeting I asked Mr Spencer and his colleagues whether they were aware of the attempts to involve the DTI on this issue. They said they were, although they had not seen any letters and that of course they would oppose it. They ventured the opinion that it might prove difficult to persuade the courts that the DTI should be joined in any action taken. One of them suggested that the lawyers involved were acting like ambulance chasers.
>
> **Solvency of Lloyd's**
>
> Considerable time was spent on this issue and Mr Spencer explained the two step procedure:

> 1/ Solvency for Lloyd's overall. There seems little doubt that Lloyd's will be able to pass this. The margin last year was three times the minimum required.
>
> 2/ Solvency for individual Names, including Names no longer underwriting, depends heavily on the Central Fund at the moment. This is where problems might arise although not unnaturally Mr Spencer did not wish to speculate on what might happen in 1995 or 1996.
>
> **Conclusion**
>
> 1/ Any Name who is thinking of joining an action group that claims it will be successful in joining the DTI to its litigation against Lloyd's or the Council of Lloyd's would do well to insist on seeing a fully briefed Counsel's opinion on the matter. My view until proved otherwise by such an opinion is that any attempt will fail…."

Names Defence Association Paper

131. The Names Defence Association produced a paper in March 1995 entitled "Lloyd's of London". It included the following remarks:

> "The present Conservative Government risks being embarrassed before Lloyd's problems are resolved. The Department of Trade and Industry is seriously implicated".
>
> "Research findings indicate that neither the DTI nor Lloyd's regulators adequately monitored the spread and magnitude of underwriting risks in individual syndicates on any regular or systematic basis. Nor did they properly monitor the spread and diversification of the financial assets of individual syndicates.
>
> Financial reporting procedures which cover such obvious matters are fundamental in the regulation of financial institutions throughout the developed world. They are particularly applied to insurance companies and money market funds, the types of organisations most akin to Lloyd's syndicates."
>
> "The DTI has the ultimate responsibility for regulating the solvency and wellbeing of Lloyd's. It has clearly failed."
>
> "The DTI also has a statutory responsibility to protect the interests of insurance policyholders, whether of Lloyd's policies or of other British insurers. Names at Lloyd's, because of their status as RITC, excess of loss re-insurance, E&O insurance, or personal stop-loss policyholders, must represent numerically the largest group of policyholders at Lloyd's. As was evident at recent hearings of the Treasury Select

> Committee, the DTI has so far not considered the interests of Names as policyholders."
>
> "Indeed, a number of them [Names] now believe that they will be forced in due course to look to the Laws of the European Community and the United States of America. Already the Writs Response Group is sponsoring the defence of Mr John Clementson against a solvency writ from Lloyd's, his defence being based on alleged irregularities and infringements of European law by Lloyd's concerning inter alia its operation of the Central Fund."

"Inside Eye" April 1995

132. The April issue of Inside Eye contained an article entitled "The DTI is wrong". The article included the following:

> "Since – under European law – the DTI bears the ultimate responsibility for ensuring that Lloyd's is solvent, the DTI may risk liability if the Central Fund runs out. There is a precedent. In the leading European case of *Francovich*, the Italian government was compelled to compensate employees because it had failed to implement a directive concerning the compensation of workers in cases of employer insolvency. In the same way, the UK government could be made to pay out to policy holders because it failed to reconcile the legal relationship between Names and Lloyd's with the provisions of the Insurance Companies Act 1982 which was enacted in order to comply with the EC First Non-Life Directive of 1973. To comply with EC law, the DTI assesses Lloyd's solvency to continue trading on the basis that all Names are liable for the debts of others. But if Lloyd's were to collapse, that would not be the position: each Name would only be obliged to cover his own responsibilities. So if Lloyd's ever did crash policy holders could well be looking to the DTI to make up their losses. Even if the litigation never came to such a pass, the implication of DTI responsibility could trigger a change away from its current Pontius Pilate-like stance. Lloyd's and its Names could therefore have a strong political card to play against the DTI.
>
> **The DTI and Lloyd's**
>
> Lloyd's has operated as a de facto self-regulating organisation since its incorporation in 1871. The Lloyd's Acts of 1871 and 1982 define the framework in which Lloyd's regulates itself: the government's regulatory function is – broadly – limited to ensuring that Lloyd's passes an annual solvency test. Under European law, the DTI must ensure that all insurance entities in the UK are adequately secured. In Lloyd's case, this is done by a test which is split into two parts: global and individual. The DTI are now arguing that the implied consequences of lumping

> all Names together for the global part of the test means that losses are mutualised via the Central Fund if any Names defaults.
>
> However, under the Lloyd's Acts, there is no mutualisation. Indeed, every insurance contract underwritten by Lloyd's states that Names are severally and not jointly liable."

133. As Mr Thomas-Everard agreed, anyone reading this would have appreciated the potential relevance of European law to the issues being raised by Names. He even went so far as to acknowledge that he "quite possibly" asked some of the lawyers involved whether a claim against the DTI on such a basis "had legs". But, he said, if he did, the answer would have been "No" as he believed then, as Mr Hay-Davison also did, that English law was "stronger" than European law. The various action groups had access to skilled legal advice.

The Association of Non-North American Names

134. The potential relevance of the Insurance Directive was known to this Association (later re-named UNO). A letter signed by their co-chairman, addressed to Mr Spencer at the DTI, and copied to the European Commission, dated 1 May 1995, raised the question whether the Names' litigation proceeds held in escrow were to be excluded from Lloyd's solvency tests for 1996 "in accordance with" Article 16 of the Insurance Directive.

The TCSC Report

135. The Report of the TCSC was published on 17 May 1995. It covered Financial Services Regulation generally but included a Section on Self-Regulation at Lloyd's. The Report summarised (accurately) the role of the DTI as "outside solvency regulator" under the ICA 1982. It also quoted Mr Stockwell's criticisms of the DTI in the context of the spiral ("a major failure of regulation") in the 1970s and 1980s, and "in setting minimum reserving percentages" which "always seemed to have worked on the assumption that a profit was inevitable" and were set at 100% or less when an appropriate figure would have been 300% whereby "a problem that was developing would have been nipped in the bud rather than becoming a full blown catastrophe".

R & R

136. Lloyd's new settlement plan "Reconstruction and Renewal" was published in May 1995: see paras 7.1.4 and 7.1.5 of the ASF.

"Thoughts from the Shearing Shed"

137. Mr Thomas-Everard prepared a document entitled "Thoughts from the Shearing Shed" dated 22 June 1995 which he circulated to a list of people whose names he could not recall when giving evidence. The document included an analysis of the provisions of the ICA 1982 applicable to Lloyd's. It also included a reference to the meeting with John Redwood in 1992 and a rather broader comment on the ICA 1982 and the Lloyd's Act as follows:

> "DTI powers
>
> I start from the statement made by John Redwood, when Minister of State at the DTI, on the 26th January 1992 to Jonathan Mantle and me, and again on the 13th Feb. to 5 MPs, that Parliament had denied to the DTI the power to regulate Lloyd's unless Lloyd's was found to be insolvent.
>
> The Insurance Companies Act 1982 and the Lloyd's Act appear to grant power to the DTI to regulate UK insurance companies (including Lloyds' members as individuals as well as collectively as Lloyd's) to maintain solvency levels of insurance entities **which are "carrying on insurance business**"."

138. Whatever was said by Mr Redwood at the meeting in January 1992 (see paragraphs 90 and 91) this document (and the memo referred to below from Mr Donner) demonstrates that Mr Thomas-Everard was not misled by it and was well able to analyse the ICA 1982 and Lloyd's Act for himself.

The Government's Response to TCSC

139. The Government prepared a Response to the TCSC Report which was published on 19 July 1995. It included the following:

> "DTI's role in the regulatory regime
>
> 1.5 The Government notes that the Committee has reported (paragraph 17) that some evidence questioned the DTI's role in performing the regulatory functions laid on it by the Insurance Companies Act 1982 (as summarised in paragraphs 14 to 19 of the Report and described in the DTI's memorandum of February 1995-pages 127 to 129 of Volume II of the Report). However the Government also notes that the Report distinguished the DTI's responsibilities for solvency regulation and policyholder protection from any regulatory protection of Names, which is left to Lloyd's itself under the Lloyd's Acts 1871 to 1982.
>
> 1.6 The DTI's monitoring of the solvency regime applied to Lloyd's as a whole is performed on a basis comparable with that applied to other insurers in the United Kingdom. This is essential to ensure that neither Lloyd's nor the insurance companies have any unfair competitive advantage as a result of differences in the regulatory regime. The DTI is not, however, involved in the supervision of the relationship between Names and the organs of the Lloyd's insurance market, any more than it is involved in the supervision of the relationship between capital providers and insurance companies, (other than through the operation of the general provisions of non-insurance

> legislation, like company law, and (where appropriate) insolvency law).
>
> 1.7 The Government notes that some evidence questioned the way in which the DTI (with the advice of the Government Actuary's Department) set the minimum percentage reserve figures (MPRs) which form part of the process of setting the solvency reserves required by Names and the market. The evidence submitted demonstrates that those who have complained about the system have not fully understood the purpose of the MPR's and, particularly, do not properly recognise that MPRs are not the sole means, nor even the principal means, by which Names' liabilities for solvency purposes are determined. The main method for determining Names' liabilities for solvency purposes is based on annual syndicate accounts, as agreed by syndicate auditors, on essentially the same basis as in the insurance company market. The MPRs are used to provide a supplementary safety-net test to provide additional protection for policyholders against the Names' liabilities being assessed too low. For most of the business about which complaints are made, the liabilities are determined by the main method, which produces a higher liability figure based on audited syndicate accounts…: a figure of 300 per cent would only be appropriate if the MPRs were not minima, but were averages to be used as the standard for all relevant syndicates. A fuller description of the way in which the liabilities are determined for solvency purposes was given in response to a written parliamentary question on 14 February 1995 (Official Report cols 557 & 558). The Government considers that reserving for solvency purposes was carried out properly having regard to the accounting standards of the day and the information available at the time."

Mr Donner

140. Mr Donner was a Members' Agent recruiting mainly in Australia and New Zealand. Mr Donner was in contact with Mr Thomas-Everard and copied correspondence to him. On 25 September 1995 Mr Donner wrote to Jonathan Evans MP at the DTI stating:

> "… whilst I do understand that your department's statutory duties are concerned primarily with solvency supervision, your department's responsibilities do indeed also incorporate areas apart from solvency responsibilities, as has become clear from my careful reading of both the content and the implications of the Act to which you refer."

141. Mr Thomas-Everard's attempts to explain why Mr Donner's views of the powers of the DTI should be wider or different from those attributed to Mr Redwood at the meeting in 1992 did him little credit. Indeed on the 25 September itself Mr Donner

sent Mr Thomas-Everard a Memo enclosing this letter stating that he believed his correspondence with the DTI had established two significant points which were:

> "1. It is the DTI that have ultimate responsibility for the supervision of Lloyd's. Furthermore and more importantly, whilst the DTI's responsibilities are concerned primarily with solvency requirements, this is certainly not their only responsibility.
>
> 2. The DTI have now conceded, at least by implication, that they failed in one of their statutory obligations with regard to solvency. The DTI in 1980 and 1981 agreed to, and have been condoning since, a policy of "stair-stepping", identifiable as such now, Evans states, with the benefit of "hindsight". I do not accept the "hindsight" theory is other than an inevitable excuse for a failure which now opens the DTI to the most severe criticism.
>
> The consequences of stair-stepping over such an extended period have resulted in Names, auditors and the public being presented with figures which have been both consistently and deliberately false.
>
> I have maintained, at least since the late 1980s, that one of the two parties most culpable for the enormity of the Lloyd's debacle, is the British Government (through the DTI's incompetence and inept Insurance Division)."

142. Mr Donner also corresponded with Mr Brebner at the DTI. He wrote on 20 November 1995:

> "It is perfectly clear that the question put to you has nothing whatsoever to do with, as you state: "I fear that I am in no position to judge how long observers of the market might have been under misapprehensions about the setting of reserves". It does, and as you well know, have everything to do with the number of years that the DTI have, in effect, condoned deliberate under-reserving (effectively a policy of "stair-stepping") of the "Non-Marine all other $US business"."
>
> 4 My allegations against the DTI are in no way based on "a false premise", as you seek to suggest.
>
> I am, of course, aware that the setting of Minimum Percentage Reserves, one of two elements of the way in which solvency purposes were and are determined. I repeat, however, that MPRs are arguably the most important single financial regulatory task undertaken annually by the DTI. As your minister correctly stated: "The MPRs are the back-stop to prevent the figures being too low".

> I repeat also that when the curtain surrounding the activities of the DTI and the insurance Division in particular, at the material time, are finally drawn back (as they will be) it will be found that this has been a case of the most monumental incompetence, with the left hand knowing not what the right hand was doing and, even if the left hand wished to know what the right hand was doing, the Insurance Division simply did not have the monitoring ability and machinery to be able to put into effect their statutory regulatory obligations (ie. proper monitoring of the figures).
>
> I repeat, therefore, the fact that this major Regulatory and Solvency failure is the direct responsibility of the DTI and the consequences of such failure are all too tragically clear. It is also extraordinary to me that you should seek to deflect the truth and the enormity of the DTI's failure by resorting to such false statements. The figures which should be in your possession and which should have been both monitored and acted upon demonstrate the truth of what I say.

