New Zealand Law Reports

Society of Lloyd's & Oxford Members' Agency Ltd v Hyslop

Court of Appeal Wellington

[1993] 3 NZLR 135; 1993 NZLR LEXIS 666

9, 10, 11 February; 29 April 1993

DECIDED-DATE: 29 April 1993

CATCHWORDS:
[*1] Practice and procedure – Jurisdiction – Stay of proceedings – Court discretion – Operation of Lloyd's – High Court Rules, RR 219 and 220 – Securities Act 1978, ss 31(1), 33(3) and 37(1).

HEADNOTES:
The respondent, Mrs Hyslop, was elected a member or "Name" of the Society of Lloyd's with effect from 1 January 1988. Her membership was arranged through Hall, Harford, Jeffreys, Langdale Ltd who were later replaced by the Oxford Members' Agency Ltd as her managing agent. In accordance with Lloyds' requirements Mrs Hyslop provided a bank guarantee to Lloyd's which was given by Barclays Bank Plc. This was secured by an indemnity given by Barclays New Zealand Ltd, which in turn was secured by counter-indemnity given by Mrs Hyslop. Through her managing agents Mrs Hyslop entered into underwriting contracts in 1988 and 1989 as a member of various syndicates. These contracts resulted in substantial losses for which Oxford had made calls on her.

The present proceedings were commenced by Mrs Hyslop against Lloyd's, Oxford, Barclays Plc and Barclays NZ. She sought the cancellation of various agreements into which she had entered, and she also sought injunctions to restrain Lloyd's and Oxford from enforcing [*2] the guarantee given by Barclays plc, and to restrain Barclays NZ from enforcing its counter-indemnity against her. She sought orders declaring that she was not liable for any of the losses on insurance contracts entered into in her name, the refunds of sums already paid by her, and general damages and interest.

All the defendants applied to dismiss or stay the proceedings on jurisdictional or other grounds. In the High Court, all causes of action except one alleging breach of the Securities Act 1978 were dismissed or stayed. Lloyd's and Oxford appealed against the refusal to dismiss that cause of action. Particularly, that cause of action alleged that Mrs Hyslop's liability was avoided because Lloyd's or Oxford were in breach of ss 33 and 37 of the Act by not registering a prospectus, by not appointing a statutory supervisor in New Zealand, or by not registering a copy of the deed of participation when offering participatory securities to the New Zealand public.

The issues were, broadly, whether the proceedings against Lloyd's and Oxford were prima facie within the jurisdiction of the New Zealand Courts; whether the plaintiff had a good arguable case against Lloyd's and Oxford; and [*3] whether the Court in its discretion should allow or dismiss the proceedings. In particular the Court was required to consider whether Mrs Hyslop's investment in or through Lloyd's or Oxford was a security or participatory security; whether it was offered to the public for subscription; whether the offer was made by or on behalf of an issuer; whether there was an allotment; and whether the Act applied to an investment outside New Zealand.

No one can participate in an underwriting syndicate in the Lloyds' market unless he or she is a member of Lloyd's. The Name operates through underwriting agents who have authority to act on their behalf in dealing with brokers, who in turn are the agents of the insured. Lloyd's does not itself carry out any underwriting business. It regulates the market within which the Names operate. The underwriting agreement provides that the reliability of each underwriting member was accepted solely for his or her own account with any loss being borne by the Name alone. Thus the Name is a sole trader. All business in the Lloyd's market is conducted in London. While some insurance business in New Zealand is placed in the Lloyd's market, that business is submitted [*4] through brokers in New Zealand, who must act through an approved Lloyd's broker in London where the contracts are made. With effect from 1 January 1988 Mrs Hyslop had entered this structure and signed the relevant contracts for membership of Lloyd's and of a number of syndicates together with the relevant

authorities provided to her members' agent and managing agent.

Held: 1 There was prima facie jurisdiction under R 219(h) of the High Court Rules for the service of proceedings out of New Zealand on Lloyd's and Oxford as Mrs Hyslop was challenging the enforceability against her by Barclays NZ (which is resident in New Zealand) of the deed of counter-indemnity and related securities on the basis that those agreements and the interrelated contracts were all tainted by breach of the Securities Act. On the assumption that the proceedings had been properly brought against Barclays NZ, that the overseas defendants could have been properly sued within the jurisdiction and were a necessary or proper party to the proceedings against Barclays NZ, the case fell within R 219(h); but the plaintiff must also show that there was a good arguable case and the Court had a discretion as to whether it [*5] was appropriate for it to accept jurisdiction (see p 137 line 54, p 138 line 45, p 149 line 10).

2 The respondent did not have a good arguable case and the Court's discretion would be exercised against her by allowing the appeal, dismissing the proceedings and dismissing the cross-appeal for the reasons:

(a) There was a legal distinction between joining Lloyd's and joining particular syndicates. Membership of Lloyd's did not confer any interest or right to participate in any capital, assets, earnings, royalties or other property of any other person. As such it was not a participatory security (see p 137 line 54, p 141 line 22, p 152 line 23).

(b) The offer, even if made in New Zealand, was not an offer made to a section of the public but to Mrs Hyslop as an individual. She had not been selected at random (see p 137 line 54, p 142 line 16, p 152 line 38).

(c) The managing agents who made the offers of membership of a syndicate were not parties to the proceedings. Even if membership of a syndicate were to constitute a security, neither Lloyd's nor Oxford as members' agent fell within the definition of an "issuer" under the Securities Act (see p 137 line 54, p 141 line 40, p 148 line [*6] 35).

(d) The fact of exclusive jurisdiction clauses placed a heavy burden on the parties seeking to oppose those clauses and a stay should be granted unless strong cause for not doing so was shown by the respondent (see p 137 line 54, p 142 line 50, p 154 line 34).

The Eleftheria [1970] P 94; [1969] 2 All ER 641 referred to.

Appeal allowed: proceedings dismissed: cross-appeal disallowed.

Observations: (i) (per Richardson J, Cooke P dissenting) A final consideration was that senior English Judges were well used to interpreting New Zealand legislation, and in any appeal from the New Zealand Court of Appeal, the same Law Lords who dealt ultimately with English cases would be determining any New Zealand proceedings (see p 144 line 10).

(ii) (per McKay J) As the Court had pointed out previously the Courts have stopped short of giving stress damages for breach of ordinary commercial contracts (see p 148 line 6).

Mouat v Clark Boyce [1992] 2 NZLR 559 (CA) approved.

(iii) (per McKay J) In cases falling outside R 219, the Court is given power under R 220 to grant leave for a statement of claim or other document to be served out of New Zealand. [*7] Similar issues as to discretion arise under both rules. The only material difference is in respect of onus. On an application for dismissal or stay in respect of proceedings properly served under R 219 the onus is on the defendant. On an application under R 220 for leave to serve out of New Zealand, it is for the plaintiff to show that New Zealand is clearly the appropriate forum (see p 149 line 27).

The Spiliada [1987] AC 460; [1986] 3 All ER 843 followed.

CASES-REF-TO:
Other cases mentioned in judgments

AIC Merchant Finance Ltd, Re [1990] 2 NZLR 385 (CA).

Ash v Lloyd's Corporation (1991) 6 OR (3d) 235, (1992) 9 OR (3d) 755 (CA).

Bolivinter Oil SA v Chase Manhattan Bank NA [1984] 1 WLR 392n; [1984] 1 All ER 351n (CA).

