



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 51
P498/22

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Petition

by

JAMES COLVILLE HUTCHISON AND ANOTHER,

as Executors of the late Sir Peter Craft Hutchison

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: Shepherd & Wedderburn LLP

24 November 2022

Introduction

[1] The petitioners are the executors nominate of the late Sir Peter Craft Hutchison (“the deceased”), who died on 20 January 2019, domiciled in Scotland. They have paid all of the debts of the estate and made distributions of various specific legacies and bequests. They

now wish to complete the administration of the estate by making over the residue to the beneficiary entitled to it.

[2] The deceased was at one time an underwriting member of Lloyd's of London (a "Name"). 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 present 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. 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.

Practice Note No 1 of 2006

[3] The Practice Note states *inter alia* as follows:

"Reinsurance

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 –

(a) for years of account before and including 1992, have been reinsured (whether directly or indirectly) into the Equitas Group; and

(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).

Remit to a reporter

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) [*sic* – remit to a reporter is in fact provided for in Rule 63.6A(4)] covers –

- (a) identification of the insurance business underwritten by the deceased;
- (b) confirmation from the documentation produced by the petitioners of the reinsurance cover taken or other indemnity;
- (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."

Developments since 2006

[4] As narrated in the petition and by the reporter in his report, two important developments have occurred since the Practice Note took effect in March 2006, both concerning liabilities for years of account before and including 1992 which had been reinsured into Equitas. The first was that in October 2006, Equitas agreed in principle to reinsure Names' liabilities with National Indemnity Company Inc, a US company and member of the Berkshire Hathaway group of companies. This phase of the reinsurance was completed in March 2007. As the reporter observes, for a liability for one or more of those years of account to affect the estate of a deceased Name, it was thereafter necessary for two layers of reinsurance to fail.

[5] The second development was that in 2009 a scheme under Part VII of the Financial Services and Markets Act 2000 was presented to the High Court of Justice in London for approval. This scheme, which provided for the transfer of Lloyd's business to a new entity within the Berkshire Hathaway group, was approved by an order of the court dated 25 June 2009 and came into effect on 30 June 2009 ("the 2009 Order"). The most significant aspect of the scheme for present purposes was that all liabilities under non-life policies effected or

carried at Lloyd's for any Name allocated to 1992 or any earlier year of account were transferred to the new entity, named Equitas Insurance Ltd. The transfer was effected by force of the order itself and did not require the consent of policyholders. The consequence is that all liabilities of Names to policyholders under policies falling within the scheme were erased and replaced by equivalent rights against Equitas Insurance Ltd. The reporter notes that although the scheme was written under English law, it was drawn up under legislation common to the whole of the United Kingdom and is intended to operate identically throughout the country. The legally binding effect of the transfer is recognised in all jurisdictions of the European Economic Area.

[6] In all of these circumstances, the risk of a claim against the estate of a deceased Name in respect of 1992 and prior business is described in a letter dated 30 September 2019 from Lloyd's Members Agency Services Ltd to the petitioners as "remote in the extreme". No court within the EEA would entertain such a claim. In the event of a claim being made in a jurisdiction outside the EEA which did not recognise the effectiveness of the 2009 Order in erasing policyholders' liabilities, the two layers of reinsurance mentioned above would require to fail before the estate would incur liability. Having investigated the current strength of National Indemnity Company Inc, the reporter notes that as at 30 June 2022 it has a surplus of assets over liabilities of around \$202 billion, and that Equitas estimated in 2021 that there was available from National Indemnity Company Inc an excess of available reinsurance of its liabilities of about \$4 billion.

Directions sought by the petitioners

[7] The question upon which the petitioners seek directions from the court is:

"Whether the petitioners, as Executors, may properly distribute the Deceased's estate 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 the Lloyd's of London."

[8] In the event of an affirmative answer to this question, the petitioners seek an order relieving them from personal liability for any such potential claims or for distributing the estate in accordance with the directions of the court.

[9] The deceased commenced underwriting at Lloyd's in 1977 and his last year of underwriting was 1988. Lloyd's considers that all of his business is now fully wound up following the closure of all syndicates in which he participated. His 1992 and prior non-life liabilities were reinsured into Equitas in 1996. At that time there remained a contingent liability in the event that Equitas was unable to meet valid claims against reinsured Names, including the estates of deceased Names.

[10] The deceased's liabilities to policyholders were, however, among the liabilities transferred to Equitas Insurance Ltd by the 2009 scheme. In these circumstances the reporter advises that, as a matter of UK law, there are in fact no liabilities facing the petitioners for which they would need to make any retention or other provision in the distribution of the estate, and that the court may therefore answer the question above in the affirmative. The reporter notes further that the deceased's estate includes no assets situated outside the UK, and accordingly that there are no assets for a policyholder to seek to attach in any country where the 2009 Order might not be recognised as having erased the deceased's liability. That being so, the reporter suggests that the court may regard the question as academic and decline to answer it. Standing the terms of the current rule of court and Practice Note, we consider that the appropriate course for us is to answer the question in the affirmative.

[11] As regards the petitioners' request for an order relieving them from personal liability for potential claims or for distributing the estate in accordance with the directions of the court, the court in *Chisholm* (at paragraph 13) did not think it appropriate to make such an order in the absence from process of any person who might come to have a contrary interest. Having regard to the (no doubt extremely remote) possibility that a claim might be made against the estate by a policyholder in a foreign jurisdiction, we shall adopt the same course and decline to make an order.

General observations

[12] So far as concerns 1992 and previous years' liabilities that were reinsured into Equitas in 1996, we suggest that practitioners should have regard to the consequences of the 2007 reinsurance and, especially, the 2009 Order when advising representatives of deceased Names whether an application to court under Rule of Court 63.6A remains necessary. Consideration should also be given to whether there is a need for an amended practice note to reflect those important developments.