The DTI paper on 22 December 1995

143. Mrs Maybury disclosed (and her husband annotated) a paper prepared by the Insurance Division of the DTI dated 22 December 1995 entitled "DTI Comments on the discussion paper prepared by the Lloyd's Names Association Working Party on an alternative to R&R". The DTI paper criticised the Working Party's discussion paper for an incorrect description of "the statutory solvency requirements placed on Lloyd's" by the ICA 1982 because the requirements were assessed not only on a global basis but also at the level of each individual Name. The former requirements were said to be "laid down in the ICA – and indeed the relevant European Directives …." Mrs Maybury agreed, as this and other documents disclosed by her demonstrated, that she knew by the beginning of 1996 that there were Insurance Directives relevant to the regulation of Lloyd's. There is little to suggest that Mrs Maybury was in a better position than any other Name to reach this conclusion.

Newsletter 5

144. Newsletter 5 of the Association of Non-North American Names dated April 1996 included a heading "The Case Against the Government" with the text:

> "The prospect of obtaining compensation from the D.T.I. for their failure to regulate has for some time been a possibility. A government department can now be sued under English as well as European law. A paper is enclosed which may be of interest."

145. The "paper" had been prepared by Catherine MacKenzie-Smith (a barrister). It referred expressly to Francovich and Factortame. It suggested two respects in which Community law might have been contravened such as to make the Government liable in damages and stated that "a suit for damages based on the above arguments will shortly be submitted to the European Court of Justice". The paper also said it was

> "putting forward these ideas for discussion. Any comments or suggestions are welcome".

146. Whilst "the ideas" were not those presently before the court and no suit was ever presented to the ECJ, the Newsletter and Paper are evidence of the wide range of skills, researches and ideas available to concerned Names.

Clementson again

147. On 7 May 1996, Cresswell J handed down judgment in the Clementson case after the successful appeal to the Court of Appeal (paragraph 119). Lloyd's succeeded on the claim and Mr Clementson's counterclaim failed.

Complaints to the Ombudsman

148. From about March 1996 onwards various Names made complaints to the Parliamentary Ombudsman in relation to the DTI's regulation of Lloyd's. Mr Maybury (Mrs Maybury's husband) made such a complaint by letter dated "20 May" in, probably, 1996. The letter stated that "As Names my family have suffered substantial losses as a result of this regulatory failure and are entitled to redress". Mrs Maybury said the letter was intended to get the DTI to take some action in the context of R & R and was defensive against Lloyd's not a threat to sue the DTI.

149. Also probably in 1996, and before the formal R & R Settlement Offer, Mr Maybury wrote again to the DTI complaining about a lack of response and the approach to stop loss policies in the R & R proposals stating:

> "I believe that Lloyd's is acting outside the powers of its constitution in doing this and that the D.T.I. may be answerable for its actions in approving it under European law. Counsel's opinion is being sought now on those and other related points."

150. In cross-examination, Mrs Maybury said she and her husband had not sought counsel's opinion but probably someone else had said they were doing so. She believed people were consulting "here, there and everywhere" and "her husband was piggybacking on the back of that". The evidence strongly suggests that her belief was right.

The UNO Letter of 20 July

151. On 20 July 1996 UNO circulated a letter to Names to address issues which would arise "post R&R". The letter included the following statements:

> "We believe there is a good chance the Clementson Case based on European law issues will eventually succeed in the European Courts. If it does not, or possibly in parallel, we will proceed to defend Names against writs from Lloyd's or Agents with the Fraud defence".
>
> "As you know the fraud evidence has been reviewed a number of times in the United States in open court… Many thousands of hours of work has gone into accumulating the vast quantity

> of evidence now available in the United States…. That evidence has all been made available to the English Defence Groups."
>
> "A substantial quantity of the evidence … have been reviewed by (leading counsel). They have said:
>
> > *It is clear that the Key Working Members knew from their involvement with the AWP and/or as members of the Audit Committee that, in 1982 and later years, appropriate reserves for asbestos related liabilities were unquantifiable and probably unfundable and an equitable IBNR impossible to calculate.*"

R&R Settlement Offer

152. The formal R&R Settlement Offer was sent to Names on 30 July 1996. It related to 1992 and prior underwriting liabilities. It included a finality statement which set out "your 1992 and prior underwriting liabilities and the credits available to assist you in meeting these liabilities". The letter from Lloyd's CEO which enclosed the Offer also included the following:

> "I urge you to read this document very carefully and to take advice from your lawyer, financial or other appropriate adviser on the terms of the settlement offer and your finality statement as soon as possible but, in any event, so that you are able to meet the deadlines for acceptance and payment.
>
> Financial background
>
> The Lloyd's market has returned to profitability. As announced on 12 July 1996, the 1993 pure year of account reported profits of £1,084 million after personal expenses, including the members' special Central Fund contribution. The 1994 and 1995 years of account have not yet been closed but it is already apparent that both will prove to have been very profitable trading periods. At this stage, managing agents' projections show profits to members after personal expenses, including the members' special Central Fund contribution, of approximately £ l billion for 1994 and nearly £900 million for 1995. Without these profits, the settlement offer could not be made.
>
> Alongside this return to profitability, the Society must face the magnitude of the losses which many Names have incurred on the 1992 and prior years of account. In comparison with the Equitas premium (calculated as at 31 December 1995) of £14.7 billion, syndicate assets (excluding Names' debt) available to meet these liabilities as at 31 December 1995 were £9.9 billion. A significant part of the balance is believed to be irrecoverable from the many Names who have incurred significant losses.

> To date, the Society has been able to deal with the non-payment of members' obligations through the application of the Central Fund. As at 30 June 1996, the Central Fund's net assets (excluding amounts owed by members) stood at approximately £505 million. In the absence of the successful implementation of the reconstruction plan, the Central Fund might not be able to meet the anticipated cash requirements arising out of members' shortfalls and the Society would be unlikely to meet the DTI's members' level solvency test. If the reconstruction plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off with consequent damage to members."

153. Thus, on receipt of this Offer, all Names were aware of their liabilities on 1992 and earlier years. The R&R Settlement was concluded and Equitas established on 2 September 1996. The time limit for acceptance by Names was extended to 11 September.

Limitation

154. If the six-year limitation period was applicable, and the issue is whether or not the cause of action had accrued to Names before the expiration of that period, the key date at which to address that issue is 2 September 1996. If the cause of action had accrued at that date the claim would be statute-barred.

Miss Stewart-Smith's Petition

155. On 6 November 1997, Miss Stewart-Smith sent a Petition to the President of the European Parliament. She said, and I accept, that the Petition was all her own work (assisted by staff at the Commission's London office). Miss Stewart-Smith is a formidable and intelligent woman. Her Petition included the following:

> "My researches of the European Treaty and the 73/239 First Council Directive have shown that the solvency requirements for Lloyd's of London must have been unreasonably modified for it to have been possible to produce accounts without the disclosure of formidable known losses….
>
> The Neville Russell letter to the Lloyd's Audit Department on 24th February 1982 signed by six panel auditors … makes it clear that the losses were unquantifiable. The Names were never advised of this vital piece of information to which they were entitled. Names have been given to understand that Lloyd's provided the panel auditors with an indemnity so that the accounts could be signed off although this fact does not appear in the accounts themselves.
>
> This dubious tactic was then followed by the necessity to devise a way to present the relevant accounts with the losses

remaining hidden. This was achieved by the latitude apparently allowed by the provisions of the new Lloyd's Act of 1982 and any adjustments to the Insurance Companies Act 1982 (which replaced the repealed Insurance Companies Act of 1981) that may have been made to enhance the effectiveness of the Lloyd's Act 1982. The Names are told that the provisions of the Insurance Companies Act 1982 enabled the competent authority (the Department of Trade and Industry) to alter the solvency requirements and that the Lloyd's Act of 1982 entitled Lloyd's to pass whatever byelaws, with the full force of the law, were considered necessary to ensure its own survival….

These extra powers have intensified the vulnerability of the deceived Names and seem to be totally incompatible with the declared aims of the European Treaty concerning the protection of the fundamental rights of the citizen. They, also, appear to infringe Articles 5, 8(2), 90(1), 100a(3), 100b(l), 129a(l) and 189.

Furthermore, there seem to be numerous breaches of the Articles of the First Council Directive 73/239/EEC which specifies the solvency requirements and the regulatory requirements of Lloyd's as follows:

First Council Directive 73/239/EEC

(1) In the preamble of this directive it is stated….

(2) Also, in the preamble of this directive, there are repeated references to the requirements of the solvency margins and the emphasis that "it is important to guarantee the uniform application of coordinated rules and to provide, in this respect, for close collaboration between the Commission and the Member State in this field".

To operate solvency margins which do not comply with the requirements of the directive appears to be a flagrant defiance of these legally binding instructions.

For example, the DTI claims that the Insurance Companies Act 1982 lays down no requirement for the audit of global accounts or statutory statement of business. However, Article II states "with regard to Lloyd's, the publication of the balance sheet and the profit and loss account shall be replaced by the compulsory presentation of annual trading accounts covering the insurance operations, and accompanied by an affidavit certifying that auditors certificates have been supplied in respect of each insurer and showing that the responsibilities incurred as a result of these operations are wholly covered by the assets. These documents must allow authorities to form a view of the s t a t e of solvency of the Association". In addition, Article 14 clearly

states "the supervisory authority of the Member State in whose territory the head office of the undertaking is situated must verify the state of solvency of the undertaking with respect to its entire business".

(3) Article 8(1) states "Each Member State shall require that any undertaking set up in its territory for which an authorisation is sought shall ... in the case of the United Kingdom ..... Lloyd's underwriters ... submit a scheme of operations in accordance with the provisions of Article 9."

Although this directive became operative on 27th J u l y 1973, the Names understand that it was not until 28th February 1995 (twenty-two years later and well after massive losses had been inflicted on the deceived Names) that, in spite of repeated reminders from the Commission, Lloyd's made any attempt to comply with this requirement. Had Lloyd's done so when first asked or had the Commission been more assiduous in its insistence that the providing of this essential information within the specified time limit was mandatory and not subject to exemption, the true state of Lloyd's affairs would have been in the public domain much sooner. The wording of this article implies that authorisation is conditional upon this requirement being met.

The Commission appears to have allowed Lloyd's to continue to trade without proper authorisation. This lack of supervision put in jeopardy the quality of consumer/investor protection that Names could have expected to receive under the terms of the Treaty.

(4) Article 16 states that the solvency margin shall be "free of all foreseeable liabilities". The Neville Russell letter makes clear that the foreseeable liabilities are unquantifiable. Unquantifiable liabilities do not suddenly become quantifiable because it is not convenient for them to remain unquantifiable.

The solvency requirements specified in this article have either not been met by Lloyd’s or were not sufficiently stringent or tightly enough defined to ensure an orderly insurance market at Lloyd's which is the prime purpose of this directive.

(5) Article 35 requires Member States to amend their national provisions to comply with this directive within eighteen months and applied within thirty months from the date of notification. The United Kingdom competent authority does not appear to have ensured that Lloyd's fulfilled this requirement.

(6) Article 36 states "Upon notification of this directive. Member States shall ensure that the texts of the main provisions of a legislative, or regulatory administrative nature which they

> adopt in the field covered by this directive are communicated to the Commission", but, also, does not seem to have been obeyed within the set time limits. Had the competent authority done as directed, the inherent anomalies would have become apparent and subject to any required revision which is the point of this article and which may be the very reason why it appears to have been deliberately ignored.
>
> The DTI ….
>
> The United Kingdom, as a Member State, and its competent authority are believed to be in breach of the European Treaty as itemised above. The European Commission is believed to have failed in its statutory duty to ensure an orderly insurance market at Lloyd's by not checking that the wording of the directive was appropriate, as required in Article 90(3), and properly applied in the Member State (the U.K.), as required in Article 87(2)b of the European Treaty.
>
> Unless the articles of the Treaties and Directives are constantly monitored and rigorously enforced the desired results have no hope of being attained. The lax supervision of these legally binding requirements have made it too easy for them to be treated with contempt and openly flouted. The result has been a catastrophic outcome of what seems to be a flawed system.
>
> If I am entitled to do so, I would like to request, under the provisions of Article 177, that a preliminary ruling on the legality of the present position be given by the European Court of Justice without delay before any further damage is done or more anguish caused and also, that a moratorium be imposed on any further harassment or fiscal deprivation of Names, as provided for in Articles 185 and/or 186, until this matter is properly addressed and resolved.
>
> I have no doubt that the European Parliament has the authority and the means to establish a firm discipline on a situation where the abuse of power is currently out of control and to ensure that those citizens who have been illegally damaged have access to justice and compensation. The Names can only hope and pray that it has the will and the determination to do so.
>
> This Petition is submitted under the provisions of Articles 8d and 138d of the European Treaty."

156. These complaints resemble those made in these proceedings. They allege a failure properly to implement the Directive. They allege a "flawed system". They seek compensation. It was not until May 2006 that the Committee on Petitions informed Miss Stewart-Smith that in April 2006 the decision had been taken "to close" her Petition. This was said to have been "more to do with the limits imposed on the

powers of the Community Institutions by the EC Treaty than with the substance of your case". The letter also referred to a statement made by the President of the European Parliament to the Parliament on 3 April that "parliament's most recent resolution on the subject, in June last year, confirms its impression that there are substantive and reasonable grounds to believe that the First Non-Life Insurance Directive and its later modified versions were not properly transposed and applied in the UK".

The Jaffray Defence and Counterclaim

157. The Defence and Counterclaim in Jaffray were served on 21 November 1997. Mr Freeman acted for some of the Defendants. They were Names who had not accepted R&R. The target was to put forward a counterclaim in fraud. Part of that plea was to allege (in paragraph 29) that the Lloyd's Brochure had represented that "because of the way in which Lloyd's regulates and monitors underwriting accounts year by year" the Defendant "could rely on his syndicate accounts" and "could in underwriting and/or deciding whether to remain a member of Lloyd's have confidence in the audited syndicate results for results of past years" and "could be sure that Lloyd's as part of its regulatory duties … would ensure that when prospective liabilities were being reinsured by one syndicate year into another, such liabilities were being fairly assessed and quantified as between the two syndicate years".