Boobyer v David Holman & Co Ltd and The **Society of Lloyd's** [1992] 2 Lloyd's Rep 436.

Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159; [1978] 1 All ER 976 (CA).

Harbottle (RD) (Mercantile) Ltd v National Westminster Bank Ltd [1978] QB 146; [1977] 2 All ER 862.

Heyman v Darwins Ltd [1942] AC 356.

Kornatzki v Oppenheimer [1937] 4 All ER 133.

Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 NZLR 513; [1991] 1 AC 187 [*8] (PC).

Massey v Heynes (1888) 21 QBD 330 (CA).

Power Curber International Ltd v National Bank of Kuwait SAK [1981] 1 WLR 1233; [1981] 3 All ER 607 (CA).

Riley v Kingsley Underwriting Agencies Ltd 969 F 2d 953; 113 S Ct 858 (1992).

Williams v The **Society of Lloyd's** (Supreme Court, Victoria, 541/292, 19 November 1992, McDonald J).

INTRODUCTION:
Application

This was an application to dismiss proceedings on jurisdictional grounds.

COUNSEL:
A D MacKenzie and S E Galloway for The **Society of Lloyd's.**

T J Broadmore and J G M Shirtcliffe for Oxford Members' Agency Ltd.

S P Bryers and Tracey J Wigmore for the respondent.

JUDGMENT-READ: *Cur adv vult*

JUDGES: Cooke P, Richardson, McKay JJ

JUDGMENT BY: COOKE P.RICHARDSON J.MCKAY J.

JUDGMENTS: In this case the present respondent, a New Zealand resident who became a Name at The **Society of Lloyd's,** is seeking to avoid liability for underwriting losses incurred by her as a result. This Court is concerned only with her pleaded cause of action that her liability is avoided because Lloyd's or her London managing agents were in breach of the Securities Act 1978 of the New Zealand Parliament, in that they did not register a prospectus or appoint a statutory supervisor in New Zealand. The question is whether that [*9] claim by the respondent should be tried in New Zealand or in England.

Lloyd's is quintessentially a London financial institution (using that term in a wide sense) with international membership. Prima facie a claim relating to liability as a Name is most appropriately tried in London. There is nothing in the facts of this case which persuades me to the contrary. Having had

the advantage of reading in draft the judgments of my brothers Richardson and McKay JJ, I agree with their conclusions and almost all their reasons. There is only one point on which I think it necessary to add something.

Richardson J adds to his judgment the reason that senior English Judges are well used to interpreting New Zealand legislation, mentioning the Privy Council system. The present appeals can be disposed of without this reason; but its advancement forces me to mention that there are well-known instances in which New Zealand legislation has been interpreted in England in a way contrary in New Zealand understanding to the intention of the New Zealand Parliament. With great respect, I would not necessarily regard the reason given as a good one for leaving the interpretation of a New Zealand Act to the English [*10] Courts.

In this particular instance, however, the Securities Act may be seen as basically similar to securities legislation in other countries. Canadian, Australian and United States Courts have been content to leave questions concerning Lloyd's membership to the English Courts. The Securities Act 1978 is not distinctively New Zealand legislation, although no doubt it has some distinctive New Zealand features. Whether any such features are significant in relation to the present case could not be determined without in-depth comparisons which, understandably, were not attempted in the argument of the present appeals. I am sure that the better course, in accordance with international trends, is to leave the respondent's claim against the present appellants to be tried in England, assuming that she pursues it there.

In the result, the Court being unanimous, the appeals are allowed, the proceedings on the third cause of action are dismissed as not appropriately brought in New Zealand, and the cross-appeal is dismissed. The appellants will have an order for costs to cover both appeals in the sum of $7500, with disbursements including the cost of preparing the case on appeal to be settled [*11] by the Registrar.

As the proceedings now stand the respondent's claim is based solely on breach of the Securities Act 1978. The contention on Mrs Hyslop's behalf is that her investment in The Society of Lloyd's was entered into pursuant to a participatory security offered to the public for subscription by or on behalf of an issuer without complying with the requirements of the New Zealand statute governing the offer of securities to the public. The appeals raise three broad and to some extent related questions: (1) whether the proceedings as against the first and second appellants Lloyd's and Oxford Members' Agency Ltd, are prima facie within the jurisdiction of the New Zealand Courts; (2) whether the respondent has a good arguable case against Lloyd's and Oxford; and (3) whether the Court in its discretion should allow or dismiss the proceedings. In his judgment which I have read in draft, McKay J has comprehensively reviewed the facts. I gratefully adopt his exposition and on that footing consider those three questions in turn.

Prima facie jurisdiction

As to the first, I agree that there is prima facie jurisdiction under R 219(h) of the High Court Rules for the service of proceedings [*12] out of New Zealand on Lloyd's and Oxford. The respondent is challenging the enforceability against her by Barclays New Zealand, which is resident in New Zealand, of the deed of counter indemnity and related securities. The ground of challenge is that those agreements and the agreements entered into by the respondent with Lloyd's and Oxford (using "Oxford" to refer to Hall Harford, Oxford's predecessor, wherever appropriate) are all part of a series of interrelated contracts which are all tainted by breach of the Securities Act . I am satisfied that the agreements are interrelated, that they are to be construed together and that there is a good arguable case that any invalidity of the initiating agreements with Lloyd's and Oxford may affect the enforceability of agreements down the chain, and in particular the deed of counter indemnity and related securities. On that footing policy considerations precluding the undermining of bankers' absolute obligations (to pay) by challenges referable to their third party contracts (RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1977] 2 All ER 862 ; Power Curber International Ltd v National Bank of Kuwait SAK [1981] 3 All ER 607 [*13] ; and Bolivinter Oil SA v Chase Manhattan Bank NA [1984] 1 All ER 351 n) may not be strictly applicable. I shall assume for present purposes that the proceedings against the fourth appellant are properly brought; that had the other appellants been within the jurisdiction they would have been properly sued along with Barclays New Zealand; and that in terms of R 219(h) Lloyd's and Oxford are necessary or proper parties to the proceedings against Barclays New Zealand (Massey v Heynes (1888) 21 QBD 330).

Securities Act : definitions and issues

The second question is whether Mrs Hyslop has a good arguable case against Lloyd's and/or Oxford under the Securities Act. She invokes s 33(1) and (3). Subsection (1) provides that no security shall be offered to the public for subscription, by or on behalf of an issuer, unless there is a registered prospectus or the offer is made in an authorised advertisement. Subsection (3) provides that no participatory security shall be offered to the public for subscription, by or on behalf of an issuer, unless a statutory supervisor has been appointed and a deed of participation registered with the Registrar. Section 37(1) goes on to provide that:

"37. [*14] Void irregular allotments - (1) No allotment of a security offered to the public for subscription shall be made unless at the time of the subscription for the security there was a registered prospectus relating to the security."

Neither Lloyd's nor Oxford complied with any of those requirements. The question is whether they were obliged to do so. On the way the case for the respondent was put five issues may call for consideration: (1) was the respondent's investment in or through Lloyd's or Oxford a security or participatory security?; (2) was it offered to the public for subscription?; (3) was the offer by or on behalf of an issuer?; (4) was there an allotment?; and (5) does the Act apply to an investment outside New Zealand?

A participatory security is defined in s 2 as meaning any security other than an equity security or a debt security. Nothing offered by Lloyd's or Oxford constituted an equity security or a debt security and accordingly the present application of s 33(1) and (3) in that regard turns on the definition of "security" in s 2, the relevant part of which reads:

"'Security' means any interest or right to participate in any capital, assets, earnings, royalties, [*15] or other property of any person;".

