[2013] UKPC 13
Privy Council Appeal No 0087 of 2011

JUDGMENT

Mutual Holdings (Bermuda) Limited and others (Appellants) *v* Diane Hendricks and others (Respondents)

From the Court of Appeal of Bermuda

before

Lord Neuberger
Lady Hale
Lord Mance
Lord Wilson
Lord Sumption

JUDGMENT DELIVERED BY LORD SUMPTION ON

7 MAY 2013

Heard on 4-7 February 2013

Appellants
Mark Howard QC
Oliver Jones
(Instructed by Harcus Sinclair)

Respondent
Michael Todd QC
Andrew Martin
(Instructed by Holman Fenwick & Willan LLP)

LORD SUMPTION:

1. This is an appeal from the decision of the Court of Appeal of Bermuda in two consolidated actions. The major issue in the courts below, and the only one which is still in dispute, arose from an allegation of fraud made against three corporate and four personal defendants. In bald summary, what is alleged is that they fraudulently overstated the extent of the Plaintiffs' exposure under a complex programme of insurance and reinsurance, thereby inducing them to order reinsurance which they did not need and to renew the programme for a further year on amended and disadvantageous terms. The trial judge, Bell J, rejected this allegation on the facts, but the Court of Appeal upheld it and made findings of fraud against two of the corporate Defendants and one of the personal ones.

The Roofers Advantage Programme

2. Mr and Mrs Hendricks owned and controlled an Illinois-based insurance broker called American Patriot Insurance Agency Inc (or "AMPAT"). They are the Plaintiffs in these proceedings. AMPAT had established an insurance product known as "Roofers' Advantage" which covered roofing contractors against workers compensation, automobile and general liability. Between 1997 and 2001, the Hendricks and AMPAT participated in a packaged "rent-a-captive" scheme devised and managed by a group of companies of which the ultimate holding company was Mutual Risk Management Ltd, based in Bermuda. The Board will call them the "MRM Group". The scheme was marketed, mainly in the United States, by a company called Commonwealth Risk Services LP, which operated as the marketing subsidiary of the group. Under the scheme, policies were issued to the roofer clients of AMPAT, which were underwritten by Legion Insurance Co, a US onshore insurer of the MRM Group. The policies were issued on Legion's behalf by AMPAT under an agency agreement. Legion was reinsured in respect of its liability under the policies under a programme of reinsurances and indemnities the object of which was to ensure that the profits or losses of the business (less a fee) were indirectly passed back, initially to AMPAT and then to Mr and Mrs Hendricks personally.

3. The essential features of the programme were as follows. Legion was reinsured with an offshore reinsurer of the MRM Group called Mutual Indemnity (Bermuda) Ltd, under a treaty known as Treaty 103, originally agreed in 1991. Each rent-a-captive scheme sold by the MRM Group was the subject of a separate addendum to Treaty 103. Under the arrangements agreed with the Hendricks in 1997, Legion was reinsured in respect of the Roofers' Advantage business in two principal layers. The first layer was known as the "Loss Fund", and covered claims up to a limit calculated by reference to a specified proportion of premiums written by Legion. The limit was designed to

correspond to the premium ceded, so that the business would be profitable to the extent that claims fell short of it. Mutual Indemnity therefore expected to assume no risk on the first layer. Once losses moved above the first layer, the programme was losing money. The second layer, which was known as "the Gap", covered these losses up to a limit referred to as the "Aggregate Attachment Point" (or "AAP"). This was also calculated as an agreed proportion of written premium and was liable to be varied on each annual renewal of the programme. A third layer was covered by a stop-loss policy reinsuring $5 million excess of the AAP, which was purchased from a third party reinsurer. In 1993, Treaty 103 had been amended by adding a new Article 3-A, the effect of which was that Mutual Indemnity wrote what amounted to a fourth layer of reinsurance in excess of the aggregate of the AAP and the stop-loss policy, up to a limit of $5 million each programme, subject to an aggregate limit for all programmes of $10 million, each underwriting year. On 23 March 1997 AMPAT entered into a Shareholder Agreement with Mutual Indemnity's parent, Mutual Holdings (Bermuda) Ltd. Under this agreement, Mutual Holdings agreed to issue a preference share to AMPAT with a special dividend entitlement corresponding to the profit made by Mutual Indemnity on the reinsurance programme, including investment income, less an administration fee. AMPAT for its part agreed to indemnify Mutual Holdings and Mutual Indemnity (although the latter was technically not party to the agreement) against any net losses on the programme, and to secure the indemnity by procuring letters of credit to be issued in their favour by a suitable bank.

4. The scheme was renewed annually, and ran for four years. Two changes in the arrangements occurred in that period which should be noted. First, on 5 July 1998, Mr and Mrs Hendricks personally were substituted for AMPAT as the parties to the Shareholder Agreement. Thereafter, the obligation to indemnify Mutual Indemnity and Mutual Holdings was assumed by the Hendricks. Secondly, in the third and fourth years (1999/2001) another US onshore insurer controlled by MRM, Villanova Insurance Co, began to participate alongside Legion as the underwriter of the direct insurances.