158. It was alleged that these representations were false and made knowingly or recklessly without any honest belief in their truth. The allegations of falsity (paragraph 34) included allegations that Lloyd's "failed to regulate properly or at all the manner in which such syndicates or their auditors reserved for and accounted for such potential liabilities" and "in relation to the closing years of syndicates exposed to asbestos-related claims failed to implement or apply appropriate audit regulations with the result that an equitable premium for RITC as between the reinsuring members and reinsured members was not assessed and charged having regard to the nature or amount of the liabilities to be reinsured".

"The Observer" 1 February 1998

159. A substantial article in "The Observer" of 1 February 1998 was sub-titled "Fresh Evidence questions DTI's role in policing the market". It included the statement:

> "Much of the speculation is and will remain exactly that – speculation unbuttressed by hard evidence. But on the particular issue of the DTI's unchallenging attitude towards Lloyd's during the Eighties the new evidence could tip the balance".

160. Mrs Mahon agreed, sensibly and realistically, that if by this stage someone did have doubts about the DTI's position, on reading this article they would realise that there was at least a case to be investigated as to the DTI's responsibility.

The LNA letter

161. On 3 March 1998, Mr Stockwell the Chairman of the LNA (the LNA replaced the LNAWP following acceptance of R&R) wrote to the DTI in the context of the transfer

of regulatory functions from the DTI to the FSA and the perceived need for some body to be responsible for protecting Names. He wrote:

> "I am concerned that we get the issue of duties and powers aligned. I am sure you recall that Directive 73/239 imposes a duty on member governments to regulate the insurance market. It follows that if the duties are not correctly delegated along with the powers, then presumably the duties stay with the national government making the national government liable for the failure of the delegated body to exercise its powers."

162. The DTI (Mr Walton) replied on 11 March. He wrote:

> "… it is, I think, straining the statutory language to say that the Council [of Lloyd's] has a "duty" to protect Members. In this context you referred to the Directive 73/239. The obligation to implement the Directive in the UK properly and on time does, indeed, fall on the Government. That obligation has been discharged and we do not consider, therefore, that any liability falls on the Government."

163. Once again, Mr Stockwell was promoting the Insurance Directive as a basis for a claim against the DTI. The response of the DTI plainly acknowledges the duty to implement the Directive, but, unsurprisingly, denies any failure to discharge the duty.

2 September 1999

164. If it be right that the relevant Limitation period is determined by a "knowledge" test and runs for three years after the relevant knowledge has been or ought to have been acquired by the Names, that test falls to be applied to such knowledge as it existed at 2 September 1999.

Jaffray: Cresswell J

165. The trial in Jaffray began in February 2000. On 3 November 2000, Cresswell J handed down judgment on what was described as the "Threshold Fraud Point". He decided that Lloyd's had made none of the representations alleged to be contained in the Brochures and that the Names had failed to prove fraud.

166. In the course of his judgment (at page 108) Cresswell J, in setting out the background to the "audit/accounting process", referred to the Insurance Directive and the ICA 1982. He said Section 32 of the ICA implemented Article 16 of the Insurance Directive and Section 84(1) of the ICA 1982 had the effect of making Section 32 applicable to the "members of Lloyd's taken together", the "global test". Although Mr Freeman also (see paragraph 120) sought to place some reliance on this, the requirements of the Insurance Directive were not in issue in Jaffray. I do not think Cresswell J was saying more than what was the unchallenged understanding of the parties, which may, of course, yet prove to have been correct should these proceedings go further.

167. At the conclusion of his judgment (at page 432), Cresswell J added some "general observations" the first of which was that:

> "I refer to all the reforms etc described in this judgment implemented as the result of the Fisher Report, the Neill Report and the very considerable efforts of men and women of undoubted integrity, independence and standing. Despite all the reforms etc the catalogue of failings and incompetence in the 1980s by underwriters, managing agents, members' agents, and others (established by judgments of the court, by disciplinary hearings and other means referred to in chapter 24) is staggering (and brought disgrace on one of the City's great markets)."

The NACDE Report

168. At the end of December 2000 UNO "felt it would be helpful if a report was prepared for the European Commission that set out the ways in which it was believed the British Government had breached the European Directive 73/239". UNO and LNA asked Mr Stockwell to prepare the report and NACDE took on responsibility for its publication. The report itself ("the Blue Book") was submitted to the Commission in draft in March 2001 and printed in June 2001. It was a substantial document of 73 pages in length. It alleged many breaches by the DTI of various Articles of the Insurance Directive.

169. This request to Mr Stockwell and the report ante-dated the judgment of the Court of Appeal in Jaffray by more than a year.

The NACDE 17 September 2001 letter

170. Mr Stockwell, on behalf of the NACDE Committee, wrote on 17 September 2001 to "European Names and former Names at Lloyd's". He wrote:

> "The English courts have commented on *"the staggering catalogue of failings and incompetence"* that represents the Lloyd's saga in the last twenty years. It is our belief that the catalogue has only been possible because of the complete failure of the British Government to regulate Lloyd's in accordance with European law. Following on from complaints and petitions by various Names to the European Commission and European Parliament, the Commission has launched an investigation into whether or not infringement proceedings are appropriate. A decision by the Commission is imminent. The European Parliament has accepted the petitions of Names and is taking a close interest in the Commission's investigations.
>
> If the Commission takes infringement proceedings and succeeds in showing that the British Government infringed European law in its supervision of Lloyd's, the British Government will be liable to compensate Lloyd's Names who suffered loss in consequence. We consider it is in the interests

> of all Names to encourage the Commission to take proceedings. Equitas faces proportionate insolvency as a consequence of the rising tide of asbestos claims in the US. The consequences of that will be serious for Lloyd's and for reinsured Names. If Equitas ceases to be able to pay claims in full, we believe it will be in your interests to be seeking not only compensation for past losses from the British Government but also an indemnity in respect of future losses.
>
> We hope you will make the time to write along the lines of the enclosed letter to as many Members of the European Parliament representing your country as possible."

171. The reference in the first line was to the observation of Cresswell J in Jaffray: paragraph 167. The "enclosed letter" included the following:

> "I have suffered substantial loss as a consequence of my membership of Lloyd's. Along with over 30,000 other Names who joined Lloyd's, I have been made liable for a share of the losses that Lloyd's has incurred in business written in the United States. I believe there is strong evidence that Lloyd's syndicates had not properly reserved for that business as required by Directive 73/239 and that I was improperly made liable for a share in those losses.
>
> ….
>
> It is my view that the European Commission should take infringement proceedings against the British Government for its failure to comply with Directive 73/239…."

172. Thus, also before the judgment of the Court of Appeal in Jaffray, Mr Stockwell on behalf of NACDE (the instigators of the present claim) was asserting that there was a basis for the Commission to take infringement proceedings against the Government and if it did so and succeeded this would result in the Names obtaining compensation for their losses from the Government. Essentially that is the present claim, save only that it was aimed at the Commission investigating the possible failure of the Government to comply with the Insurance Directive rather than the Names taking that on by the Francovich/Factortame route. The Judgment of the Court of Appeal in Jaffray was not available for another 10 months.

Jaffray in the Court of Appeal

173. On 26 July 2002, the Court of Appeal (Waller, Robert Walker and Clarke LJJ) handed down their judgment on the appeal from Cresswell J in Jaffray. The Court's conclusions were summarised in paragraph 587 of the judgment. So far as relevant, they were that:

> "i) There was a representation in the 1981 brochure that there was in place a rigorous system of auditing which involved the

> making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. (Paragraph 321)
>
> ii) Subsequent brochures contained essentially the same representation, even though the word 'rigorous' no longer appeared. (Paragraph 323)
>
> iii) The 1981 brochure also contained a representation that Lloyd's believed that such a system was in place. So did subsequent brochures. (Paragraphs 321 and 323)
>
> iv)….
>
> v) The representations in i) and ii) were, during the relevant period, untrue. (Paragraphs 375 and 376)
>
> vi) The names have however failed to prove that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue….
>
> vii) It follows that the judge was right to determine the threshold fraud issue in favour of Lloyd's and to hold that Lloyd's is not liable to the names in the tort of deceit. It further follows that the appeal on the merits, which the names had permission to bring, fails and must be dismissed."

174. It is the judgment of the Court of Appeal holding that representations were made and were false which the present Claimants say was the revelation which first led them to appreciate that the present claim was or might be sustainable. It is therefore important to set out what the Court did say in those paragraphs in the judgment which led it to the conclusions expressed in sub-paragraphs (i), (ii) and (v) of paragraph 587. Further, in paragraph 285, the Court set out its "recapitulation of pleaded case" as follows (with my emphases):

> "The names' case is that the brochures … issued from time to time by Lloyd's contain fraudulent representations upon which they relied when deciding whether to become names. In chapter 22, the judge correctly identified the alleged representations in the brochures as representations to the effect that a name joining Lloyd's:
>
> "(i) could have confidence in Lloyd's as an institution to safeguard his/her interests;
>
> (ii) could trust those who were chosen by Lloyd's to regulate the Lloyd's market and manage its affairs;
>
> (iii) because of the way in which Lloyd's regulated and monitored underwriting accounts year by year:
>
> (a) could rely on syndicate accounts;

> (b) could in underwriting and/or in deciding whether to remain a member of Lloyd's have confidence in the audited syndicate results, for results of past years;
>
> (c) could be sure that Lloyd's as part of its regulatory duties would ensure that when prospective liabilities were reinsured by one syndicate year into another, such liabilities were being fairly assessed and quantified as between two syndicate years."

175. The Court addressed these allegations in paragraphs 315 to 325 of the judgment. So far as relevant, and with my emphases, those paragraphs read as follows:

> "315. In short a central representation in the brochure is that there was in existence a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses.… In these circumstances the judge should have held that that the brochure contained representations by Lloyd's to that effect.
>
> 316 ….
>
> 317 It will be observed that the case which we have summarised above is not quite that pleaded and considered by the judge. The representations considered by the judge are set out in paragraph 285 above. As to the first two, we entirely agree with the judge that they are not contained in any of the brochures….
>
> 318 If the names are to succeed in establishing the tort of deceit based on the brochures they must identify specific representations of fact in the brochures. In our view the third alleged representation, or more accurately set of representations, set out in paragraph 285 above comes nearer to satisfying the relevant test. However, they also are in our view much too widely drawn. Moreover, they also are expressed in terms of what names "could" do, ie in the future. There is nowhere a statement that names could rely upon their syndicate accounts if, by that, is meant that names could rely upon the accuracy of syndicate accounts. The brochures make it clear that the syndicate accounts are prepared by the syndicate and that it is the managing agent and the active underwriter together with the panel auditor who conduct the annual audit. We do not think that the brochures can fairly be read as containing the kind of promise alleged in each of the pleaded representations set out in paragraph 285 and considered by the judge.
>
> 319 It appears to us, on the other hand, that the brochures do contain a number of statements of fact including statements as to the system of accounting in operation at Lloyd's. Indeed, the purpose of the brochure was to describe the system in operation and an important part of that system was the accounting

system. The system of accounting included three year accounting and the closing of one year into the next. It follows that the RITC premium and the way it was calculated were central to the system and, since the premium depended upon a fair assessment of future liabilities, the system required a workable method of calculating not only liabilities in respect of claims which had been notified, but also the IBNR liabilities or, in the words of paragraph 12.3 of the brochure "unknown and unnoted losses".

320 In all these circumstances we have reached the conclusion that the case set out in paragraphs 309 to 315 above should be accepted. In our view the 1981 brochure does contain the representation set out in paragraph 315, namely that there was in existence a rigorous system which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. It seems to us that an ordinary person applying to become a name would reasonably reach that conclusion by reading the 1981 brochure. The language of the brochure would lead the prospective member to conclude that Lloyd's, who (as Bowen LJ put it) knew the facts when the prospective member did not, knew facts which justified the statement that the accounts were submitted annually to a rigorous audit in accordance with appropriate instructions approved by Lloyd's which included proper provision for unknown and unnoted losses. To answer the question posed by Lord Evershed, that is the effect that the language of the 1981 brochure would have had upon the mind of a potential name.

321 We stress that we are not saying that the 1981 brochure contained representations that syndicates accounts were, as a matter of fact, all prepared in accordance with the Audit Instructions. Our conclusion is simply that the brochure contained a representation that there was in place a rigorous system which involved the making of a reasonable estimate of outstanding liabilities which, as it was put in paragraph 10.4 of the 1981 brochure, "must provide for liabilities in respect of claims reported but not settled, and claims, which may have not yet been reported with respect to policies attaching to the year of account". Thus we would express the representation as being that there was in existence a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses….

325 It is true that, so stated, those representations are much more limited than the representations considered by the judge, even representation (iii). Nevertheless, they are representations which in our judgment were espoused in the various ways in which the names' argument was advanced in this court and was in effect addressed in argument by both sides."