In relation to a participatory security the "issuer" of a security means "the manager" (s 2) which is defined in s 2 as meaning the person or persons acting in the promotion or management of the arrangement or the scheme to which the security relates. In turn "person" includes:

". . . a corporation sole, a company or other body corporate (whether incorporated in New Zealand or elsewhere), an unincorporated body of persons . . .".

A syndicate such as the Lloyd's syndicates would seem to answer the wide description "an unincorporated body of persons" and in relation to the breadth of the term "syndicate" it is of some relevance that the Securities Act repealed and replaced the Syndicates Act 1973 in which s 2 defined "syndicate" as meaning:

". . . any partnership, special partnership, joint venture, or other unincorporated association of persons established (whether before or after the commencement of this Act) to undertake, with a view to profit or gain, any financial or business scheme, venture, or enterprise:".

Against that background it is not to be assumed that in employing the wide expression "unincorporated body of persons" [*16] in the Securities Act the legislature intended to confine its meaning to partnerships or joint trading. Lloyd's Names may participate in insurance only through syndicates and, while in relation to risk and profits they are sole traders (Lloyd's Act 1982 (UK), s 8(1)), the members of the syndicates are committed to the same insurances (for their respective interests) and share proportionately in the syndicate expenses. The argument for the respondent is that the security offered in this case was membership of Lloyd's and membership of syndicates. I accept that there is a good arguable case that, if in other respects membership of a syndicate is a security, allotting Names to syndicates may constitute the offer of a security. In such a case it would still be necessary to consider whether Lloyd's or Oxford could be said to have made that offer and whether it constituted an "allotment" of a security. In that regard "allotment" is defined in s 2 as including selling, issuing, assigning and conveying.

In respect of the territorial issue noted as (5) above, s 7 itself provides for extra territorial application

of the legislation and there is nothing in the statute to suggest a narrower [*17] approach in the present case.

The other definition provision of present relevance is s 3 relating to offering securities to the public. Subsections (1) and (2)(a) provide:

"3. Construction of references to offering securities to the public- (1) Any reference in this Act to an offer of securities to the public shall be construed as including -

"(a) A reference to offering the securities to any section of the public, however selected; and

"(b) A reference to offering the securities to individual members of the public selected at random; and

"(c) A reference to offering the securities to a person if the person became known to the offeror as a result of any advertisement made by or on behalf of the offeror and that was intended or likely to result in the public seeking further information or advice about any investment opportunity or services, -

whether or not any such offer is calculated to result in the securities becoming available for subscription by persons other than those receiving the offer.

"(2) None of the following offers shall constitute an offer of securities to the public:

"(a) An offer of securities made to any or all of the following persons only:

"(i) Relatives [*18] or close business associates of the issuer:

"(ii) Persons whose principal business is the investment of money or who, in the course of and for the purposes of their business, habitually invest money:

"(iii) Any other person who in all the circumstances can properly be regarded as having been selected otherwise than as a member of the public:".

Securities Act : conclusions

For reasons which I can express quite shortly I am satisfied that the respondent does not have an arguable case against Lloyd's or Oxford under the Securities Act. The first requirement is that a security was offered by or on behalf of an issuer. The argument for the respondent was that capital for the Lloyd's insurance market was sought in New Zealand and two securities were offered, membership of Lloyd's and membership of syndicates. It is necessary to consider each separately. In each case it is crucial to keep in mind that the true character of a transaction can only be ascertained after careful consideration of the legal arrangement actually entered into and carried out and the forms adopted cannot be dismissed as mere machinery for effecting other purposes. Interrelated documents may be considered together [*19] but the legal rights and obligations of particular parties turn on the terms of their agreements.

Lloyd's offered the respondent membership of the society and elected her an underwriting member of Lloyd's with effect from 1 January 1988. They had received considerable information from the respondent of her proposed participation, including a return of syndicates in which she would be initially involved. As overall regulator of the insurance market Lloyd's had an interest in the proper functioning of that market. It was entitled to know that what was proposed by and for a prospective Name conformed with the institutional arrangements governing that market. Lloyd's also had a legitimate interest in knowing that intending Names genuinely wished to undertake underwriting rather than simply being listed as Names. It sought information as to the syndicates in which the prospective Name would initially be placed. It does not follow that that was any part of its legal responsibility or that membership of a particular syndicate was an incident of membership of Lloyd's.

More importantly, joining Lloyd's and joining particular syndicates are legally distinct. The parties are different: in the [*20] one case Lloyd's and the prospective Name and in the other the manager of the syndicate and the Name through the member's agent. The Name's decision to join Lloyd's and the

decision to become a member of a particular syndicate are distinct. Membership of Lloyd's was a condition precedent to engaging in underwriting on the Lloyd's market. It provided the opportunity to do so through joining syndicates but membership of Lloyd's as such did not confer any interest or right to participate in any capital, assets, earnings, royalties or other property of any other person.

As regards Lloyd's itself, all that can be said is that on a winding up of Lloyd's all members of Lloyd's at that time would have a right to share in any surplus. Nothing in the material in the case suggests that winding up was in the contemplation of Lloyd's or the respondent at the time she was elected an underwriting member. It was not pleaded by the respondent and was only raised tentatively in argument by the Court. It was no more than an obvious consequence of winding up. It was neither sought by the Name nor directly offered by Lloyd's. The remote possibility that that kind of benefit might accrue to a member cannot [*21] fairly be characterised as part of the offer of membership.

Next as to membership of syndicates. The first and obvious answer to the respondent's claim is that it was the managing agent, not Lloyd's and not the member's agent, who placed Names in particular syndicates. The member's agent acting on behalf of the member seeks space in syndicates from managing agents and accepts places in syndicates, but the offer of membership of a syndicate is made by the managing agent. It is not suggested that any such offers were made in New Zealand. The managing agents are not even parties to the proceedings. In short, even if membership of a syndicate may constitute a security, neither Lloyd's nor Oxford as member's agent was the "issuer".

In these circumstances it is not necessary to consider whether there is any capital, assets, earnings, royalties or other property of the syndicate in which the Name may arguably be said to have an interest. If tested by ownership the only property interest is that of the Name as a sole trader as to a particular share of an insurance contract. The managing agent enters into contracts of insurance for the account of the Name. The earnings, obligations and property [*22] are those of the Name alone. Neither Lloyd's nor Oxford was party to any such insurance contracts, played any part in negotiating them or received any part of the revenue or profits. The contrary argument is that members associate together in syndicates for commercial purposes and that in using the description "unincorporated body of persons" the legislature must be taken to have extended the reach of s 33 to property which in a broad sense is under the umbrella of the syndicates rather than confining it to strict legal ownership.

The next requirement is that an offer of a security was made to the public. The evidence before the Court is limited. Mr PMY Langdale's evidence was that his involvement with prospective Names usually began by them or someone on their behalf contacting him, and that after a general explanation of what was involved he would arrange for a principal of the agency to meet them on their next visit. It was not suggested that that conduct might offend the Securities Act . He went on to say that his involvement with Mr and Mrs Hyslop was a little different. They were two of only about six people, all friends of long standing, with whom he raised the issue of whether [*23] they might be interested in joining Lloyd's.