5. The commercial idea of the scheme was that the MRM Group would assume no risk, all losses and profits being ultimately for the account of AMPAT or Mr and Mrs Hendricks save insofar as they were reinsured by third party reinsurers. The documentation more or less achieved that result, provided that the losses did not exceed the upper limit of the fourth layer. However, once the losses exhausted the whole reinsurance programme, they would rest with Legion and Villanova. This was because the indemnity obligations of AMPAT and the Hendricks were limited to the liabilities of Mutual Indemnity as reinsurers of Legion and Villanova. They had not undertaken to indemnify Legion or Villanova against their unreinsured losses. Until 2000, this did not seem to matter. The MRM Group's experience with such schemes to date had been that losses rarely reached the stop-loss layer and never exceeded it. By 2000, however, the point had become potentially important. The programme had been loss-making in the first three years, and the losses had reached the stop-loss layer. There was plainly a risk that they would go higher.

6. The corporate Defendants in the proceedings are Mutual Indemnity, Mutual Risk Management and Commonwealth Risk Services. The four personal Defendants are all officers or employees of one or other of the MR companies involved. Mr Glenn Partridge was an Executive Vice-President of Legion, responsible for underwriting. Mr David Alexander was the President of Mutual Indemnity, a Vice-President of Mutual Holdings and an Assistant Vice-President of Mutual Risk Management, the ultimate holding company of the Group. Mr. Richard Turner was the President of Commonwealth Risk Services and a Vice-President of the other MRM companies involved. Mr Andrew Walsh was the General Legal Counsel of the onshore insurance subsidiaries, including Legion and Villanova. All of them were based in the group offices in Philadelphia, except for Mr Alexander who was based in Bermuda. The appeal is brought by Mutual Indemnity and Mutual Holdings, and by the two personal Defendants against whom the Court of Appeal made findings of fraud, namely Mr Partridge and Mr Alexander. The two other personal Defendants, Mr Turner and Mr Walsh, were exonerated at both stages below and have taken no part in this appeal.

The Allegations of Mr and Mrs Hendricks and AMPAT: The Coverage Meeting

7. The third year of the programme expired on 30 April 2000. The Plaintiffs' case arises out of the negotiations in the spring of 2000 for the renewal of the programme for the fourth year.

8. That case was substantially based on the allegations of two employees who had recently left the MRM Group. They were Mr Eric Bossard, an Assistant Vice President of Legion responsible for underwriting, and Mr James Agnew, an Assistant Vice-President of Commonwealth Risk Services. They are the central figures in the story which follows. In the spring of 2002 they approached the Hendricks and AMPAT. They told them that the fourth year renewal had been procured by fraud, and offered to give evidence in support of those allegations. Their story, as pleaded in the Plaintiffs' Statement of Claim, was as follows.

9. Discussion of the renewal was initiated by Mr Bossard and Mr Agnew in February 2000. Towards the end of that month, they met Mrs Hendricks and Ms Lysa Saran the President and Chief Operating Officer of AMPAT, at AMPAT's Illinois head office. At this meeting Mrs Hendricks expressed concern about the losses on the programme to date and asked Messrs Bossard and Agnew whether she and her husband were exposed to losses in excess of the AAP up to the limits of Legion's and Vilanova's policies. They replied that they were not sure and would check and come back with an answer later.

10. In March 2000, after their return to Philadelphia, there was an internal meeting at MRM's offices to discuss the renewal, which was referred to at the trial as the

"Coverage Meeting". In addition to Mr Bossard and Mr Agnew, the meeting was attended by Mr Partridge and Mr Turner. Mr Walsh participated on a conference line from another part of the building, and Mr Alexander participated for part of the meeting on another conference line from Bermuda. According to the pleading, Mr Bossard and Mr Agnew raised the question which Mrs Hendricks had asked. The obvious person to answer it was the in-house lawyer Mr Walsh, who had copies of all the relevant documentation and had drafted much of it. So Mr Partridge and Mr Turner asked Mr Walsh over the conference line whether the Hendricks were exposed to liability under their indemnity in excess of the AAP up to the direct insurers' policy limits. It was alleged that Mr Walsh replied that these losses were not reinsured by Mutual Indemnity and were not therefore covered by the Hendrick's indemnity, which was limited to the losses of that company. Any losses in excess of the AAP would remain liabilities of Legion or Villanova. Mr Partridge is then said to have asked whether it would be possible to amend the reinsurance retroactively so that the liability would fall on the Hendricks. To this, Mr Walsh is alleged to have replied No, but the addenda to the reinsurances relating to Roofers Advantage Programme could be altered so as to change the Hendricks' obligations. It will be apparent that this account of the discussion ignores both the stop loss policy and the fourth layer, which sat above the AAP. The partial explanation which emerged at trial was that Mr Bossard and Mr Agnew were unaware of Article 3-A of Treaty 103.

11. At paragraph 19.3 of the Amended Statement of Claim it is pleaded that

> "As a result of the discussion, Messrs. Partridge, Turner, Walsh and Alexander, in the presence of Messrs. Bossard and Agnew, decided that MRM, Legion, Commonwealth Risk and Mutual Indemnity should take advantage of the Hendricks' lack of understanding and lack of knowledge of the Reinsurance obligations of Mutual Indemnity and decided to tell the Hendricks that the Hendricks were responsible for losses up to Legion/Villanova's policy limits pursuant to the Shareholders' Agreement, when in fact each and all of them knew or believed that the Hendricks were not responsible to indemnify Mutual Indemnity for losses up to policy limits."

