THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 327/05
Reportable

In the two matters between

SOCIETY OF LLOYD'S Appellant

and

OWEN JOHN PRICE Respondent

TPD CASE NO. 17040/03

SOCIETY OF LLOYD'S Appellant

and

PAUL LEE Respondent

TPD CASE NO. 20764/03

Coram**:** Howie P, Scott, Zulman, Van Heerden JJA, et Cachalia AJA

Heard: 8 May 2006

Delivered: 1 June 2006

Summary: *Prescription – extinctive prescription – conflict of laws –whether lex fori, South African law, determined issue of prescription and not lex causae, English law – recognition and enforcement by South African court of English judgment – international jurisdiction of English court – whether enforcement of English judgment contrary to South African public policy.*

Neutral citation: This judgment may be referred to as *Society of Lloyd's v Price; Society of Lloyd's v Lee* [2006] SCA 87 (RSA)

JUDGMENT

VAN HEERDEN JA:

Introduction

[1] In June 2003, the appellant (Lloyd's) instituted separate claims for provisional sentence against the two respondents (Price and Lee, referred to collectively as 'the defendants'). Both claims were based on default judgments obtained by Lloyd's against the two defendants in the High Court of Justice (Queen's Bench Division, Commercial Court), London, England on 27 June 1997 (in the case of the defendant Lee) and 13 October 1997 (in the case of the defendant Price), respectively. In terms of the English Judgments Act 1838, interest on these judgments runs at the rate of 8 per cent per annum. The claims were dismissed with costs by Mynhardt J in the Pretoria High Court on the grounds that they had become prescribed, hence this appeal, which comes before us with the leave of the court below.[1]

Background

[2] In the provisional sentence summonses Lloyd's alleged that the English court was a court of competent jurisdiction by virtue of the fact that each defendant had entered into a General Undertaking, clauses 2.1 and 2.2 of which provide as follows:

'2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

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[1] The judgment of the court *a quo* has been reported as *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2005 (3) SA 549 (T).

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to *(a)* any Proceedings being brought in any such court as is referred to in this Clause 2 and *(b)* any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.'

[3] Lloyd's alleged further that the default judgments obtained by it were final and conclusive. The background to the obtaining of these judgments has been set out fully in the judgment of the court a quo, and it is accordingly not necessary to repeat this exercise for purposes of the present judgment, save to the extent necessary to contextualise the consideration of relevant issues.

[4] The basis of the default judgments was Lloyd's claim against each defendant for payment of the so-called 'Equitas premium' which is said on behalf of Lloyd's to have arisen 'in very unusual circumstances'. During the 1980's, a considerable number of persons (including the defendants) were recruited to become new underwriting members (so-called 'names') of Lloyd's. Thereafter, many of them (together with many existing names) suffered serious losses, in the main as a result of the underestimation of the size of the losses which would be coming into the market. These losses

were caused in large part by claims arising out of asbestosis litigation in the United States of America.

[5] Proceedings instituted by groups of names were largely successful and resulted in judgments in their favour against members' agents, managing agents and even auditors. By 1993, it appeared that Lloyd's itself might be at risk of being sued. In order to resolve the anticipated 'avalanche of litigation' that was threatening to destroy the Lloyd's market, Lloyd's adopted a 'reconstruction and renewal plan' ('R & R'). It offered names a settlement of certain claims in respect of 1992 and prior underwriting years, such settlement involving a mutual waiver of claims. A newly formed insurance body known as Equitas Reinsurance Ltd ('Equitas') undertook to re-insure names' liabilities arising out of non-life business written in and before 1992 and to run-off these reinsured liabilities. Equitas would be funded by means of moneys paid by Lloyd's from its Central Fund and by premiums paid by all names whose outstanding liabilities were thus re-insured. Those names who accepted the plan received financial benefits in the form of certain debt credits being used to discount their liabilities in part. Even those who did not accept the plan (including the defendants), while they did not receive the said financial benefits, were nevertheless obliged to re-insure with Equitas and pay the premiums.

[6] The means used by Lloyd's to implement R & R – and, in effect, to impose the Equitas contract and the obligation to pay the Equitas premium

even on those names who rejected the settlement offer – were summarised by Mynhardt J in the court below as follows:[2]

'[22] In order to introduce and implement the settlement offer Lloyd's had to make use of its statutory powers to make bye-laws. Members had, in any event, to enter into a standard form agreement known as the 1986 General Undertaking, which included an undertaking by the member to comply with the Lloyd's Act and any subordinate legislation made by Lloyd's thereunder and also with any direction made by the Council of Lloyd's and also to become a party to any agreement as may be prescribed or notified to the member or his underwriting agent by the council.

The provisions of the General Undertaking form the basis of the contention of Lloyd's that it has succeeded in procuring all members to become parties to the Equitas contract. It achieved that, so it contended, by using its statutory powers to make bye-laws.

In terms of bye-law 20 of 1983 the Council of Lloyd's was empowered to appoint a substitute agent to take over the whole or any part of a member's underwriting business. On 3 September 1996 the Council appointed a substitute agent, Additional Underwriting Agencies (No 9) Ltd, "AUA9", a company controlled by Lloyd's, and also based in London, to take over all non-life business written in or before 1992 for all members. AUA9 was directed to give effect to the R & R plan for which provision had been made in 1995 by bye-law 22 of 1995.

[23] In regard to members who have not accepted the R & R plan Lloyd's rely on clauses 2.1 and 2.2 of the 1986 General Undertaking . . . .

In terms of the Equitas reinsurance contract AUA9 was authorised to accept service of all process on behalf of members who have not accepted the R & R settlement plan. It is on this basis that Lloyd's contend that the process which was issued out of the English Court in London was properly served on Price and Lee. The writ of summons in each case was duly served on AUA9 and that constituted proper service under English law.