It may be that Mr Langdale had a wide authority from Oxford to assist in the recruitment of new Names. But the test under s 33 is whether there was an offer of a security to the public, not whether the agent had authority to make an offer to the public. It is whether what was actually done constitutes an offer to the public.

Here about six people, including Mr and Mrs Hyslop, were approached to become Names. They were all friends of Mr Langdale of long standing. That was the nature and extent of his solicitation. Those solicited were not selected at random within s 3(1)(b) and in the absence of any advertisement s 3(1)(c) can have no application. Reading s 3(1)(a) and s 3(2)(a)(iii) together I consider the proper inference is that those solicited were not selected as a section of the public. Rather they were approached as private individuals because they were old friends. Approaches to relatives and close business associates are excluded under s 3(2)(a)(i). Even if, contrary to my assessment, the six old friends of Mr Langdale could be regarded as a section of the public, I would hold that they were selected otherwise than as members of [*24] the public.

The Court's discretion

The third question is whether, assuming jurisdiction and a good arguable case, the Court should in its discretion dismiss or stay the New Zealand proceedings against Lloyd's and Oxford. Clauses in all

relevant contracts entered into by Mrs Hyslop with Lloyd's and Oxford, including the general undertaking, the premiums trust deed and the agency agreement, confer exclusive jurisdiction on the English Courts and apply English law as the proper law of the contract. As McKeown J observed in Ash v Lloyd's Corporation (1991) 6 OR (3d) 235, 244; affd (1992) 9 OR (3d) 755, in proceedings brought by a Lloyd's Name pleading fraud and breach of the Ontario Securities Act RSO 1980:

"Courts have generally encouraged exclusive jurisdiction clauses because there is a certainty in such clauses that the reasonable expectations of the parties can be met by having the place of any dispute set out in the contract. Such clauses are intended to prevent preliminary disputes of the type before me for there is international unanimity that this fosters certainty in international commercial law."

The existence of an exclusive jurisdiction clause places a heavy burden on the [*25] party seeking to oppose the clause. While the Court has a discretion, a stay should be granted unless strong cause for not doing so is shown by the plaintiff. In the leading English case The Eleftheria [1969] 2 All ER 641 , 645, Brandon J identified as included in circumstances for consideration in exercising that discretion:

"(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would - (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

Even [*26] without the exclusive jurisdiction clauses, the case has an overriding affinity with England. First, of the 35,000 members of Lloyd's, over 80% are in England. Some 20% are in other countries around the word but only 28 Names, or less than 0.1%, in New Zealand. Lloyd's, as regulator of the market, could hardly deal equitably with all Names if disputes could be litigated in various jurisdictions. Second, some 700 writs have been issued in England and it is to be expected that they will involve the consideration of a vast range of questions relating to membership of Lloyd's, the operation of syndicates and the conduct of Lloyd's, members' agents, managing agents and active underwriters. Mrs Hyslop will be affected by the outcome of those proceedings concerning particular syndicates in which she was placed. Third, although Mrs Hyslop's New Zealand proceedings are now confined to alleged breaches of the Securities Act , numerous factual and legal issues would arise, all the evidence of which is in England. These include the relationship and dealings between Lloyd's and members' agents, including here Oxford, the relationship and dealings between Oxford and managing agents, and the basis [*27] on which members' agents introduce prospective Names. Except for Mrs Hyslop and Mr PMY Langdale, all the witnesses are in England. So are Lloyd's, the members' agents and the managing agents - and the managing agents of syndicates in which Mrs Hyslop was placed are not present parties to her New Zealand proceedings. Fourth, the basic documentation is in England and the crucial contracts were substantially performed in England. And the central fund and assets are located in England. Finally, the relief sought by Mrs Hyslop would indirectly affect not only Lloyd's, Oxford and those managing agents, but also other Names.

The only argument of possible substance in favour of the New Zealand jurisdiction is that the Securities Act 1978 is designed to offer protection to New Zealand investors. Accordingly it may be said that it is for New Zealand Courts to determine whether foreigners who have come to New Zealand canvassing for capital have breached its provisions. In my judgment that in itself is not sufficient to counter the overwhelming weight of all the other considerations supporting England.

Then as to the legal issues, the litigation involves consideration of English law including [*28] English legislation, particularly the Lloyd's Act 1982 and Lloyd's Bylaws. In relation to the important issue of the Securities Act it is not at all unusual for English Courts to decide questions of foreign law even though it may fairly be said that other things being equal it is more satisfactory for the law of a foreign country to be decided by the Courts of that country. Here other things are by no means equal. First, the impugned contracts have been substantially performed in England. Second, there is a particular public interest in England in matters concerning Lloyd's. Third, exclusive jurisdiction clauses assume particular importance where, as here, there is a volume of similar litigation affecting parties resident in

foreign jurisdictions. Consistency, predictability and certainty are more readily achieved if the litigation is resolved in the one jurisdiction. Fourth, exclusive jurisdiction clauses have been upheld in Canada (see Ash v Lloyd's Corporation), the United States (Riley v Kingsley Underwriting Agencies Ltd 969 F 2d 953 (1992); cert denied 7 December 1992 113 S Ct 858 (1992)) and Australia (Williams v The **Society of Lloyd's,** (Supreme Court, Victoria, 541/292, 19 [*29] November 1992, McDonald J) in related Lloyd's litigation involving securities legislation of those jurisdictions. There is no obvious New Zealand public policy consideration justifying having the applicability of our securities laws in relation to the Lloyd's arrangements determined in New Zealand while the applicability of the securities laws of other countries is determined in England.

There is a final and related consideration. Senior English Judges are well used to interpreting New Zealand legislation, and in any appeal from this Court the same Law Lords who deal ultimately with English cases would be determining any New Zealand proceedings. I would allow the appeals and dismiss the cross-appeal.

The respondent, Mrs Hyslop, was elected a member of The **Society of Lloyd's** with effect from 1 January 1988. Her membership application was arranged and submitted through Hall, Harford, Jeffreys, Langdale Ltd (Hall Harford) who became her managing agent. They were later replaced by Oxford Members' Agency Ltd. In accordance with Lloyd's requirements, Mrs Hyslop provided a bank guarantee to Lloyd's which was given by Barclays Bank Plc (Barclays Plc). This was secured by an indemnity given [*30] by Barclays New Zealand Ltd (Barclays NZ), which in turn was secured by a counter indemnity given by Mrs Hyslop. Through her managing agents Mrs Hyslop entered into underwriting contracts in 1988 and 1989 as a member of various syndicates. These contracts resulted overall in substantial losses for which Oxford has made calls on her.

The present proceedings were commenced by Mrs Hyslop against Lloyd's, Oxford, Barclays Plc and Barclays NZ. She sought the cancellation of the various agreements which she had entered into, injunctions to restrain Lloyd's and Oxford from enforcing the guarantee given by Barclays Plc, and to restrain Barclays NZ from enforcing its counter indemnity against her. She sought orders declaring that she was not liable for any of the losses on insurance contracts entered into in her name, the refund of sums already paid by her, general damages and interest. The six causes of action alleged can be summarised as being:

1. misrepresentation;

2. breach of the Fair Trading Act 1986 ;

3. breach of the Securities Act 1978 ;

4. breach of a duty of care;

5. breach of implied terms of the agreements; and

6. breach of a duty of care by Barclays NZ.