12. It is alleged that the participants went on to discuss how much the Hendricks might be willing to pay to cap retrospectively what they perceived to be their exposure under the indemnity in respect of the first three years of the programme. They consulted Mr Eaton, a broker with an associated company in London. Mr Eaton told them that it would not be possible to purchase the retrospective cover required. Nonetheless, it is said, the participants agreed that the Hendricks could be induced to pay $1 million to cap the "perceived (but non-existent) potential additional liability."

13. According to the Plaintiffs, at the end of the meeting Mr Partridge and Mr Turner instructed Mr Bossard and Mr Agnew with the agreement of Mr Walsh and Mr Alexander to tell the Hendricks that they were liable to indemnify Mutual Indemnity up to the limits of the direct insurances written by Legion and Villanova, although they knew that this was not true, and to offer to buy reinsurance to cap their liability for the first three years. By this means, it was said, they proposed (i) to induce the Hendricks to buy the additional reinsurance, for which they would in due course be charged up to $1 million, (ii) to renew the programme for a fourth year, and (iii) to amend the programme documents so as to place on the Hendricks an obligation to meet all liability in excess of the AAP up to the limits of the direct policies. Mr Bossard and Mr Agnew, it was alleged, duly complied with their instructions.

Subsequent events

14. A number of events occurring after the Coverage Meeting were relied upon by the Plaintiffs as evidence that the individuals involved in the Coverage Meeting put into effect the decisions made at that meeting. The primary facts are largely documented, and have never been disputed. Their significance is another matter.

15. On 28 March 2000, Mr Bossard emailed Ms Saran of AMPAT offering to extend the programme to 30 April 2001 and proposed various changes to the rates and loss ratios. Turning to the additional reinsurance, he wrote:

> "On a positive note, we have a market that is interested in removing American Patriot from an excess aggregate exposure position in the prior years. The price should be in the range of $350k to $650k. There would be no limit to this protection. In addition, we have approached a number of markets that are interested in buying down the specific excess to $200k. We hope to have this finalised in the next day or two."

In a further email on 31 March 2000, Mr Bossard described this as a "firm quote from the reinsurers that participate on our aggregate excess layer." In the Statement of Claim it is alleged that the first of these emails was sent on the instructions of Messrs Partridge, Turner and Alexander.

16. On 5 April 2000, Mr Agnew sent a proposal to Ms Saran entitled "Program Structure" which, after summarising the reinsurance presently available up to the AAP said:

> "The shareholder is responsible for any loss or losses excess of the Aggregate attachment plus the finite limit of $5 million."

17. On 20 April 2000, Mr Alexander as President of Mutual Indemnity wrote to Ms Saran with a formal proposal for the additional reinsurance. His letter said:

> "Mutual has agreed to purchase reinsurance to limit American Patriot's obligations for the 1997 through 1999 program years. This reinsurance is in addition to the two aggregate stop loss coverages already in place and will attach xs of the dollar limit outlined immediately below which in turn is xs of the percentage stop losses in existence for American Patriot's own !PC Program. The placement of this additional reinsurance will mean that Mutual will not seek reimbursement from Ken and/or Diane Hendricks under the Shareholders' Agreements, for any losses that exceed the combined annual aggregate reinsurance protection provided under the Program for each year."

The evidence was that this letter was drafted mainly by Mr Bossard. The final sentence of the passage quoted indicates that the additional reinsurance proposed to the Hendricks was to cover not just Mutual Indemnity's liability for the fourth layer, but also any losses exceeding the aggregate reinsurance cover provided by Mutual Indemnity, i.e. the unreinsured losses of Legion and Villanova. The premium quoted was variable between $390,000 and $1,000,000, depending on the loss penetration, with a provisional fee payable of $480,000. The letter concluded by inviting them to signify their agreement by signing a copy, and recording that

> "Formal acknowledgment of this revision to the Program will be contained in the revisions to the Shareholder Agreement and will be effective upon the payment of the $480,000 fee."

Ms Saran and Mr and Mrs Hendricks duly signed a copy of the letter by way of agreement, in reliance (so the Plaintiffs allege) on the various representations said to have been made in the prior correspondence. Shortly afterwards, they paid the $480,000.

18. The revision to the Shareholder Agreement referred to in the letter was ultimately embodied in Amendment no. 5 to the Shareholder Agreement. This was drafted by Mr Alexander of Mutual Indemnity at about the beginning of November 2000 and sent to Ms Saran from Bermuda by one of his account executives, Mr Bjornson. The covering letter, dated 3 November 2000, explained the amendment as follows:

> "The purpose of the amendment is to emphasize that if losses are sustained in excess of the sum of American Patriot's specific retention and the reinsurance purchased by Mutual, those losses must be funded by American Patriot. Note that this amendment applies specifically to year 4 of the program. Note also that the underwriting fee on year 4 has been reduced to 2.5%."

The amendment recited that Mr and Mrs Hendricks had agreed to be responsible for all losses up to the AAP and that Mutual Holdings had purchased reinsurance coverage above the AAP, but that losses on the programme might exceed the reinsurance. The operative provisions of the amendment were as follows:

> "1. SHAREHOLDER agrees to indemnify MUTUAL and/or INSURANCE COMPANY for any losses sustained which exceed the sum of the SHAREHOLDERS specific retention plus the additional reinsurance purchased by INSURANCE COMPANY.
>
> 2. All other terms and conditions shall remain unchanged.
>
> 3. The effective date of this Amendment No. 5 shall be the 23rd day of March, 1997 but will exclude years 1, 2 and 3 of the program."