176. The Court addressed the question whether the representation which it had found to have been made in the Brochures was untrue in paragraphs 374 to 376 of the judgment as follows:

> "374 It is clear that detailed consideration was given each year by the audit department at Lloyd's, the Audit Committee, and the Committee as to the instructions to be given to underwriters and auditors. All this was intended to produce a system that enabled proper RITCs to be produced and proper certification of solvency. But was the system actually producing a result where audit reserves were being calculated in a way that involved the making of a reasonable estimate of outstanding liabilities including IBNRs?
>
> 375 We have felt obliged to consider the system in detail but we can answer these questions quite shortly because the facts simply speak for themselves. The mere fact that ultimately, when the R&R was carried out, so many syndicates were shown to be massively under-reserved demonstrates that the system simply had not been producing reasonable estimates of outstanding liabilities over the years. The liabilities which ultimately had to be paid had in fact been incurred before the period with which this litigation is concerned. With the benefit of hindsight it is clear that IBNRs were grossly underestimated throughout the relevant period. This is not an indictment of particular underwriters or particular auditors. We have not explored the way in which estimates were made by individual syndicates or individual auditors. The simple fact is that as it turned out most syndicates were under-reserved. Mr Murray in his evidence said there was no doubt he was under-reserved, and all those involved in the writing of business which included asbestos would, unless they were covered by reinsurance, have to accept the same.
>
> 376 In short, through the relevant period the system did not involve the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. It follows that the answer to the question posed in paragraph 344 above, namely whether there was in existence a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities, including unknown and unnoted losses, is no. Moreover, the answer would be no even if the word 'rigorous' were removed. The first representation which we found to exist in paragraph 321 above is therefore untrue."

177. Cooke J said in The Society of Lloyd's v Laws [2003] (QBD) EWHC 873, at paragraph 127,

> "… it seems to me that all the Names needed to know was that there had been a history of under-reserving and a history of inadequate provision for RITC over many years in order to see

> that the Lloyd's representation, as defined by the Court of Appeal, was false …."

178. I agree. On the evidence before me, that history was known, or at the least should have been known, to Names before, indeed long before, 3 September 1996. Once it was determined that there had been a representation that in fact the system involved the making of reasonable estimates of outstanding liabilities, including IBNR, it was easy to conclude that the representation was untrue. But it was or should have been easy to reach that conclusion of itself, had it been thought to be material to a successful claim, which, of course, the Court of Appeal, in the event, held it was not.

179. It follows that I have great difficulty in understanding or accepting the case for the Names, strongly supported by Mr Freeman, that the judgment of the Court of Appeal, and in particular the finding that the system of auditing had not been producing reasonable estimates of outstanding liabilities, was the trigger for the present claim which would not or could not have been brought without it. I can understand that, having lost the war, it was helpful that the Court of Appeal at least said what it did and that minds turned to consideration of what, if anything, might be made of it. As Mr Friedman QC said, it may have given comfort as to the prospects of success in a claim alleging regulatory failures, but I do not think that the supposedly revelatory nature of the finding is sustainable. I do not mean by that to question the integrity of the evidence given by the Names, albeit none of them who sought to do so were, I think, able to justify their view that the finding was revelatory. Names were not well placed to appreciate or analyse the basis or nature of the judgment of the Court of Appeal. Mr Freeman, who was well placed to do so said the difference between what was alleged by the Names in Jaffray and the conclusion of the Court was the difference between an allegation that a deficient system was in place and that no system was in place. I think in context that is a distinction without a difference. As the Court of Appeal said (in paragraph 325) the representation the Court found to have been made was much more limited than the representations alleged. The "system" had not done what it was represented that it would do. Moreover, I do think that every fact of any materiality to the conclusion of the Court, on which so much reliance is sought to be placed was at the very least apparent before the conclusion was expressed in the terms it was, and indeed had been so for a substantial time. This (and indeed knowledge of the relevant law) is, I think fully supported by the request for and NACDE report in December 2000 and June 2001 and the NACDE 17 September 2001 letter: see paragraphs 168 to 172. It is also, I think, confirmed by what follows in relation to the NACDE 19 August 2002 letter and the present Pleadings.

The NACDE 19 August 2002 letter

180. On 19 August 2002, Mr Stockwell, on behalf of NACDE, wrote to members, with reference to the decision of the Court of Appeal in Jaffray, as follows:

> "ACTION REQUIRED BY AUGUST 30TH TO PROTECT YOUR INTERESTS.
>
> This letter is relevant to you whether you accepted R&R or not. Acceptance of R&R did not involve waiving your rights in relation to the UK Government. In a judgment handed down on 26th July 2002 … the Court of Appeal has said that a

continuing misrepresentation was made to Names by Lloyd's in the brochures seen by Names during the period 1978-88. The Court of Appeal has said Lloyd's did not from 1978-88 have in place an adequate "system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses".

The requirement for Lloyd's to have a proper accounting system is laid down in European Community law and in English law. It is the responsibility of the UK Government to make sure that there is a proper system.

European Community law says that where there has been a serious breach of a fundamental law by a national government, that government should pay compensation to citizens who have suffered loss as a consequence of the breach.

Time-bar rules may stop you claiming past losses if your position is not protected by August 30th. Time-bar is not an issue in recovering losses yet to be incurred as a result of Equitas triggering proportionate insolvency.

We are advised you need to ACT NOW to protect your position.

PLEASE READ THE ATTACHED EXPLANATION AND THEN SEND BACK THE RESPONSE FORM….

Explanation

The judgment of the Court of Appeal in July 2002 means that all Names who joined Lloyd's between 1978 and 1988 or who expanded or continued their underwriting in that period, were the victims of mis-representations by Lloyd's. Specifically, the Court of Appeal said that Lloyd's represented to Names, future Names, and others, that it had *"a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses"*. The Appeal Court said the statement was untrue in 1978 and remained untrue, even when the word "rigorous" was dropped, throughout the period under review up to 1988….

Fundamental to the system of regulation of Lloyd's by the Council of Lloyd's and by the UK Government is the creation and maintenance of a system of auditing which includes the making of reasonable estimates for outstanding liabilities. Without such a system there can be no estimation of the solvency of the market and its fitness to trade. The insurance Companies Acts of 1974 and 1982 require the auditor to state whether in his opinion *"the value of the assets available to meet the underwriters liabilities ... is correctly shown in the*

accounts, and whether or not the value is sufficient to meet the liabilities calculated .... by the auditor on a basis approved by the Secretary of State.

The Appeal Court has said no such system existed. We believe it follows that the Insurance Companies Acts of 1974 and 1982 have not been complied with. The 1982 Act represents the translation into English law of the requirements of European Directive 73/239. We are advised by leading Council (sic), Dr Nicholas Green QC, that the Appeal Court's decision presents a *prima facie* finding of a breach of Community law by the UK Government which could give rise to a claim for damages suffered or to be suffered as a consequence of underwriting in the Lloyd's market between the years 1978 and 1988, and possibly thereafter. The Appeal Court's decision points to a breach of the relevant law as set out below; there are other hurdles to overcome to obtain compensation.

Under Community law, a national government can be required to pay damages when its citizens suffer loss as a consequence of the government's failure to transpose a directive into national law or to apply the law that incorporates the directive's requirements. To establish liability we have to show there has been a breach of the Directive 73/239's requirements (which, indirectly, the Appeal Court decision is indicating). We also have to show the breach was serious. This is not just a question of demonstrating that we have suffered loss on a huge scale. We also have to show the breach complained of is a serious breach of fundamental Community law, not a minor technical matter. The Directive requires that a specific solvency margin be maintained at all times by all insurance undertakings operating in the European insurance market. There are specific solvency requirements for the Names as individuals and "taken as a whole". These are reflected in the Insurance Companies Act 1982.

Clearly, without a system in place which is capable of providing an estimate of future liabilities, it is not possible to estimate in percentage terms, the difference between the undertaking's assets and liabilities. Therefore there can be no estimation of solvency margin. We say the result is that thousands of Names operated in the Lloyd's market without being aware of the serious under-reserving-at Lloyd’s which was to result in major calls on their funds at a later stage.

Since 1997, the European Commission has been in receipt of complaints from Names and of petitions from Names forwarded to them by the European Parliament. In December 2001, the Commission launched initial proceedings against the UK Government for infraction of the Directive 73/239. Those proceedings are being dealt with very slowly and in secret. The

UK Government responded last April and it will be September at the earliest before the Commission takes a preliminary view on the adequacy of the UK Government response –its "Considered Opinion"

NACDE has found itself in an invidious position. We have been warned that there is a risk that if we launch proceedings in the Courts, the Commission will drop its infringement proceedings. We have been warned by Dr Green that if we do not launch proceedings then we may be time-barred in relation to damage which accrued more than six years ago. If the Commission drops proceedings, the burden of proving our contention falls on us. We firmly believe that the Commission has the duty to pursue the infringement whether or not we take action ….

Locus

Under the rule in a key European case called 'Francovich', in order to be in the position (locus) to bring an action for damages for breach of a European directive, one has to be able to show that the directive allegedly breached, conferred a right on oneself. NACDE was concerned that this might present a serious obstacle. However, a decision in December 2001 would appear to present a way around. Since the case of 'Crehan', it would seem that where there is a breach by government, a citizen may be entitled to damages regardless as to whether the law breached conferred any specific right upon him, provided the law itself was sufficiently fundamental. We have been advised that this might be another problem for us, as the court may not consider our problems sufficiently fundamental when comparing them, for example, with such fundamental matters as the right to liberty. In any event, it may be that the Directive does confer rights on us as trading entities and as insured parties

Time-bar

Time-bar, or limitation of action, is a very complicated subject. There are many issues involved both in establishing when breach of the law took place, when the damage occurred, and when the Names became aware of it. There are many further issues invoked in calculating which damages are recoverable and which are time-barred. What is clear is that the six-year rule in English law does apply, even though in Community law there is no time-bar as such. As you know, the majority of the losses suffered by Names today have their origin in liability policies written in the US prior to 1960. However, most of the "1osses"suffered by syndicates and by Names have actually been to reserve for claims, many of which have not yet arisen. Previous cases suggest that, the act of reserving may not be

> defined as 'damage' for the purpose of calculating time-bar. This is significant in relation to R&R since most of the losses after 1965 arose on years of account which were left open until R&R, and then the"1oss" calculated to close the years into Equitas consisted principally of reserves for claims yet to be made. We believe that the "crystallisation" at the time of R&R in September 1996 may constitute a defining point in calculating the moment-when the limitation-period or time-bar starts to run….
>
> **Merits of the case and risk/reward ratio**
>
> NACDE Committee and many others have believed for some time that Community law has been infringed and that the Government bears the responsibility for the regulatory fiasco that caused such loss to Lloyd's Names. That view is clearly shared by the European Commission which has commenced infringement proceedings….;"

181. This letter is notable for a number of features:

i) It suggests that the finding of the Court of Appeal gave rise to breaches by the Government of both the ICA 1982 and the Insurance Directive;

ii) The finding is said "indirectly" to be "indicating" a breach of the Insurance Directive;

iii) Launching proceedings could prejudice the Commission's investigation of infringement;

iv) The operation of a time-bar for damage accrued more than six years earlier was the subject of a warning from leading counsel;

v) It seems that the "Grant of Rights" issue had been seen by NACDE to be a problem but the (then) recent case of Courage Ltd v Crehan [2002] QB 507 was seen as a possible "way round" the problem;

vi) The urgency was based on the hope that limitation would run from "crystallisation" of losses in R&R;

vii) NACDE had "believed for some time" that Community law had been infringed and that the Government was responsible. That belief is not said to have derived from anything the Court of Appeal said; the inference (and the fact) is, I think, to the contrary: see paragraph 179. The judgment of the Court of Appeal itself had been handed down less than four weeks prior to the letter.

182. No reliance, in the event, has been placed on the Crehan case.

Claim Form

183. The Claim Form was issued on 2 September 2002.

The Pleadings

184. In an attempt to illustrate the importance to the present claim of facts said to have been obtained only in the course of disclosure or evidence given in Jaffray, Mr Plender QC in his closing speech (Day 14, 29th September, page 2 et seq.) provided orally a list of those paragraphs in the particulars of claim which were said to have been dependent on information so derived. Mr Friedman QC provided a written Note dated 29 September commenting on Mr Plender QC's submission.

185. There can be no doubt that the conclusion expressed by the Court of Appeal is relied upon in the particulars of claim, but I think Mr Friedman QC is right in his submission, supported by the analysis in the Note, that very few, if any, of such facts as are relied upon to justify the conclusion were, or can sensibly be said to have been, only revealed in Jaffray. I do not think it necessary to repeat the analysis. I have, as requested, done my best to check it and I agree with it.

GRANT OF RIGHTS

The Claimants' Submissions

186. The Grant of Rights Issue, as I have said, raises substantially issues of law. The key question is whether or not the Insurance Directive was intended to grant rights to Names: see paragraph 8.

187. The Insurance Directive, its sources, Recitals and Articles and some comments upon them have been set out in paragraphs 26 to 57.

188. The Names submit that the Directive grants rights to them in two capacities, both as insurers and insureds. As insurers, it is submitted, in my words, that they have the right to a properly regulated insurance market in which they and all syndicates and insurers are correctly regulated so as to ensure an orderly and viable market. As insureds, it is submitted, that they have rights as beneficiaries of RITC, and inter-syndicate reinsurances, and insureds under personal stop loss policies and estate protection policies held by some Names.