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[2] Paras 22-24.

[24] The steps that were taken by Lloyd's to enable it to sue members, like Price and Lee, who have not accepted the settlement, for payment of the "Equitas premium", were attacked by various members. All these attacks failed and were dismissed by the English Courts.[3] The judgments that were obtained are now final and conclusive and no further appeals are possible.'

[7] The defendants relied on three defences in the court a quo, which are also advanced on appeal. First, that Lloyd's claims had become prescribed by virtue of the provisions of the South African Prescription Act 68 of 1969; second, that the English court did not have international jurisdiction in terms of South African law to grant the two judgments, and third, that it would be against public policy, as determined by the South African courts, to recognise and enforce the two judgments here. As indicated above, Mynhardt J found against Lloyd's on the prescription point and accordingly refrained from expressing any opinion on the second and third defences.

The defence of prescription

[8] Lloyd's claims are based on default judgments obtained in an English court more than three years, but less than six years, before the provisional sentence summonses were served on the defendants in this country. It is common cause that if English law should be held to govern the issue of prescription, as contended by Lloyd's, the claims on the judgments would not have become statutorily limited (prescribed). In this regard, s 24 of the English Limitation Act 1980 provides as follows:

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[3] For a discussion of the litigation in the English courts in this regard, see the recent judgment of Van Zyl J in *Society of Lloyd's v Romahn; Society of Lloyd's v H Ilse; Society of Lloyd's v M Ilse; Society of Lloyd's v FG Ilse* (C) (Case Nos. 5108/03; 5105/03; 5107/03; 8588/04, delivered 3 March 2006), reported as *The Society of Lloyd's v Ilse* 2006 CLR 101 (C), paras 14-24.

'24(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.'

[9] If South African law applies, however, as submitted by the defendants, the claims would have become prescribed after the lapse of three years in terms of s 11*(d)* of the Prescription Act 68 of 1969 ('the Act'), unless the judgments of the English court were regarded as 'judgment debts' within the meaning of s 11*(a)*(ii) of the Act, in which event the prescriptive period is 30 years and the claims would not have prescribed.

English or South African Law?

[10] According to principles of South African private international law, matters of procedure are governed by the domestic law of the country in which the relevant proceedings are instituted (the *lex fori*). Matters of substance are, however, governed by the law which applies to the underlying transaction or occurrence (the proper law or *lex causae*).[4] The same rule applies in English private international law.[5] A distinction has traditionally been drawn, in both South African and English law, between two kinds of prescription/limitation statutes: those which extinguish a right, on the one hand, and those which merely bar a remedy by imposing a procedural bar on the institution of an action to enforce the right or to take steps in execution pursuant to a judgment, on the other. Statutes of the

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[4] See AB Edwards (updated by Ellison Kahn) 'Conflict of Laws', 2 *Lawsa* Part 2 (2 ed) para 342.
[5] See Lawrence Collins (ed) *Dicey and Morris on the Conflict of Laws* vol 1 13ed (2000) para 7-002 – 7-003 at p 157.

former kind are regarded as substantive in nature, while statutes of the latter kind are regarded as procedural.[6]

[11] By virtue of the provisions of clauses 2.1 and 2.2 of the General Undertaking referred to above, the proper law of the contracts entered into between Lloyd's and the defendants – the *lex causae* – is English law. Counsel for Lloyd's relied on the provisions of clause 2.1 in support of their argument that the English law of prescription should apply, contending that there was nothing in the wording of this 'choice of law' clause which mandated the imposition of a South African prescription regime. To my mind, however, this argument is self-defeating by reason of the fact that it is precisely the provisions of English law that require matters of procedure to be determined in accordance with the *lex fori* and, as will be discussed below, on the face of it prescription under the English Limitation Act 1980 *is*, according to English law, a procedural matter.

[12] Counsel for Lloyd's contended further that, in determining whether the relevant provisions of the English Limitation Act 1980 should be classified as procedural or substantive, this court should adopt the '*via media* approach' followed by Schutz J in *Laurens NO v Von Höhne.*[7] In that case, one of the issues to be decided was whether German law or South African law had to be applied in regard to the defence of prescription raised by the defendant. Schutz J reasoned as follows:[8]

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[6] For the position in South African law, see eg *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536 (W) at 537 *in fin*-538A and further CF Forsyth *Private International Law* 4ed (2003) p 21-22. As regards the position in English Law, see *Dicey and Morris on the Conflict of Laws* op cit para 7-040 at p 172.
[7] 1993 (2) SA 104 (W).
[8] At 116H–117E.

'The traditional rule has been that the *lex fori* characterises according to its own law without looking further. In some cases this can lead to unfortunate results and because of that various writers, *Falconbridge*[9] being an important early one, have much stirred the question. *Falconbridge's* approach is a *via media* according to which the Court has regard to both the *lex fori* and *lex causae* before determining the characterisation.

According to him, although the matter is one for the law of the forum, the conflict rules of the forum should be construed "*sub specie orbis"*, that is from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules….

In doing so it will pay full attention to the "nature, scope and purpose" of the foreign rule in its context of foreign law. What the forum should do, so it is contended, is to make a provisional characterisation having regard to both systems of law applicable, followed by a final characterisation which takes into account policy considerations …. …It is also contended for the *via media* that it tends to create international harmony and leads to the decision of cases in the same way regardless of which country's courts decide them…

… For myself, I accept the *via media* and propose to follow it through wherever it leads. We may not dare to let our law stand still.… private international law is a developing institution internationally and our own South African private international law cannot be allowed to languish in a straightjacket.'