"INSURANCE COMPANY" in paragraph 1 can only have referred to the direct insurers, Legion and Villanova, although neither company was in fact party to it, or to the Shareholder Agreement which it amended. On the face of it, therefore, Amendment no. 5 made the Hendricks liable under their indemnity not only for the losses of Mutual as the reinsurer of Legion and Villanova in the fourth year, but for the unreinsured losses of Legion and Villanova themselves, up to the limits of their policies. The amendment was signed by Mr and Mrs Hendricks and Mr Alexander on behalf of Mutual Holdings, and dated 19 January 2001.

19. It was common ground that the retrospective reinsurance was never obtained. When it proved impossible to obtain, Mutual Indemnity decided to bear the additional risk itself, charging AMPAT a premium according to the formula agreed in April 2000. On 4 February 2002, Mr Bjornson wrote to Ms Saran setting out a calculation of the final premium said to be due on the reinsurance in the maximum sum of $1 million, and asking for payment of the balance of $520,000. The Defendants ultimately agreed that they would have to repay the premium or account for it by way of set-off.

The Trial and the Judgment of Bell J

20. At the trial the principal evidence for the Plaintiffs was given by Mr Bossard and Mr Agnew, and by Mrs Hendricks. Ms Saran gave evidence by deposition. All the personal Defendants gave evidence, together with Mr Eaton and Mr Mulderig who had at the relevant time been the Chairman and Chief Executive of Mutual Risk Management.

21. The Judge reviewed the evidence in considerable detail and rejected the allegations against all of the Defendants. His main reason was that he did not regard Mr Bossard and Mr Agnew as reliable witnesses and did not believe the critical parts of their evidence. He explained his reasons with some care. On their own evidence their role had been most unattractive. They not only claimed to have been party to a dishonest conspiracy, but to have initiated it. He found that Mr Bossard had also lied to Ms Saran in his emails of 28 and 31 March 2000. He found, principally on the basis of the evidence of Ms Saran, that their offer in 2002 to give evidence against their former employers had been conditional on their being paid, that they were in fact paid substantial sums. He concluded that they had lied in their evidence when they had denied this. He found Mr Bossard's demeanour to be combative and evasive. His evidence was inconsistent in important respects with Mr Agnew's evidence, with his own witness statement and with evidence that he had given in related proceedings in the United States. The inconsistencies related to critical matters, including the participation of Mr Alexander in the Coverage Meeting, the advice attributed to Mr Walsh at that meeting and the origin of the estimate of $1 million as the premium for retrospective reinsurance. In each case, Mr Bossard had embellished his evidence so as to support his allegation of dishonesty against his former colleagues. As for Mr Agnew, the Judge found that he had tailored his evidence to match Mr Bossard's. So far as that evidence supported the disputed parts of Mr Bossard's account of the Coverage Meeting, he found it to be wrong.

22. It was not disputed that on a number of occasions Ms Saran or Mrs Hendricks had been told by representatives of the MRM Group that they did have a liability beyond the AAP. The issue was whether Messrs Partridge, Turner, Alexander and Walsh had genuinely believed this. Their evidence was that they did. The Judge believed them. In particular he recorded that he had been impressed by Mr Walsh. Mr Walsh had denied giving the advice at the Coverage Meeting attributed to him by Mr Bossard and Mr Agnew, namely that the Hendricks had no liability beyond the AAP. His evidence was that he had been asked who would be responsible for the losses if they broke through AAP and the stop loss layer. This was not a question that had arisen before, and so he had then spent some time looking through the contracts before concluding that the Hendricks were liable to indemnify Mutual Indemnity in respect of their liability up to the limit of the fourth layer, i.e. the layer beyond the stop loss limit which Mutual Indemnity reinsured under Article 3-A of the treaty. Mr Walsh then reported by telephone on the same day or the next, probably to Mr Partridge or Mr Turner, that there

was exposure beyond the stop loss layer. He denied having suggested that the terms of the reinsurance could be changed so as retrospectively to alter the Hendricks' obligations. On the contrary, he had said that this could not be done. The Judge found that there was no discussion at the Coverage Meeting about the potential exposure of AMPAT or the Hendricks beyond the fourth layer up to the limits of the liability of Legion and Villanova. The focus was on whether the Hendricks were exposed if the losses went into the next layer beyond the stop loss policy, not on the limits of that exposure.

23. Turning to the documents, the Judge found that there was no evidence that Mr Bossard's emails of 28 and 31 March was sent on any one's behalf but Legion's who employed him. In the Judge's view Mr Alexander's letter of 20 April 2000, which was said to have been a representation that additional reinsurance had been obtained, was no more than a statement that it was to be obtained. He rejected the allegation that it was never intended to obtain it but only to charge for it. Until a late stage Mr Alexander assumed that it would be obtained.