189. The specific rights contended for were (or "include") those set out in paragraph 54 of Mr Plender QC and Mr Nardell's written closing submissions. They are simply statements of some of the provisions of Articles 6 to 22 of the Insurance Directive expressed as "rights": They are:

i) "the right to require the Defendant to ensure that the prior official authorisation required for the taking up of the business of direct insurance shall be sought from the competent authorities of the Member State;

ii) the right to require the Defendant to ensure that official authorisation shall be granted for a particular class of insurance;

iii) the right to require the Defendant to ensure that those running the business of direct insurance are of good repute with appropriate professional qualifications or experience;

iv) the right to require the Defendant to make it a condition of authorisation of an insurance undertaking that it shall limit its business activities to the business of insurance and operations directly arising therefrom to the exclusion of all other commercial business;

v) the right to require the Defendant to oblige any syndicate engaging in the activity of direct insurance to submit a scheme of operations to the Defendant consistent with Article 9;

vi) the right to require the Defendant to ensure that every insurance undertaking shall have sound administrative and accounting procedures and adequate internal control mechanisms;

vii) the right to require the Defendant to ensure that the appropriate supervisory authority shall verify that the balance sheet of authorised insurance undertakings shows assets equivalent to the underwriting liabilities assumed in all the countries where it undertakes business;

viii) the right to require the Defendant to oblige authorised insurance undertakings to establish sufficient reserves for the entire business, covered by equivalent and matching assets localized in each country where business is carried on;

ix) the right to require the Defendant to fix the percentage of any technical reserves that it may allow to be covered by claims against reinsurers;

x) the right to require the Defendant to oblige insurance undertakings to establish an adequate solvency margin, one third of which is to constitute the minimum guarantee fund;

xi) the right to require the Defendant to oblige insurance undertakings to produce audited annual accounts and to render periodically the returns, together with statistical documents, which are necessary for the purposes of supervision, in conjunction with the right to require the Defendant to devote the necessary resources and to make the requisite enquiries to exercise effective supervision of the Lloyd's market."

General Comment

190. However much Mr Plender QC sought to question it, to my mind, in agreement with Mr Friedman QC's submissions, this description of the "rights" said to be granted by the Directive comes to no more than claiming a right to implementation of the Insurance Directive. But that is not what Francovich/Factortame liability is about. Those decisions assume that the directive should have been but has not been transposed into national law and require an affirmative answer to the further question:

> "is it possible to identify a right which should necessarily have been granted to the claimant to achieve the results required by the Directive."

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. But that, as Mr Plender QC acknowledges, is not the law. If it were, there is no reason in this case why rights were not also granted to, say, creditors and employees of syndicates, as well as to Names. Nor is it appropriate, as some of the Claimants' submissions sought to do, to draw analogies with administrative law. Standing to complain of a failure to implement a directive does not concern the test for a grant of rights. They are different concepts. As Mr Friedman QC submitted, the Community, acting through the Commission, has a right to require transposition. Individuals do not.

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 exposures 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.

193. It would also, to my mind, be a surprising conclusion that a directive granted the same 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.

Authority

194. I have been referred to a mass of authority. It is agreed that the answer to the question whether there is a grant of rights is to be determined having regard to the wording of the relevant provisions of the directive in their context, and having regard to their nature and purpose. The purpose of the Insurance Directive, is not, as I have said (paragraph 56), hard to divine. It was to facilitate the development of an open market in the provision of direct insurance and, in that context, to harmonise (so far as then achievable) existing national supervisory provisions. That purpose, or those purposes, have nothing to do with the complaint the Names seek to pursue in these proceedings. It was in that context that it was necessary that regulation should not prevent, save to

the extent permitted by the Directive, the establishment of an insurer in a Member State.

195. Despite the extensive citation of authority, there are two leading decisions, one national and the other Community, which I think provide conclusive support for the general comments I have made and so for Mr Friedman QC's submissions. They are the decisions of the House of Lords in Three Rivers D.C. v Bank of England (No 3) [2003] 2 AC 1 and of the ECJ in Peter Paul and Others v Germany [2004] ECR I-9425. Both decisions concern regulation of banking or credit institutions. They are therefore in the same general area with which this case is concerned, and they raised similar issues in the sense that in question were the rights (if any) of depositors for whose benefit regulatory regimes existed. There is an obvious analogy between depositors and insureds.

Three Rivers

196. In Three Rivers the plaintiffs were depositors in BCCI, a licensed deposit-taker which collapsed with a massive deficiency. The relevant issue was whether or not the plaintiffs were entitled to recover damages from the Bank of England, in respect of its supervision of BCCI, as the beneficiaries of rights granted to them under the First Council Banking Co-ordination Directive (77/780/EEC). The Banking Directive was also founded on the right of establishment in article 57 of the Treaty.

197. The headnote (omitting a passage of no relevance) records the unanimous decision of the House on this issue in these terms:

> "Dismissing the appeal in so far as it related to European Community law, that whether the Directive of 1977 gave rights to individual depositors and potential depositors had to be determined by examining the terms of the Directive itself; that the recitals showed that it was intended to be the first step in a continuing process to co-ordinate the supervision of credit institutions; that the protection of savings was merely a matter to which regard had to be had, along with the creation of equal conditions of competition, in the process of co-ordination; … that, although articles 6 and 7 were concerned with supervision, their purpose was to ensure co-ordination between the supervisory authorities of the member states and the only duty which they imposed was a duty to co-operate; that article 8(1) allowed the withdrawal of authorisation in limited circumstances but its terms were restrictive rather than obligatory; that, read as a whole, the Directive placed duties of co-operation on the supervisory authorities of member states but stopped short of prescribing any duties of supervision; that, consequently, it was not possible to discover provisions entailing the granting of rights to individuals as such rights were not necessary to achieve the results which were intended to be achieved by the Directive; and that, accordingly, the interpretation of the Directive was acte clair and it would not be appropriate to make a reference to the European Court of Justice …."

198. It is, of course, true that the decision is specific to the Banking Directive. It is also true that the Insurance Directive is more prescriptive of the supervision for which it provides. But the House was addressing what might be thought to be the constituency most likely to be granted rights (depositors not banks) and yet concluded that it was clear that no such rights were granted.

199. Lords Hope and Millett addressed the issue in their speeches. Lords Steyn and Hobhouse agreed with Lord Hope. Lord Hutton agreed with both Lord Hope and Lord Millett.

200. At page 206G, Lord Hope said, with reference to the plaintiffs' submissions about the purpose of the Banking Directive, derived from its terms and the travaux preparatoires:

> "The plaintiffs say, under reference to these and other passages in the opinion that the committee recognised that the main purpose of legislation concerning banking regulation was to provide security for depositors and to protect savings. I am willing to accept that this is so. No doubt the committee recognised that the protection of savings is a necessary part of every system at national level for the regulation of credit institutions whose business it is to receive from the public deposits and other forms of repayable funds. But the point to which it was drawing attention in its opinion was the need for the harmonisation of authorisation requirements, without which there would be likely to be serious disparities between the member states. The Community law purpose which was indicated in its observations was that of the harmonisation of regulatory measures affecting the right of establishment with a view to eliminating these disparities. I do not find any indication here that the committee saw the purpose of the Directive as being to confer Community law rights on individual depositors."

201. A little later, at page 207D, Lord Hope said:

> "The purpose of the Directive of 1977 was to begin the process of harmonisation of national laws so as to remove barriers to the provision of banking services throughout the single market, but without weakening or impairing the protection of depositors. The protection of depositors was seen therefore not as a purpose of the Directive but as a constraint on the provision of banking services to the public which had to be recognised."

202. When he turned to the specific articles of the Banking Directive on which the plaintiffs relied, Lord Hope addressed (and distinguished) many if not most of the authorities on which Mr Plender QC relied in his submissions in this case. Lord Hope stressed that the Banking Directive, as, I think, the Insurance Directive, assumed that national authorities would be supervising Banks (and insurers) and that the absence of any prescribed form of supervision or definition of those to whom rights were said to

be granted were further indications that no rights were granted. This is, again, in point. The Names contend that they are, in certain respects, "insureds", entitled to whatever rights the Insurance Directive grants to "insureds". That, I feel sure, would come as something of a surprise to the authors of the Directive when they had in mind the protection of "insureds".

203. Lord Hope expressed his conclusion at page 218B as follows:

> "Looking back at the Directive as a whole, the key to a proper understanding of its purpose and effect seems to me to lie in the fact that it was the first step in a process of harmonisation of provisions for the regulation of credit institutions carrying on business within the Community. It was about the removal of barriers to the right of establishment under article 52 of the EEC Treaty (now article 43EC). It confined itself to imposing a number of minimum conditions and prohibitions on member states as to the authorisation and supervision of credit institutions having their head offices in another member state or having their head offices outside the Community. It was based upon an appreciation of the fact that credit institutions require regulation in order to protect savings. So any measures of harmonisation had to meet the twin requirements of protecting savings on the one hand and creating conditions of equal competition between credit institutions operating in more than one member state on the other. It placed duties of co-operation on the competent authorities where a credit institution was operating in one or more member state other than that in which its head office was situated. But it stopped short of prescribing any duties of supervision to be performed by the competent authority within each member state. It is not possible to discover provisions which entail the granting of rights to individuals, as the granting of rights to individuals was not necessary to achieve the results which were intended to be achieved by the Directive."

204. Whilst Lord Millett stressed the need to examine the particular provisions of the directive said to have been breached in order to discern the interest it intended to protect, otherwise I do not think anything he said detracts from the passages I have quoted from Lord Hope. Indeed Lord Millett referred to the "inherently anti-competitive" nature of the regulations protecting depositors and hence the desire to co-ordinate them in a single market.

205. Even granted the differences between the Banking and Insurance Directives, Lord Hope's conclusion could almost have been written for this case. Apart from granting a right of establishment to banks, which would derive support from other passages in Lord Hope's speech, but was of no relevance in Three Rivers and is of no relevance in this case, the want of rights in depositors, and by analogy insureds, would in my judgment make the claimants' submissions in this case that rights of the nature for which they contend were granted to them, unsustainable.

Peter Paul

206. Peter Paul also concerned the First Banking Coordination Directive and a number of subsequent directives, including Directive 94/19, which had made Banking Supervision more prescriptive. Directive 94/19 introduced a deposit-guarantee scheme, which required (subject to certain exceptions) that deposits must be covered up to a minimum of ECU 20,000 "in the event of deposits being unavailable". The minimum guarantee applied regardless of any supervisory failure. The claimants were depositors with a German Bank which was not a member of any guarantee scheme. The Bank failed. The claimants claimed damages from Germany on the grounds that it had failed to transpose Directive 94/19 into national law and that the regulatory authority had failed to discharge its prudential supervision obligations properly alleging that if it had done so the Bank would have collapsed before they had made their deposits.

207. The objective of the claimants was to recover more than ECU 20,000. They contended ("the second question") that the rules on supervision in the Banking Directives outlawed a national rule precluding claims for damages for defective supervision and ("the third question") that there was State liability in damages for defective supervision.

208. In the course of the judgment on the second question, and in its judgment on the third question, the court said:

> "In a number of the recitals in the preambles to the directives referred to in the second question … it is stated in a general manner that one of the objectives of the planned harmonisation is to protect depositors.
>
> Furthermore, Directives 77/780, 89/299 and 89/646 impose on the national authorities a number of supervisory obligations vis-à-vis credit institutions.
>
> However, contrary to the claims of Paul and others, 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.
>
> In that regard, it should first be observed that Directives 77/780, 89/299 and 89/646 do not contain any express rule granting such rights to depositors.
>
> Next, the harmonisation under Directives 77/780, 89/299 and 89/646, 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.

However, the coordination of the 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.

Moreover, as under German law, it is not possible in a number of Member States for the national authorities responsible for supervising credit institutions to be liable in respect of individuals in the event of defective supervision. It has been submitted in particular that those rules are based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect plurality of interests, including more specifically the stability of the financial system.

Finally, in adopting Directive 94/19 the Community legislature introduced minimal protection of depositors in the event that their deposits are unavailable, which is also guaranteed where the unavailability of the deposits might be the result of defective supervision on the part of competent authorities.

Under those conditions, as pointed out by the Commission and the Member States which submitted observations to the Court, Directives 77/780, 89/299 and 89/646 cannot be interpreted as meaning that they confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of competent national authorities.

In the light of the foregoing, the answer to the second question must be that Directives 77/780, 89/299 and 89/646 do not preclude a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority.

On the third question

….

It follows from the case-law that a State incurs liability for breach of a rule of Community law only where, in particular, the rule of law infringed is intended to confer rights on individuals (see … Factortame…. Dillenkofer ….).

However, it is clear from the answers given to the first two questions that Directives 99/19, 77/780, 89/299 and 89/646 do

> not confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of competent authorities, if the compensation of depositors prescribed by Directive 94/19 is ensured.
>
> Under those conditions, and for the same reasons as those underlying the answers given above, the directives cannot be regarded as conferring on individuals, in the event that their deposits are unavailable as a result of defective supervision on the part of competent authorities, rights capable of giving rise to liability on the part of the State on the basis of Community law."

209. I do not read this judgment as one dependent on the guaranteed sum being payable. I think the decision is founded on the lack of any express provision granting rights to depositors and the conclusion that a grant of rights to depositors is not necessary for the achievement of the harmonisation which was the objective of the Banking Directives. Again, I think, those considerations are of equal (indeed greater) application to this case and lead to the same conclusion that there is no grant of rights to Names on whatever basis they seek to claim it. If those who are intended to benefit from supervision are not granted rights in respect of the solvency of the institutions supervised, it would be anomalous if those institutions which are the subjects of supervision were granted such rights.

Conclusion

210. Turning to the List of Principal Issues (Appendix 4), as it applies to this Issue, I answer question 1.1: "No": the result prescribed by the Insurance Directive does not entail the grant of rights to persons in the position of the Claimants. That is sufficient to dispose of the Issue, and indeed, of the claim. Whilst paragraph 3 of the List of Issues has, to an extent, helped to focus the submissions and debate, I do not find it necessary or helpful to address it in any detail. Question 1.2 (the content of rights granted to the Claimants) is not capable of a sensible separate answer in view of my answer to question 1. I also do not think it appropriate to address the question whether or not the Directive grants rights of establishment to those seeking to carry on the business of direct insurance. That has not been in issue. The claims do not arise from any infringement of a right of freedom of establishment but from losses incurred by the Claimants as insurers.