[13] On the specific issue of prescription, Schutz J said the following:[10]

'…Our Prescription Act, as interpreted in *Kuhne's* case, is classified as substantive so that it is not a matter for the *lex fori*. German law, even although their prescription laws are only remedy-barring, characterises them as substantive. I follow the *via media*. Looking at both the *lex fori* and the *lex causae*, the policy decision is in my view obvious. German law should be applied. In this case there is no conflict between the

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[9] JD Falconbridge *Essays on the Conflict of Laws* 2ed (1954).
[10] At 121D-F.

two systems. The situation differs from that in the *Laconian* case[11] at 530I-J, so that there is not even a temptation to fall back on the residual *lex fori.*'

[14] In the present case, unlike in the *Laurens* case, there *is* a potential conflict between the two applicable systems of law. However, to my mind, this *via media* approach is the appropriate one in dealing with the kind of problem with which we are now confronted. Not only does it take cognisance of both the *lex fori* and the *lex causae* in characterising the relevant legal rules, but it also enables the court, after this characterisation has been made, to determine in a flexible and sensitive manner which legal system has the closest and most real connection with the dispute before it.

[15] The first stage in this *via* media approach – to determine, according to principles of South African law (the *lex fori*), whether prescription in terms of the Act is substantive or procedural – is perfectly straightforward. In South African law, it is clear that prescription extinguishes a right. Section 10(1) of the Act provides that –

'Subject to the provision of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

[16] This means that prescription, in South Africa, is characterised or classified as a matter of substantive law and is not simply procedural, as was the case under the old Prescription Act 18 of 1943, s 3(1) of which rendered a right of action unenforceable without extinguishing it.[12]

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[11] *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D).
[12] See *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566 (A) at 568I-569A.

[17] The second stage requires a determination of whether, according to the principles of English law (the *lex causae*), the relevant English statutory provision (s 24 of the English Limitation Act 1980)[13] is procedural or substantive. This section does not have the effect of extinguishing the right in question, but merely imposes a procedural bar on bringing an action to enforce it. Limitation in terms of this section is thus, according to the 'traditional' characterisation/classification referred to above, 'a procedural matter, and not one of substance: the right continues to exist even though it cannot be enforced by action.'[14]

[18] Counsel for Lloyd's submitted, however, that the coming into force of the Foreign Limitation Periods Act 1984 in England rendered defunct the previous English distinction between substantive and procedural statutes of limitation, with the effect that the relevant English law to be applied by this court is now also *in effect* a matter of substance and not a matter of procedure.

[19] In my view, Mynhardt J in the court below correctly rejected this argument. The relevant provisions of the 1984 Act are set out in his judgment.[15] As pointed out by counsel for the defendants, the 1984 Act does not deal with *English* limitation provisions, but rather with *foreign* limitation provisions. It simply creates a new (statutory) rule of English private international law to the effect that, if the *lex causae* is a foreign law, an English court must, in proceedings before it, apply the limitation provisions of that foreign law to the matter, irrespective of whether those

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[13] See para 8 above.
[14] See *Chitty on Contracts* vol 1 29ed (2004) para 28-126 at p 1618.
[15] Paras 35-37 at 560J-563E.

provisions are classified by the foreign law as procedural or substantive in nature. It is only where the application of this rule conflicts with English public policy that the limitation provisions of the English law as the *lex fori* will be applied.

[20] As is pointed out by Christopher Forsyth, commenting on the judgment of the court below – [16]

'The proceedings in the current case were before a South African High Court. There were no current "proceedings in a court in England and Wales" and no English court had been directed by "the rules of private international law applicable by any such court" to apply "the law of any other country". So the provisions of the Act are simply not engaged and there is no call for the court to apply the "law of that other country relating to limitation". The 1984 Act was simply a red herring.'[17]

[21] It follows that I am in agreement with the conclusion of the court below that the prescription question in the present case has to be approached on the basis that prescription is, in terms of the *lex fori*, a matter of substance, and in terms of the *lex causae*, a matter of procedure. For reasons which will become clear, I do not, however, agree with Mynhardt J's acceptance of the submission of defendants' counsel that the Foreign Limitation Periods Act 1984 is 'irrelevant' to the present two matters.

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[16] '"Mind the gap": A practical example of the characterisation of prescription/limitation rules' (to be published in *Journal of Private International Law* vol 2 no 1). This article, as well as those referred to in n 25 and 29 below, were drawn to our attention by Professor Jan Neels of the University of Johannesburg, who also provided us with copies of these articles. They were duly referred to counsel on both sides and their comment was subsequently received.

[17] At p 120-121. See also the other authorities cited by Mynhardt J (para 37 of the reported judgment).

[22] In view of the above, we are now faced with the problem of the 'gap' in the choice of law rules: under South African law (the *lex fori*), prescription is a matter of substance, not procedure, and therefore the South African law relating to prescription does not apply; under English law (the *lex causae*), the s 24 limitation provision is procedural in nature and so the *lex causae* also does not apply. Moreover, generally speaking, a South African court will not apply foreign rules of procedure in a matter to be adjudicated upon by it. This was precisely the problem which arose in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd.*[18] In that case, Booysen J described the problem of the 'gap' as follows:[19]

'…It would mean if these general rules were to apply that the *lex fori* being substantive would not apply but that the *lex causae* being procedural would also not apply.

This is indeed the last problem mentioned in Dicey and Morris *The Conflict of Laws* 10th ed at 1181.[20] The learned authors say:

"If the statute of the *lex causae* is procedural and that of the *lex fori* substantive, strict logic might suggest that neither applies, so that the claim remains perpetually enforceable. A notorious decision of the German Supreme Court once actually reached this absurd result. But writers have suggested various ways of escape from this dilemma, and it seems probable that an English Court, in the unlikely event of its being confronted by such a situation, would apply one statue or the other."