All the defendants applied [*31] to dismiss or stay the proceedings on jurisdictional or other grounds. Holland J dismissed the first, second, fourth and fifth causes of action, and granted a stay in respect of the sixth. He refused the applications for dismissal or stay in respect of the third cause of action. Mrs Hyslop's applications for interim injunctions in respect of the guarantees were also dismissed, although we were informed that no steps have in fact been taken under the guarantees pending the outcome of the present appeal.

The present appeals have been brought by Lloyd's and by Oxford against the refusal to dismiss or stay the third cause of action. Mrs Hyslop has not challenged the orders made in respect of her other causes of action, but she has brought a cross-appeal seeking an order that Lloyd's be restrained from calling up or enforcing or receiving the proceeds of the guarantee given by Barclays Plc. Alternatively, she asks for an order that Lloyd's withdraw any demand made by it under the guarantee. For the purposes of the present appeal and cross-appeal, the Court is concerned only with the third cause of action.

The pleading of the third cause of action began by repeating paras 1 to 14 and 16 [*32] of the statement of claim, although paras 10 to 16 appear to be relevant only to the first cause of action. The pleading then continues with the following paragraphs:

"19. THE First and/or Second Defendants are in breach of Sections 33 and 37 of the Securities Act 1978 in that between November 1984 and May 1987 they offered to the public in New Zealand including the Plaintiff for subscription a participatory security (namely the right to become a member of Lloyds and thereby to underwrite insurance in the Lloyds' market by joining one or more syndicates and participating in the capital, assets and earnings of those syndicates) without:

"(a) Registering a prospectus or making the offer in an authorised advertisement as required by Section 33(1) of the Securities Act 1978 .

"(b) Appointing a person as a statutory supervisor in respect of the security as required by Section 33(3)(a) of the Securities Act 1978 .

"(c) Registering a copy of the Deed of Participation as required by Section 33(3)(b) of the Securities Act 1978 .

"and by allotting a security to the Plaintiff when at the time there was no registered prospectus relating to the security as required by Section 37(1) of the [*33] Securities Act 1978 .

"20. ACCORDINGLY the allotment of the security to the Plaintiff was invalid and of no effect as provided by Section 37(4) of the Securities Act 1978 .

"21. AS a result of the First and Second Defendants' breach the Plaintiff has or will suffer the damage and loss referred to in paragraph 15 hereof and unless restrained by this Honourable Court the First, Second, Third and Fourth Defendants intend to take the steps referred to in paragraphs 13 and 14 hereof."

At the hearing before this Court Mrs Hyslop sought an amendment to para 19, the effect of which, as ultimately drafted, was to substitute for the words in parenthesis the following:

"(namely that by becoming a member of Lloyd's and by joining syndicates of Lloyd's members' underwriting insurance in the Lloyd's market, the plaintiff would obtain the right to participate in the capital, assets and earnings of Lloyds and of those syndicates)".

It was agreed by all counsel that the hearing should proceed on the basis that the proposed amendment was made.

The proceedings were served on the overseas parties in reliance on R 219 of the High Court Rules . The issues on the appeal were whether the third cause [*34] of action fell within R 219; whether, if it did, the Court should nevertheless set aside service in the exercise of its discretion; and whether, if it did not fall within R 219, the Court should in its discretion grant leave under R 220. The questions as to discretion raise further issues relating to the exclusive jurisdiction clauses in the various agreements, the desirability that all claims relating to membership of Lloyd's should be decided in England, whether there was a good arguable case based on breach of the Securities Act , and various other matters relevant to the exercise of the Court's discretion. Before examining these issues, it is necessary to say something of the structure of Lloyd's.

The structure of Lloyd's

Counsel accepted as accurate the summary of the Lloyd's structure set out in the judgment of Holland J. We were also referred to the Neill Report presented to the United Kingdom Parliament in January 1987, which contains a fuller description. What follows is based on these sources.

The **Society of Lloyd's** is incorporated by its own acts of Parliament, which are cited as Lloyd's Act s 1871 to 1982. Lloyd's is an insurance market in which underwriting members, called [*35] "Names", enter into underwriting contracts to provide insurance cover for policyholders. No one can participate in an underwriting syndicate in the Lloyd's market unless he or she is a member of Lloyd's. The

Names operate through underwriting agents who have complete authority to act on their behalf in dealing with brokers, who in turn are the agents of the assured. Lloyd's does not itself carry out any underwriting business. It regulates the market within which the Names operate.

In order to be accepted as a Name, a person has to demonstrate that he or she has sufficient wealth appropriately invested, and has to either deposit a required sum with Lloyd's or provide a bank guarantee. The personal assets of the Name provide reserve capital, the Name's liability being unlimited. Section 8 of the Lloyd's Act 1982 (UK) requires that an underwriting member is to be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, "each underwriting member for his own part and not one for another, and if the liability of each underwriting member is accepted solely for his own account". Each Name is thus a sole trader. If a Name suffers a loss, [*36] other members cannot be called upon to share it. A Name cannot be called upon to share the losses of other Names, nor to share profits with other Names.

Although the Name is a sole trader, the effective operation of the market requires that they underwrite in groups or syndicates of varying size. These syndicates, of which there were 370 at the time of the Neill Report, enable members to co-operate in underwriting risks or proportions of risks which would be too large for one individual to cover. The syndicates permit most of the participants to leave the actual business of underwriting to one or more working members acting on behalf of a whole syndicate. The syndicates have no separate corporate status. Each member contracts directly or indirectly with his underwriting agent, but the member will be responsible for only a certain percentage of the syndicate's underwriting business, known as his "line". The organiser and manager of one or more syndicates is known as a managing agent. The day to day management of each syndicate is carried out by a main underwriter employed by the agency and it is this main or active underwriter and his team who accept risks on behalf of syndicate [*37] members, receive premium income and settle claims.

The managing agent does not recruit syndicate members directly. This is the task of another type of agent, the members' agent, who introduces prospective Names to Lloyd's, advises them on syndicate membership and acts as an intermediary between Names and managing agents. The latter agree with members' agents that they will make available specified amounts of syndicate capacity which those members' agents can then allocate to individual Names. Members' agents contract with Names to act as underwriting agents on their behalf, although the actual underwriting is the responsibility of the managing agents.

Lloyd's underwriting is conducted on the basis of a three-year accounting system. Cover is granted and premiums paid on the basis of an annual cover. Each calendar year of account is normally left open for a further two years, and the profit or loss on underwriting determined at the end of that period. At the end of that time, all known and estimated outstanding claims in respect of risks attributable to the year of account, and arising in previous year's of account, are covered by reinsurance. The reinsurance is effected with the members [*38] at that time of the same syndicate, who thus receive a reinsurance premium and undertake to indemnify the previous members against all outstanding liabilities. This enables the accounts for the earlier year to be finalised and profits to be distributed, or calls made to cover losses.

All business in the Lloyd's market is conducted in London. While some insurance business in New Zealand is placed in the Lloyd's market, that business is submitted through brokers in New Zealand, who must act through an approved Lloyd's broker in London. The contracts are made in London.

Background facts

Mrs Hyslop's husband was originally approached by a friend, Mr Phillip Langdale of Hastings, whose brother, Mr Anthony Langdale, is a partner in Hall Harford. He asked whether Mr Hyslop was interested in becoming a member of Lloyd's. He said that Mr Harford was coming to New Zealand in the following month and would explain what was involved. This meeting duly took place about November 1984, and the following year when Mr and Mrs Hyslop were in England they called on Hall Harford. Further discussions took place, but Mr Hyslop had decided not to proceed, one reason being that he did not wish to put his [*39] farm at risk. Mrs Hyslop was interested, but did not have sufficient assets in her own right. She and her husband met Mr Anthony Langdale or Mr Harford socially on two or three occasions in 1985 and 1986, when one or other was making their regular

visits to New Zealand.