211. I have commented on the meaning of "third parties" in paragraph 35 of this judgment. A case based on Crehan has not been advanced.

THE LIMITATION ISSUE

212. In the light of my conclusion on the Grant of Rights Issue it is, perhaps, particularly unfortunate that the Limitation Issue has been part of the trial. But it has, and the parties are agreed, as I am, that it should be addressed. I also agree that the Issue has to be addressed on the basis that, contrary to my decision, implementation of the Insurance Directive could have granted rights to the claimants of the nature for which they contend. The only caveat I would enter is that this is not a case in which the Government can be or is accused of want of good faith or acting unreasonably in

asserting, so far as it did, that it had no liability for the losses suffered by the claimants or Names generally.

213. The List of Principal Issues (paragraph 12) raises a question as to where the burden of proof lies on this Issue. I do not, however, think anything turns on the answer to the question. The answer is, I think, to be found in the speeches of Lords Nicholls (paras 23-24) and Mance (para 106) in Haward v Fawcetts [2006] 1 WLR 6002. It is for the Defendant to establish that, but for the application of an extended limitation period, such as Section 14A, the claims are statute-barred. It is for the Claimants to establish that they are entitled to the extended period upon which they rely.

Emmott

214. The starting point in addressing the Limitation Issue is the Claimants' primary case that, applying the decision of the ECJ in case C-208/90, Emmott v Minister for Social Welfare [1991] ECR I-4269, Community law precludes the competent authorities of a Member State from relying on national rules of limitation to defeat a claim in respect of rights granted by a directive until such time as the directive has been properly transposed into national law. In other words, time can only begin to run following implementation of a directive: see paragraph 23 of the judgment of the Court.

215. The rationale for this decision appears from paragraphs 21 and 22 of the judgment, as follows:

> "So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national court.
>
> Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created."

216. There are, as has been well recognised in subsequent decisions, obvious difficulties with the application of this principle or at least with what may, perhaps, be called "unqualified Emmott". Why should it apply to a claimant who knows of the failure to implement? Or one who ought to know? Can the potential claimant wait for ever if the directive is not implemented? What if it is a difficult question whether or not a directive has been properly implemented? In this case, the claimants do not accept that the FSMA properly implemented the Insurance Directive. If they are right and unqualified Emmott is good law, time has not even now begun to run for the present claim.

217. The claim in Emmott was based on the direct effect of a directive which required the progressive implementation of the principle of equal treatment for men and women in matters of social security. The provisions of the directive should have been transposed

in Ireland by 23 December 1984 but were not in fact transposed until various dates in 1986. Mrs Emmott only received her full entitlement to benefit from November 1986. Her solicitors pursued a claim in correspondence in the spring of 1986. The Irish Government's response on 26 July was that since the Directive was still the subject of litigation in the High Court "no decision could be taken in relation to her claim which would be examined as soon as that court has given judgment".

218. Mrs Emmott obtained leave for judicial review in July 1988 seeking, in effect, the benefit of the directive from December 1984 when it should have been transposed. The defendant relied on a rule that applications for judicial review had to be brought promptly and in any event within a three or six-month period according to the nature of the relief claimed. It was this rule which the ECJ held could not be relied upon by the Irish Government.

219. In Case C-338/91 Steenhorst-Neerings v Bvd B [1993] ECR I-5475 the claim concerned benefits for incapacity at work. The relevant directive was transposed late. Domestic law precluded a claim for benefit earlier than one year preceding the date of the claim. The ECJ upheld this time bar. It did so on the basis (paragraph 23) that the aim of the rule restricting retroactive claims for benefit was "quite different from a rule imposing mandatory time-limits for bringing proceedings".

220. In Johnson v Chief Adjudication Officer [1994] ECR I-5483 the ECJ followed Steenhorst-Neerings in a case raising the same issue. The court said (paragraph 26) the "solution adopted in Emmott was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under the directive".

221. In Case C-2/94 Denkavit Intnl BV v Kamer [1996] ECR I-2827 Mr Advocate-General Jacobs (at page 524) considered Emmott should be confined to cases in which not only was there a failure to implement a directive but the Member State was also in default in obstructing the exercise of a remedy based on the directive or where in some other way the failure by the claimant to meet the time-limit was due to the conduct of the national authorities. The opinion concluded that "in the interests of legal certainty the obligation to set aside time limits should be confined to wholly exceptional circumstances such as those in Emmott". The court itself did not address the issue. As I have recorded, in Emmott, the Irish authorities had said that the claim would be examined once the litigation in the High Court had concluded. Yet they had then claimed Mrs Emmott was out of time when she came to pursue her claim after waiting for that conclusion.

222. In Preston v Wolverhampton Healthcare Trust [1997] 1 CR 899 the Court of Appeal considered Emmott. At page 915H, Schiemann LJ said that while Emmott had not been overruled by the ECJ it had "been consistently confined to its facts". Schiemann LJ also endorsed the opinion of Advocate General Jacobs in Denkavit describing it as authoritative and correct.

223. In Case C-188/95 Fantask A/S v Industreministeriet [1997] ECR I-6783 the ECJ held that a time-limit could begin to run before the directive in issue had been properly implemented. The opinion of Advocate General Jacobs again sought to confine Emmott to its particular facts. He questioned (paragraph 65) the references in Emmott to an individual not having notice of a directive or being unaware of his rights merely

because the directive had not been transposed into national law. He distinguished (paragraph 82) cases (such as Emmott) involving claims to recover tax overpaid or benefits denied, in which delay did not aggravate the loss, from cases involving claims for damages based on the Factortame principle concluding in paragraph 83 that:

> "The existence of a wholly independent claim for damages, subject to longer time-limits than the comparatively short ones prescribed for restitutionary and entitlement claims in many Member States, is consistent with the different nature of the claim. Its basis is not merely the unjust enrichment of the State resulting from simple error in the routine application of technical legislation but a serious violation of individual rights, calling for a re-appraisal of the balance between such rights and the collective interest in a measure of legal certainty for the State."

224. Thus the existence of Factortame claims, with longer time limits, itself made it unnecessary to set aside national time limits for Emmott-type claims.

225. The judgment of the Court on the issue, so far as material, reads:

> "The Danish, French and United Kingdom Governments consider that a Member State is entitled to rely on a limitation period under national law such as the period at issue, since it complies with the two conditions, of equivalence and of effectiveness, laid down by the Court's case-law …. In their view, the judgment in *Emmott* must be confined to the quite particular circumstances of that case, as the Court has, moreover, confirmed in its subsequent case-law.
>
> As the Court has pointed out in paragraph 39 of this judgment, it is settled case-law that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules for actions seeking the recovery of sums wrongly paid, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.
>
> The Court has thus acknowledged, in the interests of legal certainty which protects both the taxpayer and the authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law. Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought ….

> The five-year limitation period under Danish law must be considered to be reasonable …. Furthermore, it is apparent that the period applies without distinction to actions based on Community law and those based on national law.
>
> It is true that the Court held in *Emmott*, at paragraph 23, that until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.
>
> However as was confirmed by the judgment in … *Johnson* … it is clear from … *Steenhorst-Neerings* …that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive…."

226. Finally, Emmott was recently considered by the Court of Appeal in Secretary of State for Work and Pensions v Walker-Fox [2006] EuLR 601. The claimant claimed winter fuel payments. In respect of two years the claims were out of time under the applicable UK Regulations. But the claim was also based on an EEC regulation. The claimant did not appear nor was he represented but the Court acknowledged that counsel for the Secretary of State had "genuinely tried to argue both sides of the case".

227. In the course of his judgment, with which the other members of the Court agreed, Ward LJ said:

> "20. Shorn of detail the legal question is whether principles of law enunciated by the Court of Justice in *Emmott v Minister for Social Welfare* retain their authority or whether they have been gradually so whittled away that the case is now to be seen as based narrowly upon its own facts.
>
> 47. What in reality stood in the way of a person in another EEA country making a claim in time in the years 2001 and 2002 was the fact that on reading the 2000 Regulations and accepting them to be the letter of the law, he would see no point in applying at all because he did not meet the clear residential qualification in regulation 2(1)(a). A potential claimant is, however, presumed to know the law (a fiction which is increasingly more of a joke in a real world inundated by legislation, primary and secondary, flooding in on us from Westminster, Whitehall and Brussels). However unreal and therefore unfair it may appear to many, I have to conclude that, in the light of that presumption, he must be taken to know the law contained in Regulation 1408/71 better than the Secretary of State seemed to have understood it at the time. He is deemed

to know that a winter fuel payment is a form of old age benefit which is exportable. If Advocate-General Jacobs is correct, as I respectfully think he is, to say that an individual cannot be considered not to have notice of a Directive merely because it has not been transposed into law, then the individual's position is all the weaker when his rights flow from a Regulation which is directly applicable and needs no transposition.

48. Now I can easily accept that in the real world in which life is lived, it could be said to have been virtually impossible or excessively difficult to make a claim in circumstances where the individual is understandably ignorant in fact of his rights and where his government, whose duty it is to comply with EC Regulations, is steadfastly denying their application. In the legal world it is different. With knowledge of the law the arguments in favour of the exportation of the benefit were not excessively difficult to see or to understand and the making of the claim was thus perfectly possible. For that reason I conclude that the Deputy Commissioner erred in posing the question to be answered to be whether the position for which the government had been arguing, which was not resolved until July 2002, rendered the possibility of a claim in time being virtually impossible or excessively difficult. The proper question is whether a claimant with knowledge of the law (which he is presumed to know) could have applied in time. To that question the answer is sadly "Yes". The Deputy Commissioner erred in finding that it was virtually impossible or excessively difficult for Mr Walker-Fox to make his claim in time and for that reason the appeal should be allowed.

49. Although, therefore, it is not strictly necessary to consider what is left of *Emmott* in the light of the subsequent rulings of the ECJ, I have come to the clear conclusion, if I am permitted to utter it, that, again in agreement with Advocate-General Jacobs, it should be confined to very exceptional circumstances. They are that in some unconscionable way the state has obstructed the exercise of the individual's judicial remedy or contributed to his failure to exercise it. Such unjust conduct would make it a breach of the principle of effectiveness which underpins this jurisprudence….

50. The question then arises whether the Government has behaved in an inequitable way here which makes it unjust for it to rely on the time bar. This is the matter to which I have said in para. 18 I would return. For the Government genuinely to advance a view of the law and subsequently to acknowledge that the argument cannot prevail, cannot, in my judgment, come close to being the kind of unconscionable conduct which the court should not countenance. This case is on its facts miles away from *Emmott*. The Secretary of State may have taken a

> bad point in Brussels but he was in no way actively misleading the applicant or lulling him into a false sense of security. The narrow reading of *Emmott* to which it has been confined by the subsequent ECJ judgments does not apply in this case …."

228. It would, I think, be difficult to find a case which, whilst never being overruled, has been more emasculated by subsequent decisions than Emmott. "Unqualified Emmott" is, beyond doubt, now of no authority. National Limitation periods can and do bite before a directive is implemented in respect of claims for non-transposition. The claimants in this case cannot therefore succeed in their primary submission on the Limitation Issue.

Conduct of the Government

229. The extent to which Emmott survives as authority beyond its particular facts may be debatable, but at best for the Claimants it could do so only in circumstances in which it could be said that the conduct of the Member State was responsible for the lapse of time which brought the relevant time-bar into operation such as to make it inequitable for the State then to rely upon it. Although Mr Plender QC submitted that the evidence in this case justified such a conclusion, in my judgment it does not come near to doing so. I have referred to the letter from Mr Brebner to Mr Bingham in paragraphs 121 to 122. Mr Plender QC and Mr Nardell attached as Annex A to their Closing Submission a summary of documents which they put forward as representing "the stance" of the DTI from 1973 to 1991 and from 1992 to 2001. I was also supplied with other summaries and files of documents on the same topic. I can find nothing in any of this material, seen in context, for which I would criticise the DTI. It is all consistent with the conclusion I expressed in respect of the Brebner/Bingham letter. It is also entirely consistent with paragraph 50 of the judgment of Ward J in Walker-Fox in the sense that the DTI was putting forward a genuine view both of its role and that it had discharged it. Nor, unlike the position in Walker-Fox, has the DTI resiled from that view. There was no active misleading nor lulling into a false sense of security of anyone. Indeed, it is in general not the Names' case that they did not bring this claim earlier because of anything the Government said or did beyond the undoubted fact that the Government maintained that it had no responsibility for and was not liable for the losses the Names had suffered. As Mr Freeman acknowledged the Government had not disclaimed responsibility for solvency but asserted it had fulfilled it. I could accept that it might seem a daunting task to challenge the Government (even for claimants who were quite ready to take on agents, auditors and Lloyd's itself, all of whom denied liability) but I cannot accept that the Government bears any relevant responsibility for any delay in bringing this claim. Nothing was said to encourage postponement of a claim. Discouraging the making of a claim is nowhere near sufficient. I, therefore, also reject the submission that the Defendant is disenabled by its conduct from relying on a time-bar to defeat the claim.

Domestic Law:

Section 14A

230. The Claimants submitted that Section 14A(1) of the 1980 Act (paragraph 66) applied directly to their claims so as to disapply section 2 of the Act. The submission is that

the Francovich/Factortame cause of action "involves fault" on the part of the Member State and so should be treated as an "action for damages for negligence".

231. In my judgment, this is a hopeless submission. The cause of action does not require negligence to be alleged or proved. "Fault" might be relevant to the question whether or not a failure to transpose was sufficiently "serious" to found the cause of action but it is not itself an element of the cause of action nor is recovery "conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach going beyond that of a sufficiently serious breach of Community law": Factortame, judgment paragraphs 76 to 81.