The German case is not available to me but *Forsyth* in his article in the *SALJ*[21] says of this case:

"There is a notorious decision of the Reichsgericht of 1881, upholding a claim on a Tennessee Bill of Exchange. The Bill was prescribed under both German law (the *lex fori*) and Tennessee law (the *lex causae*) but the German provision was classified as substantive, while the Tennessee rule was procedural."

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[18] 1986 (3) SA 509 (D).
[19] At 524B-F.
[20] See now *Dicey and Morris on the Conflict of Laws* op cit para 7-043 at p 174.
[21] (1982) 99 *SALJ* 16.

I certainly have no wish to join the German Court in its notoriety although strict logic might so advise.'

[23] In the *Laconian* case, the South African court was approached for an order that an arbitration award handed down in London be made an order of court in terms of the recognition and enforcement of Foreign Arbitral Awards Act 40 of 1977. The respondent raised (inter alia) the defence of prescription. Booysen J held that the proper law of the underlying contract was English law and that, accordingly, the proper law of the arbitration award was also English law. The limitation rules of the English law (*lex causae)* were classified as procedural and therefore did not apply. On the other hand, the rules of prescription in South African law (the *lex fori*) are classified as substantive and thus also did not apply. On the face of it, therefore, there were no prescription rules at all applicable to this arbitration award. Faced with this dilemma, Booysen J opted to apply the *lex fori* and held that the provisions of the Prescription Act 68 of 1969 should be applied, reasoning as follows:[22]

'…it seems to me that in such an event I should apply my own law on the basis that, if I am not enjoined by my own law to apply foreign law, I am enjoined by my oath to apply my country's law. I am, no doubt, influenced to some extent by *Ehrenzweig's* scepticism and preference for the residual *lex fori* approach where no formulated or non-formulated rule exists[23] which seems to me to accord with good sense.'

[24] It is important to note that, in the *Laconian* case, the arbitration award was not prescribed under either English or South African law. Booysen J's application of the South African law as *lex fori*, in preference

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[22] At 524 F-G.

to the English as *lex causae*, thus made no difference to the outcome of the case as the defence of prescription would have failed in any event. That is of course, *not* the position in the matters presently before this court.

[25] Booysen J's 'residual *lex fori*' approach in the *Laconian* case was followed in *Minister of Transport, Transkei v Abdul.*[24] So too, in the court below, Mynhardt J, faced with the problem of the 'gap', adopted this approach in coming to the conclusion that the provisions of the South African Prescription Act should be applied rather than the English law relating to limitation periods. For the reasons that follow, I do not agree with this conclusion.

[26] As suggested by Schutz J in the *Laurens* case, the resolution of the dilemma of the 'gap' involves making a choice between two competing legal systems. At this third stage of the *via media* approach, the court must take into account policy considerations in determining which legal system has the closest and the most real connection with the legal dispute before it. As pointed out by Sieg Eiselen –[25]

'The conflicts process is aimed at serving individual justice, equity or convenience by selecting the appropriate legal system to determine issues with an international character. The process ought to be neutral in the sense that it should display no bias in favour of the *lex fori*.'

[27] The selection of the appropriate legal system must, of course, be sensitive to considerations of international harmony or uniformity of

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[23] See Albert A Ehrenzweig *Private International Law* (1974) at p 125.
[24] 1995 (1) SA 366 (N) (Alexander J, Thirion J concurring).
[25] '*Laconian* revisited – a reappraisal of classification in conflicts law' (to be published in (2006) 123 *SALJ* 146) at 156.

decisions, as well as the policies underlying the relevant legal rule. It is in this regard that I take issue with the court a quo's conclusion that the English Foreign Limitation Periods Act 1984 is 'irrelevant to the present two matters'. The 1984 Act, based on recommendations of the English Law Commission,[26] was a response to searching criticism of the English common law characterisation of statutes of limitation barring the remedy as procedural. These criticisms are summarised by JP McClean as follows:[27]

'The notion that foreign statutes of limitation are characterised as procedural if they merely bar the remedy is open to a number of criticisms. (1) The distinction between right and remedy is an unreal one, for "a right for which the legal remedy is barred is not much of a right." (2) The rule may bar a claim which is still alive in the country where it arose, eg if the English period of limitation is shorter than the foreign one. (3) Conversely, the rule may work hardship on a debtor in the opposite situation if, in reliance on the foreign law, he has destroyed his receipts. (4) The rule may encourage forum shopping. (5) It would be no more difficult for an English court to apply a foreign statute of limitations than any other rule of foreign law. Not to do so in a situation where the foreign statute of limitations, unlike most other foreign rules of procedure, would determine the outcome of the litigation seems perverse.'

[28] In my view, all these criticisms hold good in a situation such as the present, where the *lex fori* is South African law, but the *lex causae* is a foreign system of law. Considerations of international uniformity of decisions suggest that claims which are alive and enforceable in terms of the law of the country under which such claims arose should as a general rule also be enforceable in South Africa. By virtue of the abovementioned

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[26] See *Report on Classification of Limitation in Private International Law* Law Com 114, Cmnd 8570, (1982).
[27] JD McClean *Morris*: *The Conflict of Laws* 4ed (1993) at p 386-387.

clauses 2.1 and 2.2 of the General Undertaking, English law is the system governing the creation, operation, interpretation and enforcement of the rights of the parties. It seems logical that English law is also the legal system which has the closest and most real connection with the question of the extinction or non-enforceability of such rights because of the expiry of a prescription/limitation period, irrespective of whether the particular prescription/limitation statute is characterised as being merely remedy-barring or extinctive. This is particularly so where, under the *lex causae*, the traditional distinction between extinctive and remedy-barring statutes of limitation has become a largely artificial one. The artificiality of this distinction in English law is cogently illustrated by Forsyth as follows:[28]

'In an entirely English case, where both substance and procedure are undeniably governed by English law, the question will never arise whether any part of the Limitation Act 1980 is procedural or substantive. The Act will simply be applied according to its terms and there will be no need to draw any such distinction. It is only when the law of another country falls to be taken into account, that any question of the characterisation of limitation rules being procedural or substantive may arise. But in these circumstances, the 1984 Act provides that, in general, the foreign law in regard to limitation applies. Hence since the 1984 Act this question of the characterisation of prescription rules has not, to the best of my knowledge, been before an English court.'