The following year Mrs Hyslop inherited substantial assets from the death of her mother. She became interested in pursuing the possibility of becoming a Lloyd's member, and arranged to meet Mr Harford on his next visit to New Zealand. She provided information, and on Mr Harford's recommendation, approached Barclays NZ to arrange a guarantee as security for the required deposit. She was given a number of documents explanatory of the Lloyd's structure and of the requirements for membership. In June 1987 she went to England to finalise the process of becoming a Lloyd's member. She signed a document prepared by Hall Harford setting out details of the syndicates in which they had arranged for her to be placed as from 1 January 1988. She attended the necessary formal meeting at Lloyd's, referred to as "the Rota Meeting", and some time after her return to New Zealand learned that she had been accepted as a Name at Lloyd's. [*40]

Mr Anthony Langdale again visited New Zealand in November 1987. Mrs Hyslop signed some more documents either at that time or shortly afterwards when they were sent to her from England. These included an agency agreement appointing Hall Harford as her agent, with the sole control and management of her underwriting business and with power to accept risks effecting insurance and to settle or compromise claims. Hall Harford were also given full powers to sign on her behalf any deeds, contracts or other documents relating to the underwriting business. She also signed a "general undertaking" with Lloyd's by which she undertook to comply with the Lloyd's Act s 1871-1982, and with any requirements made or imposed by the council of Lloyd's pursuant to those Acts. She signed individual contracts with each of a number of syndicates. She paid her initial deposit and received confirmation that the bank guarantee had been provided, and that her membership was effective from 1 January 1988.

Rule 219

Mr Bryers, on behalf of Mrs Hyslop, submitted that the third cause of action fell within paras (a), (b), (e) and (h) of R 219. The rule sets out the cases in which a statement of claim may be served [*41] out of New Zealand without leave. Paragraph (a) is the case:

"Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand:".

The "act or omission" relied upon is the alleged offering by Lloyd's and/or Oxford to the public in New Zealand for subscription of a participatory security. The primary relief claimed is not damages but an order declaring the various agreements signed by Mrs Hyslop to be invalid and of no effect, and injunctions to restrain the calling up or enforcing of the guarantee given by Barclays Plc, and of the counter indemnity given by her to Barclays NZ. She also claimed an order declaring that she was not liable for any of the underwriting losses, and an order for the refund of moneys already paid by her to Oxford. The latter claim was on the basis that the breaches of the Securities Act made the allotment of the security invalid, hence the various agreements signed by her were invalid, and the moneys she had paid were recoverable. This part of the claim was thus for money had and received, not for anything which could be described as "damages". There was, however, a claim for general damages for stress, trouble [*42] and inconvenience.

Stress damages are recoverable for breach of a duty of care, whether in tort or contract, where the kind of harm suffered was reasonably foreseeable: Mouat v Clark Boyce [1992] 2 NZLR 559 . However, as was pointed out in that case by Cooke P at p 569, the Courts have stopped short of giving stress damages for breach of ordinary commercial contracts. Mrs Hyslop's third cause of action is not based on any breach of a duty of care, but on breaches of the Securities Act . There is nothing in that Act to suggest that a breach will found a claim for damages, much less a claim for stress damages.

Although the fact that such a claim has been made may bring the case technically within para (a), this is not sufficient. Notwithstanding the rights conferred by R 219, the Court retains a discretion to set aside service on the same principles as governed the granting of leave under the former R 48 of the Code of Civil Procedure : Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 NZLR 513 per Lord Lowry at pp 524-525. A foreigner resident abroad will not lightly be subjected to the local jurisdiction, and jurisdiction will not be accented if the plaintiff does not [*43] make out a good

arguable case. Other matters, such as forum conveniens, are also relevant to discretion. All of these matters will be considered later in this judgment.

Paragraph (b) of R 219 allows service out of New Zealand without leave:

"(b) Where the contract sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any proceeding, or for the breach whereof damages or other relief is demanded in the proceeding -

"(i) Was made or entered into in New Zealand; or

"(ii) Was made by or through an agent trading or residing within New Zealand; or

"(iii) Was to be wholly or in part performed in New Zealand; or

"(iv) Was by its terms or by implication to be governed by New Zealand law."

The claim is to have a contract rescinded or set aside as invalid. The alleged security is membership of Lloyd's and the joining of syndicates of Lloyd's members underwriting insurance in the Lloyd's market. The evidence is quite clear that Mrs Hyslop did not acquire any prior "right" to membership as a result of any contract made in New Zealand. Membership was granted to her by the council of Lloyd's in London. There is simply no evidence of any contract made in New Zealand [*44] either relating to membership of Lloyd's or relating to membership of syndicates.

Nor did she acquire any prior right to join syndicates. Membership of Lloyd's made it possible for her to join a syndicate, but only pursuant to a contract to be made between her (through her agent) and the managing agent of the syndicate. She was apparently advised in New Zealand of the syndicates in which Hall Harford proposed to place her, and she signed the necessary documents in New Zealand. These included "syndicate schedules" with each of the proposed syndicates, but these schedules were not contracts with the managing agent of the syndicate. They are schedules to the agency agreement between Mrs Hyslop and Hall Harford, and are referred to in that agreement as incorporated in and forming part of it. Some of them also contain an express statement that they form part of the agency agreement "between the Name and his underwriting agent". They are signed on behalf of Hall Harford, but in no case have they been signed on behalf of the named managing agent of the syndicate. It is clear that she did not become a member of any syndicate until her agent entered into the appropriate contract on her [*45] behalf in London. Paragraph (b) thus has no application.

Paragraph (e) of R 219 is:

"(e) Where the subject-matter of the proceeding is land, stock, or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land, stock, or property:".

The only relevant property in New Zealand Mr Bryers could point to was the security given by Mrs Hyslop for the counter guarantee to Barclays NZ. That property is the subject of Mrs Hyslop's claim against Barclays NZ, but it can hardly be described as the subject-matter of the proceeding against the overseas defendants.

Finally, Mr Bryers relied upon para (h) of R 219:

"(h) Where any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand:".

He submitted that the proceeding was properly brought against Barclays NZ, against whom Mrs Hyslop sought relief in respect of her liability under the counter guarantee. Her claim for relief was dependent on her succeeding in her claim to have held invalid under the Securities Act her membership of Lloyd's, her contract with Hall Harford (and subsequently Oxford), [*46] the guarantee by Barclays Plc, and the right of that company to claim under its indemnity from Barclays NZ. If this line of argument is sustainable, then the case would seem to fall within para (h). It must also be shown, however, that there is a good, arguable case and the Court must consider whether in all the circumstances the case is one where it is appropriate for it to accept jurisdiction.

Rule 220

Reference has been made to the Kuwait Asia Bank case and to the Court's discretion whether to accept jurisdiction in a case falling within R 219. In cases falling outside R 219, the Court is given power under R 220 to grant leave for a statement of claim or other document to be served out of New Zealand. Mr Bryers relied on this rule in the alternative. Similar issues as to discretion arise under both rules, and it will be convenient to deal with them together. The only material difference is in respect of onus. On an application for dismissal or stay in respect of proceedings properly served under R 219 the onus is on the defendant. On an application under R 220 for leave to serve out of New Zealand, it is for the plaintiff to show that New Zealand is clearly the appropriate forum. [*47] Authority for these propositions will be found in the judgment of Lord Goff of Chieveley in The Spiliada [1987] AC 460 at pp 476-478 and p 481.