232. Section 11 of the 1980 Act (personal injury claims) applies to "any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute…." The contrast is plain. Where the Act refers to negligence and statutory duty it is drafted expressly to do so: see SCR v ERAS [1992] 2 All ER 82. Where it refers to "tort" (section 2) of course the reference is to both (and more). The claim is a claim in tort; it is not an action for damages for negligence. The extent to which this construction of the Act may be affected by Community law is addressed below by reference to the Marleasing principle.

Section 2

233. I think, logically, the next question which should be addressed is the application of national law to the Limitation Issue on the basis that Community law has no relevance to the question.

234. Section 2 provides for a six-year limitation period "from the date on which the cause of action accrued". Damage is an ingredient of the Francovich/Factortame cause of action. Time therefore does not start to run until damage has been suffered.

235. A reading of paragraph 8.3 of the List of Principal Issues (Appendix 4) shows that the Claimants put forward two main arguments of domestic law. First, in contrast to the Defendant's case, which is that damage is suffered when a Claimant undertook a commitment to become or remain a Name or to increase his underwriting limit which he would not have undertaken but for the breach, the Claimants submit, first, that time only begins to run "when substantial loss is first suffered" and, second, that the breach by the Defendant is a continuing breach so that subsequent loss gives rise to a new cause of action whenever it occurs. The question of a continuing cause of action is addressed later. In paragraph 7.1.5 of the Amended Reply, the Claimants put a bit more substance on their case as to when substantial loss was first suffered as follows:

> "So far as it is material to determine when, as a matter of domestic law, each Claimant's cause of action first accrued, the Claimants contend that this occurred, at the earliest, when the Claimant first became liable to pay a contribution to syndicate underwriting liabilities, or received reduced profits by reason of syndicate underwriting liabilities, as a result of the Defendant's failure to implement the Directive."

236. I do not agree with this analysis. Without intending to express any disagreement with the judgment of Cooke J in Laws (which supports the Defendants' case) I would be content to approach the question on the basis that actionable damage first occurred when a Claimant became a Name, or did not leave, or increased limits, on a Syndicate which was already or subsequently became exposed to the liabilities which caused the losses of which complaint is made. In my judgment that would be regardless of awareness of the exposure. Damage would have been suffered upon the commitment (or increased commitment) to meet the liabilities on the relevant year of account. The immediate consequences of becoming a Name and risks of open syndicates are set out in the ASF, paragraphs 2.2.27 to 2.2.30. The exposures from RITC can be seen from paragraphs 2.4.7 to 2.4.9 of the ASF.

237. It is, however, the Claimants' submission that the recent decision of the House of Lords in Law Society v Sephton & Co [2006] 2 WLR 1091 supports their analysis.

238. Sephton was a claim in negligence against accountants. The negligence was alleged to have exposed the Compensation Fund of the Law Society to claims on the Fund which would not, however, necessarily be made. The House decided that time did not run unless and until a claim was actually made. The risk or likelihood of a claim was not sufficient. To quote the headnote:

> "… a contingent liability, such as the possibility of an obligation to pay money in the future, was not in itself damage until the contingency occurred; that, consequently, until a claim was actually made, no loss or damage had been sustained…."

The liability was "contingent" because the misappropriations by the solicitor which gave rise to the risk of liability might have been made good and a claim on the Fund had to be made in proper form.

239. But, in this case, I do not think the court is addressing a loss which is only prospective and might never be incurred. By becoming a Name (and joining a Syndicate or Syndicates) a Name was committed to the liabilities of that Syndicate under RITC it had written and on all business (including RITC) it did write in the course of his membership. Quite apart from joining fees and the provision of charges and guarantees (ASF 2.2.27) there were therefore actual liabilities undertaken albeit unquantified. This was not a contingency standing alone in the sense with which, as I understand their speeches, their Lordships were concerned in Sephton: see in particular, Lord Hoffmann at paragraph 30. The Names were worse off than if they had not become or continued to be Names. That is precisely their case, albeit, and quite understandably, they were shocked to discover just how much worse off they were when the claims did start to come in, or became manifest, as they did, from at the latest 1991 onwards.

240. Inevitably, this conclusion personalises the start of the running of time. But it does not matter; the losses which are the subject of this claim were, with one possible exception, all incurred on claims on the 1992 or earlier years of account: RRAPC paragraphs 2.4, 2.5, and 99 to 104. The Names who have suffered such losses must all, therefore, have been committed to them prior to 1993. Moreover, on the evidence, all of the sample Names had suffered actionable damage within any definition many more than 6 years before this claim was issued on 2 September 2002. In all

probability, that is also true for all the claimants. On that basis, the issue is academic, save insofar as it may impact on other issues.

Continuing Breach

241. It is not the Defendant's case that the (assumed) failure to transpose the Insurance Directive was a once and for all breach committed on the last day (27 July 1976) by which the Directive should have been transposed and entered into force in the UK. It is accepted that there was a breach on that day and every day thereafter that the Directive was not properly transposed: see Phonographic Performances Ltd v DTI [2004] EuLR 1003. In that case, as in the case of Hartmann v Council [1997] ECR II-00595, the particular loss claimed arose on each performance or each day for so long as the Defendant was in breach and so could properly be said to have been caused by the continuing breach committed the day before each loss.

242. It is, however, necessary again to refer to the nature of the present claims. They, like R&R, relate to losses on Syndicates on 1992 and earlier years of account. The nature of the claim and its limitation to 1992 and earlier years of account appears plainly from paragraph 2 of the RRAPC (see paragraph 2). The latest date on which a Name could have been committed to contribute to those losses must therefore ante-date 1993. The breach or breaches by the Defendant which are said to have caused those losses must also therefore have been committed prior to 1993. No breach committed thereafter could be material to the cause of action advanced. Any further calls on the Names made in and after 1993 increase the amount of the claim in respect of the previous breaches. It is, of course, well-established law that a cause of action having damage as a constituent may arise long before it is possible to quantify the damages recoverable. I can see no answer to this submission made by the Defendant. Mr Plender QC did seek to suggest that payments to Equitas were sufficient to provide a new cause of action or that should there be "proportionate insolvency" of Equitas (ASF paragraph 7.2.1) that would do so. But the payments made to Equitas and to be made in the event of proportionate insolvency were and would themselves be referable to the losses in the years prior to 1993 to which alone R&R related: the ASF at paragraph 7.1.5. to 7.1.7 and paragraph 2.4.3 of the RRAPC. Recent public statements also suggest that the risk of "proportionate insolvency" is now likely to be removed.

243. The one exception in the pleaded claims which the Defendant accepts might involve a loss first arising after 1992 is the claim in paragraph 99.2 that damage was suffered by way of "trading losses not included in the Equitas premium". That claim remains wholly unspecified and unsupported by evidence. It is also said by the Claimants that other losses are claimed after 1992 in the RRAPC. There were some dark mutterings about this in the Claimants' Response and Closing Submissions. I propose to say no more about them. They should be addressed if and when they are pursued further.

244. In my judgment, therefore, the application of section 2 of the Act would result in the claims of each of the sample Names being statute-barred and so failing. The same applies to all the Claimants. Although Mr Plender QC has rightly cautioned against assuming that all Claimants are in the same or no better position than the sample Names, on this question the reasoning which leads me to the judgment I have expressed is applicable to all.

Community law

245. It is the Claimants' submission that if, as I have otherwise held, English law provides without qualification for Francovich/Factortame claims to be time-barred six years after a claimant has suffered damage as a result of a failure to transpose the directive in question then the Community law principles of "effectiveness" and "equivalence" require amelioration of English law. Three routes to that end are put forward by the Claimants. The first two involve the application of Section 14A, either by way of the principle to be derived from Case C-286/85 Marleasing S.A. v La Commercial Internationale de Alimentacion S.A. [1990] ECR I-4135, or simply by analogy. The third is that losses suffered within the 6 year period before proceedings were commenced should be recoverable even if earlier losses are not.

246. The first question is, therefore, whether the application of section 2 of the 1980 Act to claims for failure to transpose a directive is an infringement of either of the principles of effectiveness or equivalence. Those principles require (see Fantask at paragraph 225 above) that the substantive and procedural conditions imposed by domestic law must not be less favourable than those relating to similar domestic claims (equivalence) and must not operate so as to make it virtually impossible or excessively difficult to obtain reparation (effectiveness). Subject to these principles, it is for each Member State to determine what conditions, including limitation periods, are appropriate to be imposed. Such periods do not themselves offend either principle, founded as they are on "application of the fundamental principle of legal certainty": case C-261/95 Palmisani v Istituto Nazionale della Previdenza Sociale [1997] ECR I-4025 at paragraph 28.

Effectiveness

247. The Claimants submit that English law does not provide an effective remedy because time can begin to run and expire before a Claimant has knowledge he has suffered a loss or of a causal link between that loss and the failure of which he complains. That is true, but it is true of many, if not most, limitation periods. As Lord Scott said in Haward v Fawcetts [2006] 1 WLR 682, at paragraph 32 on page 690, such periods must seek to strike a balance between the interests of claimants in seeking to pursue what may be meritorious claims and the interests of defendants in certainty. Section 14A is itself an example of the application of that balance in cases of the kind with which its provisions are concerned.

248. I cannot see any principled ground of objection to the strict application of section 2 of the 1980 Act in the manner in which I have held it does apply. Time does not begin to run until damage has been suffered by the potential claimant. It is improbable that a claimant will be unaware of such damage before six years expires. In the case of failure to transpose a directive the breach is continuous; if, therefore, there is damage which is truly caused by such a failure at any time before proper transposition it is recoverable. The period of six years is substantial, longer indeed than the period which applies to claims for non-contractual liability against the Community: Article 46 of the Statute of the Court of Justice, which itself only runs from damage (Hartmann). The question is not whether in a particular case the application of the period may work injustice but whether generally it causes injustice by making it virtually impossible or excessively difficult to obtain reparation. I do not think that test is met on the evidence relating to the Claimants in this case.

Equivalence

249. I have held that the true analogy in domestic law to Francovich/Factortame claims is a claim for breach of statutory duty not claims for damages for negligence. It follows that the principle of equivalence is not infringed: domestic and relevant Community law are subject to the application of the same time-period without discrimination.

Marleasing

250. The principle was stated in paragraph 8 of the Judgment in Marleasing. It is that, because of the obligation upon Member States to achieve the result envisaged by a directive and to take all appropriate measures to do so, "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter …."

251. The Claimants' submission is that Section 14A of the 1980 Act is to be construed so as to extend to Francovich/Factortame claims because it is necessary to do so to achieve the purpose of the Insurance Directive. It follows from what I have already said that I think this, too, is a hopeless submission. So to construe Section 14A does, I think, involve considerable violation to the language of the Section read in context of the Act in which it appears (see paragraphs 230 to 231) but even if that is permissible (as it may be) I can see nothing in the Directive or the other principles of Community law which require the court to perform such an exercise.

Conclusion so far

252. It follows from what I have so far said that in my judgment the present claims are statute-barred and must also fail for that reason. Section 2 of the 1980 Act applies and none of the ways in which the Claimants have sought to evade its application are effective to do so. Again, however, I have been encouraged to address the issues which would arise if Section 14A were to apply to the claims. I will do so, albeit as succinctly as I can in the hope of not adding too much more to what is already a judgment of unacceptable length. It is, of course, to this issue that the facts I have set out are material. The Defendant accepts (in agreement with the Claimants) that if, by any of the ways put forward by the Claimants, section 2 of the 1980 Act was inapplicable, then Section 14A (applied with suitable adjustments) provides the appropriate analogy.

Section 14A

253. Section 14A is quoted in paragraph 66 and the most material provisions are repeated below. The alternative limitation period for which it provides in sub-sections 4(b) and (5) is 3 years from "the earliest date on which the [Claimants] first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action".

254. The material provisions are sub-sections (6) to (10) which provide:

> "(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both-
>
> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (8) The other facts referred to in subsection (6)(b) above are-
>
> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.
>
> (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
>
> (10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire-
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

255. These sub-sections draw a contrast between facts and law. That may reflect the maxim that a person is deemed to know the law. Thus the reference to expert advice

in sub-section (10) is advice on facts not law. But the contrast is not easily drawn. Sub-section (8) requires knowledge that the damage was attributable to the act alleged to constitute negligence and that it was an act of the defendant, but sub-section (9) excludes knowledge that the act did "as a matter of law involve negligence". The contrast is yet more difficult, I think, when seeking to apply Section 14A to the Francovich/Factortame cause of action. What are the acts or omissions of the Member State which constitute the cause of action and what is excluded as a "matter of law"? And in any event to what extent, if at all, is a potential claimant to be deemed to know of (in this case) the Insurance Directive and the (assumed) failure properly to transpose it into the ICA 1982? I find these difficult questions to which there are, and such authority as there is provides, no easy answers.

256. The leading authority on Section 14A is Haward, which followed and applied the decision of the Court of Appeal in Hallam-Eames v Merrett Syndicates Ltd [2001] Lloyd's Rep PN 178. The claim in Haward was by the purchasers of a company acting on the advice of the Defendant accountant. The purchase was completed on 9 December 1994. The claim in Haward was brought on 6 December 2001. The claimants relied upon Section 14A contending that the earliest date on which they had the relevant knowledge was May 1999. To quote the headnote:

> "knowledge" for the purposes of Section 14A of the 1980 Act meant knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ; that knowledge that the damage was "attributable" in whole or in part to the acts or omissions of the defendant alleged to constitute knowledge within Section 14A meant knowledge in broad terms of the facts on which the claimant's complaint was based and of the defendant's acts or omissions and knowing that there was a real possibility that those acts or omissions had been the cause of the damage; that the burden of proof had been on the claimants to show that the date when the first claimant had first known enough for it to be reasonable for him to investigate the possibility that the partner's advice had been defective had been after 6 December 1998; that, whether or not the first claimant had before that date realised that the partner had not investigated matters sufficiently before giving his advice, he had known all the material facts as they had occurred and the causal connection between the partner's advice and the damage had been patent and obvious; and that, accordingly, the claimants had failed to discharge the burden of proof.