24. The Judge did not deal with Amendment no. 5 in his analysis of the fraud allegation. He simply mentioned in passing that he would deal with it later in his judgment, and in the event returned to the subject only towards the end of his judgment when he came to construe the indemnity conferred by it. He rejected the argument that Amendment no. 5 was prepared in order to carry into effect the fraudulent scheme said to have been agreed upon at the Coverage Meeting. The Judge found that although on its face Clause 1 of Amendment no. 5 appeared to extend the indemnity to losses of Legion and Villanova, the "common intention of the parties" was that it should merely record the liability which the Hendricks were thought to have already to indemnify Mutual Holdings in respect of the fourth layer, while excluding that liability for the first three years for which it had been agreed to buy additional reinsurance.

The Judgment of the Court of Appeal

25. Evans JA delivered the only reasoned judgment in the Court of Appeal, with which Zacca P and Baker JA agreed. He regarded the Judge's findings about what happened at the Coverage Meeting as incomplete, and considered that that made it necessary for him to make his own findings. He embarked upon this task mainly by reference to the witness statements and oral evidence of Mr Bossard and Mr Agnew, on the footing that neither Mr Partridge nor Mr Turner (the only personal Defendants who had been present in person) had any very clear recollection of the words used, and that the primary facts about the Coverage Meeting were substantially undisputed except for Mr Walsh's part in it. Against this background, Evans JA considered whether support could be found for the allegations of Mr Bossard and Mr Agnew in the events after the meeting. He concluded that their allegation was supported by (i) Mr Bossard's emails of 28 and 31 March 2000 referring to non-existent reinsurance quotes; (ii) Mr

Alexander's letter of 20 April 2000, and (iii) the terms of Amendment no. 5. He concluded that these documents made good the Plaintiffs' allegations. He therefore considered that the Judge ought to have accepted the evidence of Mr Bossard and Mr Agnew.

26. Evans JA thought that the Judge had erred in two respects:

> "First, he decided the issue of fraud in relation to the Coverage Meeting alone, when it was necessary to take account of the whole sequence of events leading up to the 2000 renewal (on terms set out in the 20 April letter) and to Amendment No. 5 to the Shareholder's Agreement. Secondly, having found that there was no fraudulent intent, he held that the letter and the Amendment had to be interpreted consistently with that finding. That approach made it impossible to give the documents what I would hold is clearly their correct interpretation, and on that basis they did contain representations that AMPAT/the Hendricks were liable for all losses in excess of the AAP and third party reinsurance aggregate limit specified in the Program."

"For the above reasons", he concluded,

> "I would find and hold that Mr. Bossard's and Mr. Agnew's account of the Coverage Meeting was broadly correct, and that representations were made to AMPAT/the Hendricks thereafter to the effect that they had an unlimited liability to Holdings and/or Mutual Indemnity for losses incurred by Legion and/or Mutual Indemnity in excess of the AAP/third party reinsurance aggregate. Those representations included the emails sent by Mr Bossard on 28 and 31 March 2000 and Mr Alexander's letter dated 14 April 2000, and they were unjustified on any view of the legal effects of the Program and of the Shareholder's Agreement. Both Mr. Partridge and Mr. Alexander knew that they were unjustified or they were at least reckless as to whether they were justified, or not. In my judgment, the evidence established a fraudulent conspiracy to which Mr. Partridge and Mr. Alexander were parties which was implemented by the 2000 Program Renewal and Amendment No.5 to the Shareholders Agreement, finally signed in January 2001."

27. Evans JA limited this conclusion to Mr Partridge and Mr Alexander. He exonerated Mr Walsh, as the Judge had done. This was because his involvement had been limited to giving the correct advice that the Hendricks' indemnity extended to any losses reinsured by Mutual Indemnity under the fourth layer. Mr Walsh had never been

asked about the potential liability of the Hendricks beyond the fourth layer. Evans JA thought that the fact that he was not consulted again was itself evidence in support of the allegation of fraud against Mr Partridge and Mr Alexander. As for Mr Turner, Evans JA described his position as "ambivalent", but concluded that the Judge had been right to dismiss the claim against him because he had had no responsibility within the MRM Group for either Mutual Indemnity or the direct insurers, and had no recollection of participating in the conversation on the telephone with Mr Alexander.

The Present Appeal

28. An appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness. There are particular reasons for caution in a case like this. The allegation was one of fraud, which fell to be proved to the high standard on which the courts have always insisted, even in civil cases. The critical issues were (i) what was said at an informal and undocumented meeting eight years before the trial, and (ii) what the four personal Defendants believed to be the exposure of the Hendricks and AMPAT to losses that penetrated through the stop loss layer. Any findings about these matters necessarily had to be based on the oral evidence of those Defendants and of Mr Bossard and Mr Agnew. The Judge had to assess their character, the honesty and candour of their evidence, and the quality of their recollection. As Lord Hoffmann observed in *Biogen Inc v Medeva Plc* [1997] RPC 1, 45,

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

29. In the opinion of the Board, the material on which the Court of Appeal relied for their finding of fraud against Mr Partridge and Mr Alexander was wholly inadequate for that purpose, and their reasoning came nowhere near to justifying it. There is a large number of byways in the evidence, some of which were explored at length in argument, but the Board will confine itself to what it considers to be the critical objections to the Court of Appeal's analysis.