Rule 220(4) refers to certain specific matters to which the Court must have regard in exercising its discretion under that rule. These are:

"(4) Upon any application for leave under this Rule, the Court, in exercising its discretion, shall have regard to -

"(a) The amount or value of the property in dispute or sought to be recovered; and

"(b) The existence, in the place of residence of the person to be served, of a Court having jurisdiction in the matter in question; and

"(c) The comparative cost and convenience of proceeding in New Zealand or in the place of residence of the person to be served."

Discretion - good arguable case

The first matter to be considered is whether Mrs Hyslop has a good arguable case based on the alleged breach of the Securities Act 1978 . This question was not dealt with by the Judge, possibly because it was only one of six causes of action canvassed before him and the focus of argument appears to have been on other matters going to discretion. We have had the benefit of very full argument on this as on other [*48] relevant issues.

The claim is based on ss 33(1), 33(3) and 37(1) of the Securities Act 1978 in the respects pleaded. The relevant portions of these sections are as follows:

"33. Restrictions on offer of securities to the public- (1) No security shall be offered to the public for subscription, by or on behalf of an issuer, unless -

"(a) The offer is made in, or accompanied by, a registered prospectus that complies with this Act and all regulations made under this Act; or

. . .

"(3) No participatory security shall be offered to the public for subscription, by or on behalf of an issuer, unless -

"(a) The issuer of the security has appointed a person as a statutory supervisor in respect of the security and both the issuer and that person have signed a deed of participation relating to the security; and

"(b) A copy of the deed of participation has been registered by the Registrar pursuant to section 46 of this Act; and . . .".

"37. Void irregular allotments - (1) No allotment of a security offered to the public for subscription shall be made unless at the time of the subscription for the security there was a registered prospectus relating to the security.

. . .

"(4) Any allotment [*49] made in contravention of the provisions of this section shall be invalid and of no effect."

The terms "security" and "participatory security" are defined in s 2 as follows:

"'Security' means any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person; and includes -

"(a) Any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person (whether or not the interest or right is secured by a charge over any property); and

"(b) Any renewal or variation of the terms or conditions of any existing security:

"'Participatory security' means any security other than an equity security or a debt security:".

It was common ground if any security was offered to the public in breach of the Act, then it was not an equity security or debt security. It would therefore be a participatory security.

Other relevant definitions in s 2 are the following:

"'Allot' includes sell, issue, assign, and convey; and 'allotment' has a corresponding meaning:

"'Issuer' means -

. . .

"(b) In relation to a participatory security, or to an advertisement, prospectus, or registered prospectus or to [*50] a deed of participation that relates to a participatory security, the manager:

"'Manager', in relation to a participatory security, means the person or persons acting in the promotion or management of the arrangement or scheme to which the security relates:

"'Person' includes a corporation sole, a company or other body corporate (whether incorporated in New Zealand or elsewhere), an unincorporated body of persons, a public body, and a Government department:".

To succeed at trial Mrs Hyslop must show that membership of Lloyd's and the joining of syndicates of Lloyd's members, or either of these, are within the definition of a "participatory security under the Act", that one of the appellants was the "issuer", and that such securities were offered to the public in New Zealand.

It is common ground that no prospectus or deed of participation was registered in terms of the Act, and no statutory supervisor was appointed. If she establishes breach of the Act, then by s 37(4) the "allotment" of the security is void and of no effect. Mrs Hyslop must show that the invalidity of the "allotment" has the effect of invalidating her contracts with Lloyd's and with her agents, Hall Harford, [*51] and the subsequent transactions entered into by her agents on her behalf, at least to the extent of entitling her to the relief sought against the respective defendants.

Mrs Hyslop's case is that she was offered a security in New Zealand, namely that by becoming a member of Lloyd's and by joining syndicates in the Lloyd's market, she would obtain the right to participate in the capital assets and earnings of Lloyd's and of those syndicates. Mr Bryers accepted that membership did not of itself give her the right to participate in any particular syndicate, although it was a prerequisite to her doing so. He relied on what he called "the total package" which was offered to her. The essential elements of that package included the fact that she had to become a member of Lloyd's in order to write insurance in the Lloyd's market, and in order to become a member of Lloyd's she had to appoint an agent and enter into the other contracts which she signed giving the agent the authority to join syndicates and enter into underwriting contracts on her behalf. The agreement

appointing Hall Harford her agent contained far reaching powers, of which the following are an illustration:

"4. POWERS OF [*52] THE AGENT

"(a) The Agent is authorised, and such authority shall continue to subsist so far as may be appropriate until the winding-up of the underwriting business shall have been completed, to exercise such powers as the Agent may consider to be necessary or desirable in connection with or arising out of the underwriting business, including without prejudice to the generality of the foregoing: . . .

"(b) Without prejudice to the generality of the provisions of sub-clause (a) of this Clause, the Agent shall have the following customary and/or special powers in connection with the conduct and winding-up of the underwriting business:

. . .

"(B) Execution of documents on behalf of the Name:

"Power to sign or execute, or to accede to, on behalf of the Name all deeds, instruments, contracts and agreements relating to the underwriting business, whether with the Corporation of Lloyd's or others, to which the Name may be required by the Council to become a party or to which the Agent may consider it desirable in the interests of the Name that the name should become a party, and which are not required by the Council or by any statutory or governmental authority to be signed or executed [*53] by the Name personally.

. . .

"5. CONTROL OF UNDERWRITING BUSINESS

"(a) The Agent shall have the sole control and management of the underwriting business and the Name shall not in any way interfere with the exercise of such control or management."

Mr Bryers submitted that the completion of the agency agreement involved a commitment to allow the agent to conduct business in her name in the Lloyd's market, and was a prerequisite to the granting of membership by the council of Lloyd's. He pointed to a document headed "Notes on Lloyd's Membership", which was among the documents she received from Mr Harford and which set out the procedure leading to election. It was stated that an application could only be made through a registered members' agent. An applicant was required to complete an Allocation of Syndicates Form and various other documents, to attend in London at a meeting of the "Rota Committee" and to effect the required deposits with Lloyd's, and "when all these requirements have been met, the prospective member's name will be submitted to the Council of Lloyd's for election by ballot". Mr Bryers submitted that the Act is aimed at the protection of investors, by regulating [*54] the conduct of issuers of securities: Re AIC Merchant Finance Ltd [1990] 2 NZLR 385 per Richardson J at p 391. He submitted that an English institution which comes to New Zealand with a view to recruiting New Zealand investors must expect to comply with New Zealand statutes and New Zealand law, and to be answerable in New Zealand for breaches of those laws.

It is clear, however, that all that Hall Harford offered Mrs Hyslop in New Zealand was that they would act as her agent in London. There they would put forward her application to Lloyd's to become a member, and would negotiate with the managers of syndicates for her to become a member of them so as to be able to enter into her individual underwriting contracts. No offer of membership of either Lloyd's or of any syndicates was made to her in New Zealand. Hall Harford identified the syndicates in which they expected she would become a member, and they had no doubt spoken to the managers of those syndicates. But the evidence does not suggest any commitment on the part of the managers, nor any actual offer of membership.

