EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 6
P634/22

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Petition

by

THE RIGHT HONOURABLE JAMES HUBERT RAMSAY, 17th EARL OF DALHOUSIE; PATRICK ANTONY FRANCIS GIFFORD; AND ROBERT CHEYNE TURCAN as the executors of the late THE RIGHT HONOURABLE CHARLES LYELL, BARON LYELL OF KINNORDY

Petitioners

for

Directions as to the distribution of the estate of a deceased underwriting member of Lloyd's of London in terms of Rule of Court 63.6A

Petitioners: Welsh; Turcan Connell

17 January 2023

[1] The petitioners are the executors-nominate of the late the Right Honourable Charles Lyell, Baron Lyell of Kinnordy ("the deceased"), who died on 17 January 2017 domiciled in Scotland. They have paid all of the debts of the estate and made distributions

of legacies in accordance with the deceased's will. They now wish to complete the administration of the estate by making over the residue to the beneficiaries entitled to it.

[2] The deceased was at one time a Name - an underwriting member of Lloyd's of London. For the years 1988 to 2009 the deceased's several liability for his share of his syndicate's liabilities was unlimited. The accounts for each of these years have been closed and there are no known residual liabilities. The problem is that, at least theoretically, it is possible that a long-tail claim might yet emerge. In that event, if the arrangements in place to meet such a contingency fail to satisfy the claim, the petitioners and the estate would be exposed to liability.

[3] The petitioners seek directions as to how the remainder of the estate should be distributed, having regard to any potential liability in respect of the deceased's underwriting activity. The petition has been presented in terms of Rule of Court 63.6A and in accordance with the guidance given by the court in *Chisholm, Petitioners* 2006 SLT 394 and Practice Note No 1 of 2006. The questions submitted for the directions of the court are:

> "1. Whether the petitioners, as executors-nominate of the deceased, may properly carry out the deceased's testamentary instructions and fully distribute the deceased's estate in accordance with the Deed of Appointment dated 10, 11 and 14 December 2018 without retention or further provision to meet any potential claim or claims which might otherwise be made against them in respect of any contracts of insurance or re-insurance underwritten by the deceased in the course of his business as an Underwriting Member of Lloyd's of London.
>
> 2. Whether the petitioners, as executors-nominate of the deceased, are entitled to seek from the Court an order relieving them for personal liability for any such potential claims or for distributing and holding the remaining assets of the estate in accordance with the directions of the Court."

[4] In accordance with Rule 63.6A(4), the court remitted the petition to a reporter, Mr Robert Howie KC, to enquire into the facts and circumstances and to report. Following receipt of that report, the court asked Mr Howie to prepare a brief supplementary report.

[5] At the summar roll hearing the court heard submissions from counsel for the petitioners, Mr Welsh. The petitioners did not insist upon Question 2. Mr Howie also appeared at the hearing and he made a number of observations which assisted the court. At the end of the hearing the court answered Question 1 in the affirmative. This opinion provides the court's reasons for taking that course.

Practice Note No 1 of 2006

[6] Practice Note No 1 of 2006 states:

> "…
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> **Reinsurance**
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> 3. It is anticipated that Rule 63.6A will only apply where the liabilities of the estate in respect of syndicates of which the deceased was a member—
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> (a) for years of account before and including 1992, have been reinsured (whether directly or indirectly) into the Equitas Group; and
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> (b) for years of account from and including 1993, have arisen from membership of syndicates in respect of which any liability will be met by the Central Funds at Lloyd's or which is otherwise reinsured or the subject of indemnity (such as by being protected by an Estate Protection Plan covered by Centrewrite Ltd or by EXEAT insurance cover provided by Centrewrite Ltd).
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> **Remit to a reporter**
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> 4. In accordance with the opinion of the Inner House in the *Petitions of James Crosby Chisholm (Pardoe's Executor) and Others* [2005] CSIH 82, in general it will be sufficient that the remit to a reporter on an application under Rule 63.6A(2)(a) covers—
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> (a) identification of the insurance business underwritten by the deceased;
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> (b) confirmation from the documentation produced by the petitioners of the reinsurance cover taken or other indemnity;
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> (c) where relevant, an assessment of the current position of the Equitas Group from the most recently available reports; and

> (d) where relevant, confirmation in documentary form that the Lloyd's Central Fund remains available to meet prospectively valid claims by a relevant policy holder or that there is available some other suitable reinsurance or indemnity in respect of such claims.
>
> …"

The years 1988 to 1992

[7] On the basis of the material before the court it is plain that Question 1 should be answered in the affirmative in relation to the years 1988 to 1992. The position for those years is essentially the same as that in *Hutchison's Executors, Petitioners* [2022] CSIH 51, 2022 SLT 1374. All of the deceased's underwriting business for those years is now fully wound up. The business was non-life business. The liabilities were reinsured into the Equitas Group. There are two layers of re-insurance (the second layer being introduced in 2007) and those policies are backed by very significant assets. More importantly, with effect from 25 June 2009 Lloyd's non-life business liabilities for the years 1988-1992 were transferred to Equitas Insurance Ltd under a scheme made in terms of Part VII of the Financial Services and Markets Act 2000. Mr Howie advised that as a result there are no liabilities facing the petitioners for which they would need to make retention or other provision in the distribution of the estate. He noted further that the estate includes no assets outside the UK, and that accordingly there are no assets for a policyholder to seek to attach in any country where the 2009 scheme might not be recognised as having erased the deceased's liability.