30. The Court of Appeal regarded themselves as being at liberty to accept the evidence of Mr Bossard and Mr Agnew about the Coverage Meeting, which the Judge

had rejected, for two reasons: first, that the Judge had confined himself to rejecting the factual case put forward by the Plaintiffs through Mr Bossard and Mr Agnew, without giving his own account of the meeting; and, secondly, that none of the personal Defendants claimed to have a clear recollection of the words used. Neither of these reasons is satisfactory. The fact that the Judge did not seek to reconstruct what did happen at the meeting (except for Mr Walsh's part in it) is nothing to the point. It was enough for his purposes that the Plaintiffs had failed to discharge the burden of proving their version. The fact that after eight years none of Messrs Partridge, Turner, Alexander and Walsh had a clear recollection of the words used at the meeting does not mean that Mr Bossard and Mr Agnew, who did claim to have one, were to be believed. The Judge gave full and compelling reasons why he did not believe them. He found that Mr Bossard in particular had been inconsistent, evasive, and untruthful, and that his evidence had been bought for a substantial sum, a fact which he had not disclosed and about which he had lied in the witness box. The Judge found that Mr Agnew had tailored his evidence to suit Mr Bossard's. These considerations appear to the Board to be compelling reasons for treating their evidence with great reserve. The Court of Appeal chose to believe Mr Bossard and Mr Agnew, without having heard them and without addressing any of the Judge's criticisms of their evidence. Indeed they believed it notwithstanding that it was in important respects irreconcilable with the evidence of Mr Walsh, which they also believed.

31. Having embarked on this course, the Court of Appeal does not seem to have appreciated either the nature of the case which was being made against the Defendants or the significance of their own acceptance of Mr Walsh's evidence. There had been, during the trial, some ambiguity about the exact nature of the deception which (according to the Plaintiffs) the participants at the Coverage Meeting decided to practise on Mr and Mrs Hendricks. In principle, there were two possibilities. One was the pretence that the Hendricks were exposed under their indemnity to losses of Mutual Indemnity above the AAP. This may be called the "narrower version". The other, which may be called the "wider version", was the pretence that they were exposed to all the unreinsured losses of Legion and Villanova up to the limits of their direct policies. It was therefore of some importance to decide which issue was being discussed at the Coverage Meeting.

32. The Statement of Claim appeared to be based on the wider version. The pleaded case was that at the meeting with Mrs Hendricks and Ms Saran in February 2000, Mrs Hendricks asked whether the exposure "extended to amounts in excess of the Aggregate Attachment Point up to Legion and Villanova's policy limits", and that this was the question put to Mr Walsh at the Coverage Meeting. It was because Mr Walsh, according to the pleading, advised that the exposure of the Hendricks was limited to that of Mutual Indemnity, and Mutual Indemnity's exposure stopped at the AAP, that all of those participating in the meeting were said to have appreciated that the Hendricks did not need more reinsurance. Nonetheless, it was said, a joint decision was made by those present to tell the Hendricks that under the Shareholder Agreement they were liable for

all losses up to Legion's and Villanova's policy limits, and to sell them reinsurance on that basis.

33. The evidence of Mr Bossard and Mr Agnew, however, did not go that far. It supported only the narrower version of the proposed deception. Only Mr Bossard dealt directly with the point. He said that he explained to Mr Partridge that the Hendricks had a misunderstanding about their exposure, and that Mr Partridge had replied: "Are you sure they think they are on above the aggregate excess? Can you sell them retro reinsurance?" Mr Partridge then telephoned Mr Walsh and asked him: "on the reinsurance agreement, does the client assume the risk above the aggregate stop loss?" To this question, Mr Walsh answered "No". Nonetheless, at the conclusion of the meeting, Mr Bossard says that he was instructed by Mr Partridge to "falsely confirm that the Hendricks did have exposure above the Aggregate Attachment Point."

34. The critical witness on these points was Mr Walsh. Mr Walsh said that he had been asked who would be responsible for the losses if they broke through the AAP and the stop loss layer. It was a question which could only be satisfactorily answered by looking at the contracts, which is what Mr Walsh did. But he denied giving the advice attributed to him by Mr Bossard. His advice was that the Hendricks were exposed beyond the AAP and the stop loss layer because of the existence of the fourth layer, to which their indemnity extended. The Judge accepted Mr Walsh's account, and so did the Court of Appeal. Yet if, as both courts found, Mr Walsh advised that there was exposure beyond the AAP and the stop loss layer, Mr Bossard's allegation that the Defendants thought that there was no such exposure collapses and the case based on the narrower version must fail.

35. In these circumstances, the fraudulent conspiracy found by the Court of Appeal was not the one alleged by Mr Bossard and Mr Agnew, but a somewhat different one. In the first place, they found that the conspiracy did not include Mr Walsh, who although participating only on the telephone had been central to its formation according to the case made by Mr Bossard and Mr Agnew. Nor did it include Mr Turner, who had been present in person throughout the meeting at which it was supposed to have been hatched. Secondly, the deception which the Court of Appeal found was the wider version rather than the narrower one supported by Mr Bossard. Instead of being a deception about the existence of liability beyond the AAP and the stop loss layer, it was said to be a deception about the extent of that liability. Yet none of the witnesses on either side who spoke to the Coverage Meeting had supported this. Mr Bossard and Mr Agnew did not. Mr Alexander was not on the line during the relevant part of the meeting. Mr Partridge and Mr Turner gave evidence that no one at the meeting had been focusing on the extent of the exposure, but only on the question whether it exceeded the AAP and the stop loss layer. Mr Walsh's advice related only to the latter question. The Judge accepted their evidence. He could hardly have done otherwise.