A second difficulty is that even if her application in London were successful, she would acquire no interest in [*55] any assets or earnings of Lloyd's, except in the remote possibility of that society being wound up. She would arguably acquire some beneficial interest in the premiums to be received by her syndicates until the closure of the accounting period and the determination of each member's

individual profit, but otherwise her trading would be entirely on her own behalf.

Mrs Hyslop has the further problem that she must show that the issuer of the alleged securities was either the first or second defendant, who are the appellants in this Court. Hall Harford are not parties to the proceedings, their place as Mrs Hyslop's agent having been taken subsequently by Oxford. Mr Broadmore, for Oxford, informed us that for the purpose of the present appeals, he did not wish to take that point, and I accordingly put it to one side. Hall Harford was not the manager of any of the relevant syndicates. The evidence does not show that they had any authority to make any offer on behalf of any syndicate, or on behalf of Oxford as one of the syndicate managers.

Yet a further difficulty in Mrs Hyslop's way is that before the Securities Act can apply, the security must have been offered to the public. Mr Bryers [*56] relied on the relevant portion of s 3 of the Act which provides as follows:

"3. Construction of references to offering securities to the public — (1) Any reference in this Act to an offer of securities to the public shall be construed as including -

"(a) A reference to offering the securities to any section of the public, however selected; and

"(b) A reference to offering the securities to individual members of the public selected at random; and

. . .

whether or not any such offer is calculated to result in the securities becoming available for subscription by persons other than those receiving the offer."

The initial approach to Mr and Mrs Hyslop was by Mr Phillip Langdale, who was a personal friend. From that approach came their contacts with his brother in Hall Harford, and with Mr Harford of that company. Even if an offer had been made to her by Hall Harford in New Zealand, it was not an offer made to a section of the public, but an offer made to her as an individual, and she had not been selected at random.

Mr Phillip Langdale said he had assisted Hall Harford in respect of the recruitment of new Names, not by active canvassing or "cold calling", but usually by receiving [*57] approaches initiated by persons interested in becoming a Name. In a few cases he had himself made the first approach, but in each case to friends of long standing. It appears that the only criteria for membership of Lloyds, according to Lloyds' booklet which Mr Langdale gave to Mrs Hyslop, is that candidates are required to satisfy the council of Lloyd's that they are people of "suitable character and appropriate financial standing", and are at least 21 years old. That group is wide enough to constitute the public, but there is nothing to suggest that Mr Phillip Langdale or Hall Harford did any more than receive approaches initiated by people who were eligible. They did not make offers to the public. In Mrs Hyslop's case, she was approached as being a long-standing friend of Mr Phillip Langdale.

Yet another difficulty faces Mrs Hyslop in her claim to prevent the calling up by Lloyd's of the guarantee from Barclays Plc. The guarantee is in the form of an undertaking by the bank, in the event of a default by Mrs Hyslop under the trust deed, to pay $70,000 to Lloyd's upon demand. Default is for this purpose to be "conclusively proved" by the certificate of a duly authorised officer [*58] of Lloyd's. It is of the essence of such a bank guarantee that it can be relied upon without question or delay. In Bolivinter Oil SA v Chase Manhattan Bank NA [1984] 1 All ER 351 at p 352 Sir John Donaldson MR, giving the judgment of the Court of Appeal, said:

"Before leaving this appeal, we should like to add a word about the circumstances in which an ex parte injunction should be issued which prohibits a bank from paying under an irrevocable letter of credit or a performance bond or guarantee. The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request,

by obtaining an injunction restraining [*59] the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."

For similar reasons, Kerr J in the earlier case of RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1977] 2 All ER 862 discharged injunctions not only against the bank but also against the parties in whose favour the guarantees had been given. His decision was approved by Lord Denning MR in Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976 at p 983, where Lord Denning also said:

"All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the [*60] supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."

Even if Mrs Hyslop could succeed against the appellants, it does not follow that the Court should interfere with the enforcement of the guarantee.

Any one of the various difficulties referred to could prove fatal to Mrs Hyslop's case. Their cumulative effect is such as to satisfy me that she does not have a good arguable case. It follows that the New Zealand Courts should not accept jurisdiction.

There are other matters relevant to the exercise of the Court's discretion which confirm me in this view. There are clauses in the relevant documents involving both Lloyd's and Oxford which confer exclusive jurisdiction on the English Courts. This is true of the general undertaking between Mrs Hyslop and Lloyd's, and the agency agreement between Mrs Hyslop and Hall Harford. The agency agreement also refers certain disputes to arbitration in London. Both documents are governed by English law. Mr Bryers relied on The Eleftheria [1969] 2 All ER 641 at p 645 as showing that such clauses [*61] did not conclude the matter, but he accepted that case as authority for exercising the discretion in favour of granting a stay unless the plaintiff could show a strong case for not doing so. He pointed out that if the contracts were void for illegality, then the jurisdiction clause would likewise be void: Heyman v Darwins Ltd [1942] AC 356, 366. It would still be relevant to the exercise of discretion, however, that Mrs Hyslop had herself agreed to all disputes being resolved in England.

It is also clearly desirable that issues concerning the structure of Lloyd's insurance market and the construction of the standard documents relating to participation in that market should be decided in a single jurisdiction, and this could only sensibly be in England. No challenge has been made to the Judge's ruling that the other causes of action pleaded by Mrs Hyslop should properly be tried in England. In Boobyer v David Holman & Co Ltd and The **Society of Lloyd's** [1992] 2 Lloyd's Rep 436 at p 439 Mervyn Davies J, in transferring to the Commercial Court eight actions brought by Names against Lloyd's and their members' agent, said he was informed that 700 writs in like cases had been issued.

Mr [*62] Bryers was on stronger ground in submitting that, in general, questions involving the Securities Act 1978 can best be decided by the New Zealand Courts, with the opportunity for appeal which would not be available if New Zealand law were dealt with by evidence before a Court in England: The Eleftheria, per Brandon J at p 649. Furthermore, if the contracts are found to be illegal, then the discretionary power to grant relief under the Illegal Contracts Act 1970 could only be exercised by the New Zealand Courts: see Kornatzki v Oppenheimer [1937] 4 All ER 133 at p 138. The Securities Act is not dissimilar, however, to legislation in other jurisdictions which has been relied upon by members of Lloyd's seeking to avoid responsibility for underwriting losses. In all of the cases to which our attention was drawn the Court has declined jurisdiction on the basis that the proper forum is England; examples are Riley v Kingsley Underwriting Agencies Ltd 969 F2d 953 (1992); Ash v Lloyd's Corporation (1992) 4 OR (3d) 755; and Williams v The **Society of Lloyd's** (Supreme Court, Victoria, 541/292, 19 November 1992, McDonald J), application for leave to appeal dismissed by the Full Court on 17 February [*63] 1993. New Zealand would be out of step with the Courts in other

jurisdictions if we were to accept jurisdiction in a case such as the present.

I would, therefore, allow the appeal, and dismiss the proceedings in respect of the third cause of action. I would similarly dismiss the cross-appeal.

ORDER:
Appeal allowed: proceedings dismissed: cross-appeal disallowed.

SOLICITORS:
Solicitors for The **Society of Lloyd's:** Rudd Watts & Stone (Wellington).

Solicitors for the Oxford Members' Agency Ltd: Chapman Tripp Sheffield Young (Wellington)

Solicitors for the respondent: Martelli McKegg Wells & Cormack (Auckland).#LS990812LEugremfx# #020509M001USPENK#