The years 1993 to 2009

[8] The business for the years 1993 to 2009 was also non-life business. All of the business is now fully wound up. Each year, reinsurance to close insurance ("RITC") was obtained with a Lloyd's syndicate for a succeeding year whereby that syndicate undertook the underwriting obligations of the deceased's syndicate for the year being closed. In event of a claim arising and the RITC failing or having insufficient assets to satisfy it, the deceased's estate could call upon the Lloyd's New Central Fund to make money available to satisfy the claim.

[9] Lloyd's was incorporated as a Society by Lloyd's Act 1871. That Act also empowered the Society to make byelaws. Further powers were conferred on the Society by Lloyd's Act 1911, Lloyd's Act 1925 and Lloyd's Act 1951. The Council of Lloyd's was established by Lloyd's Act 1982. The New Central Fund Byelaw (No 23 of 1996) ("the Byelaw") was made on 4 June 2006 by the Council of Lloyd's by special resolution in the exercise of its powers under section 6(2) of, and paragraphs (1) and (4) of schedule 4 to, Lloyd's Act 1982 and sections 7 and 9 of Lloyd's Act 1911. Between 2006 and 2014 it was amended by six other byelaws. The Byelaw as amended provides:

> "**Part C - Application of fund**
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> 8. Availability and application of Fund
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> (1) Subject to and in accordance with the following provisions of this paragraph, the Fund is available, and moneys or assets may be applied out of the Fund (including application by way of loan or on any other terms as to repayment) –
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> …
>
> (b) … for any of the purposes specified in sub-paragraph (2).
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> …

(2) The purposes referred to in sub-paragraph (1) are:

(a) directly or indirectly extinguishing or reducing any liability of a member to any person arising out of or in connection with insurance business carried on by that member at Lloyd's;

…

11. Liability of members in respect of payments made out of the Fund

(1) Where moneys or other assets have been applied out of the Fund (including any part of the Fund vested in trustees under paragraph 7) for the purpose mentioned in paragraph 8(2)(a), any member in relation to whom such moneys or assets have been so applied shall within 28 days after demand pay to the Society an amount not exceeding the aggregate of any sums so applied in relation to that member.

(2) The Council may at any time agree to reduce or waive any amount demanded by the Society or owed by a member to the Society under this paragraph.

(3) In this paragraph references to a ''member'' shall be taken to refer also to any person, or to the estate of any person, who has been a member at any time on or after the date when this byelaw comes into force, notwithstanding that that person is no longer a member at the time of any application referred to in or demand made under this paragraph.

…"

[10] Mr Welsh and Mr Howie both stressed that in terms of paragraph 8(1) Lloyd's had a discretion whether to use the Fund for any of the approved purposes; and that where it decided to do so in order to extinguish or reduce any liability of a member to any person arising out of or in connection with insurance business carried on by that member at Lloyd's (paragraph 8(2)(a)), the Society could demand repayment from the member (paragraph 11(1)). However, the Council could agree to reduce or waive any amount demanded by the Society or owed by a member to the Society under paragraph 11 (paragraph 11(2)). In essence, there was a discretion to make a repayable loan to a member, and a discretion not to enforce recovery of the whole or part of the loan from the member. In those circumstances, while Mr Welsh and Mr Howie proceeded on the basis that the

possible availability of assistance from the Fund was a factor to which regard should be had, neither thought that significant weight ought to be attached to it.

[11] Mr Welsh submitted that Question 1 should be answered in the affirmative in respect of the years 1993 to 2009. There was no present liability. There would only be liability if a double contingency came to pass, *viz.* that an unforeseen claim should appear and that the RITC would fail or have insufficient assets to meet it. The prospect of that occurring was so remote that it could reasonably be disregarded. There was no reason to anticipate that the RITC would be unable to satisfy any claim which might arise.

[12] Mr Howie supported that position. He advised that failure or insufficiency of assets of RITC to meet a claim was rare. He advised that "there is no present reason to believe in the failure or exhaustion of the specific RITC obtained by the syndicates in which his Lordship participated between 1993 and 2009". He suggested that it would be unfortunate if the court were to hold that as a general rule the estates of deceased Names could not be wound up without making retention or further provision.

[13] The court agrees. The position is similar to that of the post-1992 years in *Chisholm, Petitioner* (see paragraphs [11] and [12]). The court is satisfied on the basis of the material before it that the prospect of the double contingency coming to pass is a remote one. In the whole circumstances, balancing the interests of beneficiaries against those of possible contingent claimants, it is reasonable for the petitioners to pay beneficiaries without making any retention or further provision. In reaching that conclusion the court attaches less weight to the possible availability of moneys from the New Central Fund than the court in *Chisholm, Petitioners* may have, because if moneys were to be made available from that source to the petitioners it seems likely that repayment would be demanded. It attaches much more weight to the existence of RITC, the fact that there is no reason to anticipate it will not be

capable of meeting any claim which might arise, and the fact that the prospect of the double contingency coming to pass is a remote one.

The Practice Note

[14] In *Hutchison's Executors, Petitioners* this court observed (paragraph [12]) that consideration should be given to whether there is a need for an amended Practice Note to reflect two important developments which had taken place (the 2007 reinsurance and the 2009 scheme). In light of the discussion in this case consideration might also be given to whether what the Practice Note says about the Central Fund at Lloyd's is wholly accurate. We record that both Mr Welsh and Mr Howie endorsed the desirability of an amended Practice Note, and each raised further matters (which it is unnecessary for the court to rehearse) which might benefit from consideration.