[29] It is also worth noting that, on an international level, prescription rules are increasingly characterised as substantive for the purposes of private international law. So, for example, the Rome Convention on the Law Applicable to Contractual Obligations (1980), which applies in the European Union countries, follows such characterisation. The provisions of

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[28] Op cit n 16 at p 121.

the Rome Convention were given the force of law in the United Kingdom in terms of the Contracts (Applicable Law) Act 1990. There has also in recent years been a distinct movement in the common law countries away from the traditional English common law 'dual' classification of prescription/limitation rules to a substantive characterisation of such rules.[29]

[30] Counsel for the defendants submitted that the *lex fori* should govern the issue of prescription because the provisional sentence proceedings in effect amounted to part of the process of execution of the foreign judgments in South Africa. Thus, as execution is a matter of procedure, it is – so counsel contended – the *lex fori* which now has the closest and most real connection with the question whether the claims which Lloyd's seeks to enforce in South Africa are still 'alive'. In my view, however, the basis of counsel's contention is this regard is incorrect. The provisional sentence proceedings against the defendants in this case are, like any quest for judgment, obviously a *step towards* eventual execution, but cannot be regarded as *part of the process of* execution. As indicated above, English law is the system governing, inter alia, the enforcement of the rights of the parties by virtue of clauses 2.1 and 2.2 of the General Undertaking. The provisional sentence proceedings against each defendant are simply a means of obtaining an enforceable judgment against such defendant, albeit a second one on the basis of the English judgment already obtained.

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[29] See further in this regard Jan L Neels 'Classification and liberative prescription in private international law: The experience with a Canadian doctrine in Southern Africa' (paper delivered at the University of Namibia, Yeditepe University (Istanbul, Turkey) and the University of Antwerp (Belgium) on respectively, 1 July and 22 and 29 October 2003 (to be published in TSAR)) at p 18-21.

[31] It follows that, in my view, considerations of policy, international harmony of decisions, justice and convenience require the dilemma of the 'gap' in the present case to be resolved by dealing with the issue of prescription in terms of the relevant limitation provisions of the *lex causae,* the English law. This means that, because the provisional sentence summonses were served on the defendants less than 6 years after the default judgments were obtained in the English court, as contemplated by s 24 of the English Limitation Act 1980, the claims on the judgments have not become prescribed and the defence of prescription must fail. This conclusion renders it unnecessary for me to deal with the question whether the English default judgments against the defendants are 'judgment debts' for the purposes of s 11*(a)*(ii) of the Act.

[32] In the recent Cape High Court case of *Society of Lloyd's v Romahn,*[30] Van Zyl J came to the same conclusion on the prescription issue. He purported to do so by adopting the *via media* approach followed by Schutz J in the *Laurens* case but in reality proceeded to establish a new rule of private international law. In dealing with the problem of the 'gap', Van Zyl J stated the following:[31]

'[85] In the present matter the parties agreed that their rights and obligations would be governed by and construed in accordance with English law. This means that they also agreed that the rule, requiring procedural matters to be dealt with by the *lex fori*, would apply. What they did not agree upon, in that they clearly could not have applied their minds to it, was that, in terms of South African prescription law, their respective claims would be extinguished by the effluxion of time. As mentioned previously, the creators of the English rule were probably blissfully unaware of the fact that a debt,

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[30] See n 3 above.
[31] At p 141-142 of the reported judgment.

which was time-barred in English limitation law, would be extinguished should the *lex fori* be applied. It can scarcely be imputed to the parties that they intended such a result.

[86] This brings me to the question whether, in such circumstances, the rule might have been qualified to the extent that, if a matter of procedure in the *lex causae* should be a substantive matter in the *lex fori*, it would revert to the *lex causae*. In my view justice, fairness, reasonableness and policy considerations dictate that this question be answered positively.'

The 'qualification' suggested by the learned judge amounts in effect to the creation of a new and somewhat inflexible rule of private international law. In my view, when confronted with the problem of the 'gap', the more flexible approach of applying the law of the legal system which, in the circumstances of the particular case, has the closest and most real connection to the question of extinction or enforceability is the more appropriate, although in practice the result in most cases is likely to be the same. Insofar as Van Zyl J emphasises the need to take cognisance of the nature, scope and purpose of the foreign rule in its appropriate legal context and with regard to relevant policy considerations, as well as the desirability of avoiding 'artificial attempts to fit the issue into a "prefabricated" or preconceived form or structure',[32] his judgment takes a commendable step towards the development and application of the *via media* approach.

International jurisdiction of the English Court

[33] The second defence raised by the defendants was that a South African court should refuse to recognise and enforce the English default

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[32] Para 83 at p 141 of the reported judgment. See also para 87-89 at p 142-143.

judgments on the basis that the English court lacked international jurisdiction to pronounce these judgments.

[34] One of the established procedures for the enforcement of a foreign judgment in a South African court is provisional sentence. In *Jones v Krok*,[33] the general requirements for the recognition and enforcement of a foreign judgment in South Africa were summarised as follows:[34]

'As is explained in Joubert (ed) *The Law of South Africa* vol 2 (first reissue) para 476, the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgments by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended . . . . Apart from this, our Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law'.