36. In reality, the Court of Appeal's findings in support of the wider version of the deception were not based on the evidence of those who were there, but on Evans JA's analysis of the subsequent documents, namely Mr Bossard's emails of 28 and 31 March 2000, Mr Alexander's letter of 20 April and the terms of Amendment no 5 to the Shareholder Agreement. Accordingly, it is necessary to turn to the Court of Appeal's treatment of these documents.

37. It was common ground that Mr Bossard's emails of 28 and 31 March 2000 were false. They pretended that a quotation for reinsurance had already been obtained when in fact the process of trying to obtain one had hardly begun. Evans JA accepted the Judge's conclusion that since Mr Bossard was not employed by any of the corporate Defendants, none of them was responsible for his emails. But he held that Mr Partridge personally "must accept responsibility for them" because Mr Bossard's evidence had been that he had sent them in order to implement the instructions which Mr Partridge had given him at the end of the Coverage Meeting. In fact, Mr Bossard did not mention either email in his witness statement and was not cross-examined about them at the trial. Neither email was copied to any of the personal Defendants, and there was no evidence that any of them was aware of them at the time. The pleaded allegation that Mr Bossard had sent them on the instructions of Messrs Turner, Partridge and Alexander, was not put to any of them apart from Mr Turner, who denied it. In those circumstances, the reason why Mr Bossard should have told a gratuitous lie about the progress that had been made to date on the reinsurance placement was never investigated at trial, and the Board does not propose to speculate about it. The Judge was clearly right to say that this episode does not speak well for Mr Bossard's honesty.

38. Turning to Mr Alexander's letter of 20 April 2000, Evans JA found that it had been "carefully drafted" by Mr Alexander. In fact, the evidence was that it was drafted mainly by Mr Bossard and that Mr Alexander signed it without giving it much thought. Evans JA thought that it was untrue (i) because it suggested that the extra reinsurance had already been placed, and (ii) because it suggested that the Hendricks were liable for "any losses" that exceeded Mutual Indemnity's reinsurance coverage, i.e. that their exposure extended to the unreinsured losses of Legion and Villanova.

39. The Board is satisfied that Evans JA's view on point (i) was based on a misconstruction of the letter. It opened with the statement that "as part of the renewal proposal for the 2000-2001 program year, Mutual has agreed to purchase reinsurance to limit American Patriot's obligations for the 1997 through 1999 program years." This was a reference to what Mutual had agreed with the Hendricks and AMPAT to do. It was not a reference to terms that had been agreed with a reinsurer. If that was not sufficiently clear from the first paragraph it was abundantly clear from later reference to "reinsurance to be purchased by Mutual".

40. Turning to point (ii), the Board accepts that the letter of 20 April 2000, coming as it did after Mr Bossard's email of 28 March 2000 and the formal proposal sent to Ms Saran with Mr Agnew's letter of 5 April 2000 (both quoted above) did suggest that the Hendricks were exposed to the unreinsured losses of Legion and Villanova, and that the additional reinsurance cover would protect them against that additional exposure. It follows, since they did not have that exposure under the contracts as they then stood, that there was a misrepresentation. Whether this misrepresentation was dishonest is another question which is conveniently considered in conjunction with Evans JA's finding about Amendment no. 5 to the Shareholder Agreement. Amendment no 5 brought the contractual position into line with what had been represented in the communications of 28 March and 5 and 20 April 2000, by extending the Hendricks' indemnity to the unreinsured losses of Legion and Villanova. It was of course foreshadowed in the last substantive paragraph of the letter of 20 April 2000. Between them, these two documents were the main basis of the Court of Appeal's finding of fraud against Mr. Alexander, and that was in turn the basis of the finding of fraud against Mutual Indemnity and Mutual Holdings, of which Mr Alexander was a Vice-President.

41. Evans JA regarded Amendment no. 5 as establishing the fraud "beyond doubt". He criticised the Judge's treatment of the amendment on two grounds. First, he said that the Judge had failed to take account of it in his analysis of the allegation of fraud. Secondly, the Judge had construed it in the light of the subjective intention of the parties and concluded that it only confirmed the liability of the Hendricks under their indemnity in respect of the fourth layer for the fourth year, whereas the language appeared to refer to the unreinsured losses of Legion and Villanova. The Board considers that there is some justice in both of these criticisms. The Judge did not in fact ignore Amendment no. 5 in his treatment of the fraud case, for he did cross-refer to what he would say about it later in his judgment. But it is fair to say that this way of laying out his judgment does leave the unfortunate impression that his treatment of the amendment was an afterthought and that the implications of Amendment no. 5 were not considered in conjunction with the rest of the evidence on the alleged fraud. Turning to the Court of Appeal's second criticism, the judge was unquestionably wrong to construe the document in the light of the subjective intention of the parties. The subjective intentions behind Amendment no. 5 were relevant to the question whether it was drafted for a dishonest purpose, but were not admissible for the purpose of construing it as a matter of law. On the other hand, it appears to the Board that Evans JA made the equal and opposite error of treating the true construction of Amendment no. 5, which depended upon an objective determination of its meaning, as conclusive of the Defendants' dishonest state of mind.