257. At page 687, paragraph 15, Lord Nicholls referred to some of the difficulties in Section 14A to which I have referred but noted that they did not arise in Haward. So, too, did Lord Walker, at paragraphs 58 and 59. Nonetheless, the practical approach to the overall question which the section poses is, I think, helpful. Lord Nicholls said, at paragraph 23:

> "The relevant date was not when (the first claimant) Mr Haward first knew he might have a claim for damages. The relevant date was an earlier date, namely, when Mr Haward

> first knew enough to justify setting about investigating the possibility that (the defendants') advice was defective."

258. Lord Scott at paragraph 49 described "the requisite knowledge" as "knowledge of the facts constituting the essence of the complaint of negligence". So, too, did Lord Walker at paragraph 66, noting (paragraph 68), as did Lord Mance, an unusual feature of Haward that constructive knowledge was not there in issue. Lord Brown (paragraph 90) referred to knowledge of "the substance of what ultimately came to be pleaded". Lord Mance, at paragraph 122 commented on cases where the loss may be attributable to more than one cause that:

> "it must always be remembered that all that Section 14A requires is knowledge that loss is "capable" of being attributed in whole or "in part" to the act or omission alleged to constitute a particular defendant's negligence."

259. What facts, then, are the essence of the present complaint, and when would a Name have sufficient knowledge of those facts to justify setting about investigating the possibility that the Government was responsible for the damage suffered?

260. In seeking to answer the questions I have posed in the preceding paragraph I would first make some general points.

261. First, the fact that knowledge of the facts on which the complaint is based is contrasted with knowledge that those facts amount or may amount in law to a cause of action was emphasised in Broadley v Guy Clapham [1993] 4 Med LR 328 and Dobbie v Medway HA [1994] 1 WLR 1234 in relation to the wording of Section 14(1)(b) which mirrors the wording of Section 14A(8)(a). The same contrast appears in Hallam-Eames. To quote the headnote:

> "(3) A claimant did not have to know that he had a cause of action or that the defendant's acts could be characterised in law as negligent or as falling short of some standard of professional or other behaviour, but he must have known the facts which could fairly be described as constituting the negligence of which he complained ….
>
> (4) Applying those principles, in this case it was not enough that the Names knew that run-off and RITC policies were being written or that the syndicate accounts were being certified. It was necessary in addition to add the knowledge that those policies exposed the Names to potentially huge and unquantifiable liabilities …."

262. In my judgment, in this case, applying the analogy, the relevant facts for the purposes of section 14A(6), (7) and (8) are knowledge of the exposure to the losses and that the exposure was or might, wholly or in part, be capable of being attributed to the failure of the Government to regulate or supervise Lloyd's. That requires, as the Defendant accepts, knowledge of the regulatory system in fact in place and that the Government had a relevant role in it. But it does not require, or section 14A(9) applied by analogy does not require, knowledge that the regulatory failures of the Government would or

might give rise to a Francovich/Factortame claim for failing properly to transpose the Insurance Directive.

263. Second, what is not required is knowledge of facts sufficient to bring a claim, although Mr Freeman, in his evidence, was keen to stress that there was insufficient basis for a claim to be properly pleaded prior to the judgment of the Court of Appeal in Jaffray, and some of the Claimants' submissions focus on the time when a claim could first have been expected to be brought.

264. Third, deemed knowledge of the law is, it seems, a principle of both Community and domestic law. But it is not, I think, clear how far it goes. I have referred (paragraph 223) to the opinion of Advocate-General Jacobs in Fantask and the judgment of Ward LJ in Walker-Fox (paragraph 226). The most recent discussion is to be found in the decision of the Court of Appeal in It's a Wrap (UK) Ltd v Gula [2006] EWCA Civ 544. The issue was whether or not the statutory remedy against a shareholder, in section 277(1) of the Companies Act 1985, entitling the company to recover an unlawful distribution paid to a shareholder who knew or had reasonable grounds to believe that the payment was made in contravention of the Act, required knowledge or belief of only "the relevant facts constituting the contravention" or also "the fact that the Act was contravened". Section 277(1) was designed to implement the second EC Directive on Company Law.

265. The Court of Appeal held that the shareholder could not resist a claim because he did not know of the restrictions in the Act on making distributions.

266. In paragraph 14 of her judgment Arden LJ said:

> "Directives also have to be interpreted in the light of the general principles of Community law: see *Kolpinghuis,* Case no 80/86 [1987] ECR 3969. One of those principles is that a person is taken to know the content of Community law as soon as it is published in the Official Journal of the European Communities: see for example *Friedrich Binder GmbH & Co KG v Hauptzollamt Bad Reichenstall,* Case 161/88 [1988] ECR 2415 at para. 19. Here the Community instrument was a directive and accordingly (article 16 not having created directly applicable rights) a person was not bound by article 16 until it was implemented in UK law. This has now happened by the enactment of primary legislation. Thereupon, the further presumption in English law that a person is presumed to know the law is brought into operation: for this presumption, see generally Halsbury's Laws of England para 1324. Advocate General Darmon expressed the view at para 34 of his opinion in the *Binder* case that this presumption would arise in national proceedings in most member states. Accordingly, in my judgment the right approach to the interpretation of article 16 is to proceed on the basis that, when implemented, the general presumption that ignorance of the law is no defence will apply unless on a true interpretation of the directive it is excluded."

267. Both Sedley and Chadwick LJJ also said that the shareholder must be taken to know the content of Community law.

268. However, I do not find these statements conclusive or indeed easy to apply in the present context. In this case I am to assume that the Insurance Directive was not (unlike the Company law Directive) transposed into English law. It was, of course, published in the Official Journal and Arden LJ's words can be read as saying a citizen of the Community is therefore taken to know the content of the Directive. That would, I think, include knowledge of any rights granted by the Directive to individuals. But the words can, and indeed more naturally, I think, are to be read as requiring transposition of a directive before the English law presumption applies, and that, in such a case, it was the latter presumption which mattered. Of course a Name is presumed to know the ICA 1982, but it does not necessarily follow that the Name is also deemed to know that the ICA 1982 failed to grant him the rights to which he was entitled under the Insurance Directive and Community law. There is, as Ward LJ noted, a real artificiality about such presumptions perhaps all the greater in the present context. Nonetheless, if I had to decide the point, I would decide that the Names are indeed presumed to know the law which in this case is said to give them a Francovich/Factortame cause of action. Were it not to be so, there would be the, to my mind, awkward dilemma, if I am right in my decision on Grant of Rights, and assuming, as I do, that the Defendant has at least an arguable case on transposition, that the Act would require actual or constructive knowledge of something which proved to be wrong in law. There are, however, two other reasons which in my judgment make the point academic. First, as I have said (paragraphs 261-262), the knowledge requirements of section 14A applied by analogy to such a claim involve sub-section (9) itself which I think makes irrelevant knowledge that the 1982 Act failed to transpose the Insurance Directive such as to give rise to a Francovich/Factortame cause of action. The second reason is that on the facts it is my conclusion (as will be seen) that the Names acting reasonably ought at least to have appreciated that such a cause of action was possible such as to lead to the step of seeking advice upon it.

269. The next, and fourth, general point I would make is that it would be a serious concern if section 14A had the effect of making it easier for a claimant to rely upon an extended limitation period the more difficult or doubtful the potential claim was in law and, indeed, on the facts, with the consequence that the more hopeless a claim the longer the period in which to pursue it. The justification for certainty and the risks of injustice in trying stale claims may be all the greater in circumstances in which a defendant can say there was no reason even to anticipate a claim. That is why, consistent with its purpose (latent damage), I think the emphasis on Section 14A is on knowledge of damage and the relevant expertise in sub-section (10) does not include legal expertise. It is the fact and knowledge of damage which is likely to and should trigger enquiry. In my judgment that supports the conclusions expressed in the previous paragraphs.

270. The final general point I would make is specific to Names in the circumstances in which they found themselves exposed to potentially massive and unheralded losses. Those circumstances were the subject of extensive public debate and media attention. They led to the formation of numerous Action Groups. Skilled legal advice was sought and available to those Groups. There was extensive and expensive litigation. I

have set out at inordinate length some, but even then only a fraction, of the history. Mr Plender QC has, as I have said, counselled against treating Names as one. There may, of course, be some individual case which is truly to be distinguished, but it has not been identified and I think that any Name who had suffered damage as the Claimants define it (paragraph 235) must have been aware of it not long thereafter and was then in a position to seek advice and information either personally or, more realistically, through an Action Group, so as to explore what avenues of recovery might be available and that acting reasonably, the Name should have done so. Indeed most Names did just that. The Action Groups and individual Names were in regular contact. Certainly, on the evidence of the sample Names, I see no reason to distinguish between them. Many were deeply involved in pursuing claims. Those who were not were, and said in evidence that they were, content to rely on the Action Groups to consider pursuing whatever claims and fighting whatever battles were thought to be worthwhile in the hope all might benefit from whatever victories were achieved. That is true for both acceptors and non-acceptors of R&R. The one sample Name who might be placed in a different category was Mr Villiers who said that by 1994 he had determined to do nothing more, had "more or less written off his liabilities" and was not a member of any Action Group. But I do not think it was, in terms of Section 14A, reasonable for a Name who had suffered damage as Mr Villiers had, simply to ignore the prospects of recovery and especially so when he was or at least should have been aware that others were very much involved to that end. Like, of course, all the other sample Names, he was ready to join in the present claim when it was launched. Sub-section (10) of section 14A has, I think, a significant bearing on the position of all Names.

271. I will now seek to summarise the evidence about the knowledge of the Names largely and simply by reference to samples from the Section of this Judgment entitled Chronology and Facts.

272. There are certain facts which are indisputable. By, at latest, 1992 the sample Names and, it is conceded, "numerous Names" (and in all probability all Names) had suffered significant losses and knew that they had done so. A reading of the chronology demonstrates also that at latest by the time of the publication of the Business Plan in April 1993 (paragraphs 106 to 109) it was apparent that the losses affected numerous syndicates, such as to call into question the future of Lloyd's, and were the result of under-reserving and the exposed inadequacies of RITC. Allegations that the (or a) cause of the losses was regulatory failures by Lloyd's were made in Mason in 1993 (paragraphs 112 and 115) and thereafter, finding their most refined form in Jaffray in 1997 (paragraphs 157 and 158). The fact of such failures was apparent from the market-wide nature of the problem and the need for R&R. The role of the DTI in regulation of Lloyd's was under debate and criticism from 1994 onwards: paragraphs 121, 125, 127-8, 131, 160. The possible relevance of Community law and the Insurance Directive as a basis for claims against both Lloyd's and/or the Government arose in Clementson and Mason (paragraphs 110 and 119), was known to Mr Stockwell, (paragraphs 116 and 163) and to others (paragraphs 131 and 143) including the existence of Francovich liability or at least the possible right to compensation (paragraphs 133, 145, 150 and 156). Mr Freeman said he had been aware of the Insurance Directive since 1994 and by 1996 was aware of Francovich and the possibility of obtaining compensation from the DTI. He said what was lacking was "evidence". He believed then that the DTI was doing what the Directive required

it to do. Miss Stewart-Smith (an acceptor of R&R) was able on her own to formulate a Petition to the European Parliament as she did. Finally, as I have found (paragraph 179), there is nothing in the decision of the Court of Appeal in Jaffray which justifies the case that any significant new fact emerged then. What happened after the Court of Appeal could have happened before it. The facts were there and the law no different.

273. In my judgment, these matters demonstrate, as Mr Friedman QC submitted, that prior to 3 September 1999 the Names, (including Mr Stockwell in his capacity as representing Action Groups) who did address their minds to European requirements were in fact aware of their possible relevance to the alleged regulatory failures by the Government which they believed had, at least in part, caused the losses. They were in a position to justify setting about investigating a claim against the Government on that basis. Reasonable enquiries by others would have put them in the same position or, perhaps more realistically, others chose to leave to Action Groups, and in particular to Mr Stockwell, the pursuit of any worthwhile claim. That was reasonable of itself, but I think carries with it the consequence that they are no better placed than those on whom they relied.

274. Against this body of evidence there is very little to be put into the scales. Mr Freeman said that, to the best of his knowledge (and he would expect to know) none of the long list of distinguished lawyers who advised the Names from time to time put forward the possibility of a Francovich/Factortame claim before the decision of the Court of Appeal in Jaffray. But that may be no surprise if this judgment is right. Nor do I think it material to the questions asked by section 14A.

List of Principal Issues

275. Again, I do not think it necessary to address each of the questions or matters raised in paragraph 8 of the List of Principal Issues. The claims, as pleaded, are wholly statute-barred. Section 2 of the 1980 Act applies and provides for that result. Even if, which in my judgment it does not, by one route or another section 14A of the Act is applicable by analogy, the sample Names, and in all probability all the Claimants, had or are to be taken to have had the requisite knowledge more than 3 years before their claims were issued and so the claims would also be wholly statute-barred on that hypothesis.

OVERALL CONCLUSIONS

276. The Insurance Directive did not grant any relevant rights to the Claimants and the claims as pleaded are statute-barred. It follows that the claims fail and fall to be dismissed. I will hear the parties on the appropriate form of order and any other ancillary matters which cannot be agreed on a date to be fixed after this judgment, which was supplied to them in draft form on 27 October 2006, is formally handed down.