[35] In proceedings to enforce a foreign judgment, the defendant thus cannot attack the foreign judgment on its merits. However, the court which is asked to enforce the foreign judgment is entitled to adjudicate upon any jurisdictional fact necessary to establish international jurisdiction – 'to

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[33] 1995 (1) SA 677 (A).
[34] At 685B-E.

determine for itself whether the facts on which the jurisdiction of the foreign Court is purported to be based really existed'.[35]

[36] It is generally accepted in our case law that, where a defendant in provisional sentence proceedings brought to enforce a foreign judgment challenges the international jurisdiction of the foreign court, the onus of proving, on a balance of probabilities, that the foreign court had such jurisdiction rests on the plaintiff.[36] In the case of a foreign judgment sounding in money, one of the grounds on which the foreign court will be regarded by a South African court as having had international jurisdiction is that the defendant submitted to the jurisdiction of the foreign court.[37]

[37] Lloyd's relied on the 'exclusive jurisdiction clause' (clause 2.2) in the General Undertaking entered into by each of the defendants in support of its contention that the defendants had submitted to the jurisdiction of the English courts and that the English courts accordingly had the requisite jurisdiction to grant the default judgments against them.

[38] It is common cause that, by letter dated 25 June 1997, the defendants' legal representatives purported to 'cancel and rescind' the agreements in terms of which the defendants became members of Lloyd's, alleging that 'each one of our clients was induced to enter into the respective agreement with [Lloyd's] by serious and fundamental misrepresentations of existing facts, all of which went to the root of the

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[35] *Coluflandres Ltd v Scania Industrial Products Ltd* 1969 (3) SA 551 (R) at 560E-H; see also *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 77C-E.

[36] See *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* supra at 76E-G.

[37] See *Purser v Sales* 2001 (3) SA 445 (SCA) para 12 at 451B.

contract which each one of our clients was thereby induced to enter'. Counsel for the defendants submitted that, in terms of South African law, the agreements with Lloyd's were either void *ab initio* on the grounds of 'fundamental mistake' or voidable on the ground of misrepresentation, and that a South African court should thus refuse to recognise the English court's international jurisdiction based on the submission to jurisdiction clause which formed part of such agreements.

[39] In my view, the defendants have not succeeded in establishing on the facts before us that their agreements with Lloyd's were void *ab initio*, either in terms of South African law or English law. As regards their purported rescission of such agreements on the grounds of misrepresentations by Lloyd's, this issue was canvassed in some detail by the English Court of Appeal in *Society of Lloyd's v Leighs & others.*[38] In that case, various names had alleged that they had been induced to become members of Lloyd's on the terms of the General Undertaking by fraudulent misrepresentations and that they had rescinded their contracts with Lloyd's (including the General Undertaking) with retroactive effect. In deciding whether rescission was a remedy which was open to the names, the court reasoned as follows:[39]

'The remedy of rescission is open to those induced to enter into contracts by misrepresentation and is now governed by the *Misrepresentation Act* 1967. The act of rescission avoids the contract retroactively ab initio – see *Chitty*, para 6-064 – and can only take place provided:

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[38] [1997] CLC 1398.
[39] At 1404A-B.

(1) that it is possible to restore the parties to substantially the same position that they were in before the contract was concluded; and

(2) that rescission will not harm the rights of third parties.'

The Court held that rescission would indeed harm the rights of third parties, stating that –

…'The names contend that the effect of rescission was to withdraw, retroactively, the authority of AUA 9 to contract for the names so that the contracts concluded by AUA 9 at a time when AUA 9 had authority are retroactively invalidated. We know of no case where rescission has invalidated a contract with a third party in this way and we do not believe that such a result can be accommodated within established legal principles.'[40]

In addition the Court found that membership of Lloyd's was the foundation of the insurance business that was carried on by the names and had to be carried on by them until all their liabilities to policy holders had been discharged. In essence, the names were attempting to withdraw from a partly performed contract and this could not be done –

'…It is fundamentally incompatible with the business that has been carried on for names to withdraw, retroactively, from membership of Lloyd's. It is impossible to sever the contracts under which the names became members of Lloyd's from the business that has been carried on, and the contracts that have been concluded, by virtue of that membership. Restitutio in integrum is impossible.

So far as rescission ab intitio is concerned, these considerations apply just as much to names who purported to rescind before the Equitas contract was concluded as to those who did so after that event . . . .

…We are not aware of any principle of law which permits a party to terminate a partly performed contract on the ground that the conclusion of the contract was induced by fraud, in circumstances where rescission of the contract is impossible.

For these reasons we concur with the judge's conclusion that the names have not validly rescinded their general undertakings and thereby avoided the contracts with Equitas concluded on their behalf by AUA 9.'[41]

[40] From the perspective of English law, therefore, the defendants' purported rescission of their agreements with Lloyd's on the grounds of misrepresentation has no effect and they remain bound by such agreements, including the submission to jurisdiction clause in the General Undertaking. In this regard, however, counsel for the defendants submitted that the validity of a submission to jurisdiction must be tested with reference to principles of the *lex fori* and that, in terms of South African law, the defendants had a basis for rescinding their agreements with Lloyd's, including the General Undertaking, with retroactive effect.

[41] This contention does not hold water. It would appear that, as a general rule, the validity of a submission to jurisdiction agreement should be tested with reference to the proper law of the contract in question.[42] Moreover, under both South African and English private international law, there is authority for the proposition that the material validity of a contract (including the question whether or not the contract is voidable and can be rescinded) should be determined with reference to the so-called 'putative proper law' of the contract, ie the law which would govern the contract or any term thereof if it were valid.[43] In my view, this is the correct approach to follow in the circumstances of the present case. In terms of the *lex*

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[40] At 1405B.
[41] At 1405E-H.
[42] Cf *Blanchard, Krasner & French v Evans* 2002 (4) SA 144 (T) para 10-11 at 149A-D; and generally CF Forsyth *Private International Law* 4ed (2003) p 399-400.

causae the defendants are bound by the exclusive jurisdiction clause in the General Undertaking. This being so, the English court did have international jurisdiction to grant the default judgments against them and the second defence must fail.