42. In the Board's opinion, the letter of 20 April 2000 and Amendment no. 5 will not bear the weight which the Court of Appeal placed on them. For present purposes, the Board is concerned only with the implications of these documents for the case of fraud. They are relevant to that case in only two respects. First, they may be evidence that the Defendants believed the Hendricks to have no exposure beyond the limits of the reinsurance cover provided by Mutual Indemnity, at the time when they were proposing

to sell them third party reinsurance for that exposure. Otherwise, why would they seek to introduce such a liability by amendment? Secondly, they are relevant to the pleaded allegation that part of the plot conceived at the Coverage Meeting was to induce the Hendricks to renew the programme for the fourth year on the basis that they would bear the losses up to the limits of the direct insurances in that year. On that footing, the letter of 20 April 2000 and Amendment no. 5 might be regarded as part of the execution of the plan.

43. On any view, Amendment no. 5 was an unsatisfactory document. The language is convoluted and obscure. Terms are left undefined and their meaning left to be inferred. Rights are purportedly conferred upon non-parties. The recitals are hard to match up with the terms. The only evidence given at the trial about its intended purpose was that of Mr Alexander, who drafted it without legal or other assistance. His evidence on the subject was rambling and confused, but what emerges with reasonable clarity is that he intended to "memorialise" (i.e. record in a binding manner) the liability which he understood that the Hendricks already had. According to his own evidence, Mr Alexander believed at the time that the Hendricks were liable under the existing terms of the Shareholder Agreement to meet all losses on the programme, including the unreinsured losses of Legion and Villanova. This was because, commercially, the whole idea was that the MRM Group was only taking a fee and that all risks of loss and prospects of gain were ultimately for the account of the client, viz. the Hendricks, save in so far as they were ceded to third party reinsurers. This appeared to be the concept embodied in the letter which he had signed on 20 April 2000, and which he used as the basis for drafting Amendment no 5. Indeed that is how it would have worked if the losses had not recently risen to unforeseen levels. Mr Alexander acknowledged in hindsight that he was mistaken. If he was to "memorialise" the existing contractual position, he should have drafted Amendment no. 5 so as to record the Hendricks' liability in the fourth year for the fourth layer losses of Mutual Indemnity only. Evans JA remarked that Mr Alexander's evidence about his understanding at the time when he drafted Amendment no. 5 had no legal basis and was unsupported by any legal opinion. That is true, and it does not speak well for Mr Alexander's understanding of the programme or his drafting skills. However, Mr Alexander was not sued for these professional failings, but for fraud. If his evidence is accepted, then he did not believe at the time of the renewal that the Hendricks had no exposure beyond the limits of the reinsurance cover provided by Mutual Indemnity. The Judge recited Mr Alexander's evidence on these points without making any specific finding about his personal intentions in drafting the amendment. But he found that its drafting inadequacies were "genuine errors and not part of the theory of fraudulent conspiracy." The Judge therefore accepted that incompetence rather than dishonesty explained the drafting of the amendment. The Board considers that there was no basis for the Court of Appeal to reject that finding. Mr Alexander's view of the extent of the Hendricks' exposure was not consistent with the existing documentation, which he appears never to have properly studied, but it was entirely consistent with the commercial rationale for this programme and it is perfectly credible that he could have had that belief. It is perhaps worth noting that his view was shared by the Chairman of the MRM Group, Mr Mulderig.

44. Evans JA thought that Amendment no. 5 was consistent with the plan said by Mr Bossard and Mr Agnew to have been made at the Coverage Meeting to make the Hendricks liable for losses on the programme up to the limits of the direct policies. In fact, neither Mr Bossard nor Mr Agnew gave any such evidence. Mr Bossard said that he could not remember whether there was any discussion of amending the Shareholder Agreement. He and Mr Agnew both said that Mr Walsh had made a rather different proposal, namely that there could be a retrospective amendment to the Roofers' Advantage addendum to Treaty 103 to make Mutual Indemnity liable beyond the AAP, so that the Hendricks' liability under their indemnity would be increased. But that evidence was contradicted by Mr Walsh in evidence which was accepted by both the Judge and the Court of Appeal.

45. There are a number of other problems in Evans JA's treatment of the evidence, but these points are more than enough to make the Court of Appeal's finding of fraud untenable. It is regrettable that such a serious, indeed potentially career-destroying, finding should have been made against Mr Partridge and Mr Alexander on such an unsatisfactory basis.

The Corporate Appeal

46. At the trial two additionals were taken on behalf of the Hendricks and AMPAT that the Shareholder Agreement was *ultra vires* Mutual Holdings, or void by reason of the alleged non-issue of the preference share. These points which were referred to as the "corporate issues", were the subject of a separate appeal. They were rejected by both Bell J and the Court of Appeal, and the appeal from their decisions on them was ultimately withdrawn abandoned by the Plaintiffs shortly before the hearing before the Board.

Conclusion

47. In the result, the Board will humbly advise Her Majesty that the order of the Court of Appeal should be set aside and that of Bell J restored. Subject to any argument which may be advanced to the contrary the Respondents must pay the Appellants' costs in the Court of Appeal and before the Board.