Public policy

[42] The third defence raised by the defendants is that the recognition and enforcement of the English default judgments against the defendants by a South African court would be contrary to South African public policy. In essence, the defendants alleged that the means used by Lloyd's to procure that all names (including those names who rejected the R & R settlement) were bound by the Equitas contract and thus liable to pay the Equitas premium to Lloyd's as the assignee of Equitas, offended against the basic principles of public policy underlying the law of contract in South Africa. According to the defendants, by using its bye-law making powers to appoint AUA9 as substitute agent which then, in accordance with Lloyd's directives, entered into the reinsurance and run-off contract with Equitas on behalf of each 'non-accepting name', Lloyd's procured the conclusion of binding contracts in the defendants' names without their consent and on terms dictated entirely by itself. This *modus operandi,* it was said, constituted a flagrant disregard for the requirement of *consensus* underlying contractual liability in civilised legal systems worldwide and should not be countenanced by the courts in this country.

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[43] See 2 *Lawsa* Part 2 (2ed) para 332; CF Forsyth *Private International Law* p 319-320; *Dicey and Morris on the Conflict of Laws* vol 1 para 12-084 – 12-085 at p 429-430 and vol 2 para 32-152 – 32-153 at p 1250-1251 and para 32-163 – 32-164 at p 1254-1255.

[43] The defendants also emphasised the fact that, in terms of clause 25.2 of the Equitas contract, a name not domiciled in the United Kingdom authorised the substitute agent (AUA9) to accept service of court process on his or her behalf. In the case of each defendant, the writ of summons in the English proceedings was not served on the defendant himself, but was served on AUA9. In this regard, the defendants submitted that the basic rules of natural justice had not been complied with in that they had not been given reasonable notice of the proceedings against them in the English court and a reasonable opportunity to contest those proceedings. For this reason too, the defendants contended, recognition and enforcement by a South African court of the English judgments against them would be contrary to public policy in this country.

[44] As indicated above, the sequence of events leading up the appointment of AUA9 as substitute agent and the circumstances in which AUA9 entered into the Equitas contract on behalf of the non-accepting names were attacked in the English courts in complex and protracted litigation. All of these attacks failed. The findings of the Commercial Court, in *Society of Lloyd's v Leighs & others*,[44] on the various challenges of non-accepting names to the means used by Lloyd's to impose the Equitas contract and the obligation to pay the Equitas premium on them were summarised in a later judgment of the Court of Appeal[45] as follows:

'By March 1997, Colman J [the judge of the Commercial Court assigned to take charge of the litigation by Lloyd's against non-accepting names for payment of the Equitas premium] had determined a number of points [of law]. He made declarations that:

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[44] [1997] CLC 759 (QB).
[45] *Society of Lloyd's v Fraser & others* [1998] CLC 1630 (CA).

"1. Subject only to the determination of the defendants' allegation that they were not names of Lloyd's at the relevant time or in the relevant context, the defendants are bound by the terms of the Reinsurance and Run-Off Contract dated 3 September 1996 ('the reinsurance contract').

2. The following byelaw and decisions of the plaintiff [Lloyd's] were intra vires the plaintiff and cannot be impugned by the defendants if they were names at Lloyd's at any relevant time:

   (i) the Reconstruction and Renewal Byelaw (No. 22 of 1995);
   (ii) the Resolution and Direction of the Council of Lloyd's made pursuant to the Reconstruction and Renewal Byelaw and the Substitute Agent's Byelaw and effective on 3 September 1996.

3. None of the following contentions or allegations enable the defendants to contend that, if they were names at Lloyd's at any relevant time, they were not bound by the terms of the reinsurance contract:

   (1) The purported termination by the defendants of their managing agent's authority;

   (2) The allegation that the execution of the reinsurance contract was outside the scope of the powers given by the defendants to their managing agents;

   (3) The allegation that the execution of the reinsurance contract contains terms which are against the defendant's interest and in favour of Lloyd's, Equitas or other Lloyd's related entities;

   (4) The alleged conflict of interest between the interests of the defendant and Lloyd's, including the allegations that:

      (i) such conflict of interest renders the Reconstruction and Renewal Byelaw unreasonable in law and ultra vires, and
      (ii) the reinsurance contract is voidable by the defendants by reason of an alleged conflict between the interests of the defendants and Lloyd's, and AUA 9's failure to consider each defendant's personal position or the reasonableness of each and every term of the reinsurance contract in the context of the defendants' best interests as opposed to those of Lloyd's;

(5) The allegation that the appointment of AUA 9 as substitute managing agent was ultra vires Lloyd's;

(6) The allegation that the Reconstruction and Renewal Byelaw was unreasonable in law and ultra vires;

(7) The allegation that the Resolution and Direction made by the Council of Lloyd's . . .was unreasonable in law and ultra vires;

(8) The allegation that Lloyd's had no title to sue, by reason of an ineffective notice of assignment, including the allegation that AUA 9 had no valid authority to receive notice of assignment.'

The appeal by the names against the judgment of Colman J in this regard failed.[46] In dismissing the names' argument on appeal that the bye-laws and resolutions exceeded the scope of the powers of Lloyd's, the Court of Appeal stated the following:[47]

'R & R, and in particular the Equitas scheme, is not, of course, simply designed to provide cover against the risk of individual defaults. It has a much more fundamental object – to settle intractable litigation and to avoid the need to put the whole of Lloyd's into run-off. In short, a primary object of the scheme, if not the primary object, has been to save Lloyd's itself, for the benefit of its members. We find it hard to see how it can be argued that the scheme has not been "requisite or expedient to the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the society".

We are in no doubt that the R & R byelaw falls fairly and squarely within the society's powers and that the directions given to implement it were validly given.'

[45] It is important to reiterate that the obligation of the names – including the defendants – to comply with the various bye-laws and

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[46] See *Society of Lloyd's v Leighs & others* [1997] CLC 1398 (CA).
[47] At 1403A-B.

directions which underpinned the R & R plan, the appointment of AUA9 and the Equitas contract was *voluntarily* undertaken. In terms of clause 1 of the General Undertaking entered into by each name on becoming a member of Lloyd's, the name agreed that –

'Throughout the period of his membership of Lloyd's the Member shall comply with the provisions of the Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of, any agreements or other instruments as may be prescribed and notified to the Member or his underwriting agent by or under the authority of the Council.'

As was conceded by counsel for the defendant, the mere fact that the enforcement of a foreign judgment by a South African court would involve the recognition of a foreign institution or rule unknown to our legal system does not *per se* constitute a reason for refusing to enforce such judgment.[48] The R & R scheme, however extraordinary it might appear from a South African perspective, was a solution devised to resolve an extraordinary insurance industry-related situation. It is clear from the judgments of the English courts that R & R was devised and implemented to deal with a market in a state of crisis and that one of the primary aims was to protect the names *themselves* from the risk of massive claims to which they would otherwise be totally exposed.[49] All of the steps taken by Lloyd's to implement this scheme have been thoroughly scrutinised by the English courts and have been found to be legitimate. In my view, it certainly cannot be said that the recognition by a South African court of an English

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[48] See eg *Eden v Pienaar* 2001 (1) SA 158 (W) at 167I-168A.
[49] See eg *Society of Lloyd's v Fraser & others* [1998] CLC 1630 (CA) at 1635G-1636A.

judgment obtained against a name on the basis of this scheme 'would be so repugnant to the values of our law that the *lex causae* will be excluded on grounds of public policy'.[50]

[46] As regards the defendants' allegations that they had not received reasonable notice of the English proceedings against them and that they did not have a reasonable opportunity to contest those proceedings, this is belied by the abovementioned letter dated 25 June 1997 addressed by the defendants' legal representatives to Lloyd's legal representatives.[51] The contents of this letter make it clear that, by that stage, the defendants were aware of the appointment of AUA9 as substitute agent and the fact that proceedings either had been, or were about to be, instituted against them in the English courts. Despite this knowledge, the defendants' legal representatives expressly placed on record that –

'Our clients will not enter an appearance to defend in English Courts, as the alleged choice of jurisdiction is vitiated by the fraud set out above . . . .

Our clients obviously reserve their right to present this letter to the South African Courts in which action against your client will be instituted. This letter will also be presented to the South African Court in which your client might wish to enforce any English judgment obtained against our clients.

We are of the considered view that the prospect of your client being able to enforce any judgment against our clients against the background of the above facts is negligible. We deem it advisable however, to inform you and your client of our clients' attitude at the earliest opportunity – lest it be argued that our clients had ignored your clients' attempts to obtain a judgment against them.'

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[50] CF Forsyth *Private International Law* op cit 110.
[51] See para 38 above.

[47] It is not without significance that neither Price nor Lee referred to this letter in their first answering affidavits filed in opposition to provisional sentence. It was only after the letter was dealt with in some detail in a supplementary replying affidavit filed by Lloyd's in the proceedings against Price, that the defendants saw fit to deal with it in their second answering affidavits. According to Price, 'our legal advisors' motive in stating that their clients would not enter appearance to defend in English courts, was that any indication that we submitted to the jurisdiction of the English courts was to be avoided, because the contracts with Lloyd's were considered to be void *ab initio.*' However, as pointed out on behalf of Lloyd's, entering an appearance to defend in England solely to contest the English court's jurisdiction would *not* in any way have compromised their stance that the English courts had no jurisdiction to hear the matter. Moreover, even after the defendants became aware of the existence of the default judgments against them (several years before the provisional sentences summonses were served on them here), neither of them took any steps whatsoever to have the judgments set aside.

[48] In terms of clause 25.2 of the Equitas contract, the writ of summons in the English proceedings against each defendant was duly served on AUA9. After careful scrutiny, the English courts have upheld the validity of the designation of AUA9, inter alia, as an agent for service of process on names not domiciled in the United Kingdom. The validity of this form of service in terms of the Equitas contract has also been challenged in courts in the United States of America on much the same grounds as those on

which the defendants now rely. Those challenges have also failed.[52] In this regard too, I am of the view that the manner in which the default judgments were obtained against the defendants cannot be said to be so repugnant to the values of South African law that it would offend South African public policy to recognise and enforce such judgments here.

[49] It follows from what I have said above that the defences based on public policy also cannot be upheld. In my opinion, there are thus, in the circumstances o+f the present case, no public policy grounds on which a South African court should refuse to recognise and enforce the English judgments on which the provisional sentence proceedings against the defendants are based.

Order

[50] In the circumstances, the following order is made:

1. The appeals are upheld with costs, including the costs consequent upon the employment of two counsel, for which costs the respondents are jointly and severally liable, the one paying the other to be absolved.

2. The orders made by the Pretoria High Court on 14 January 2005 are set aside and substituted with the following:

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[52] See the decision of the United States District Court, Southern District of California, in the matter of *The Society of Lloyd's v Bambi Byrens et al* Civil No. 02CV449-J (AJB) at 9-13 and the other authorities there cited.

1). *In* ***Case No. 17040/03****, the defendant, Owen John Price, is ordered to pay the plaintiff:*

(a) the amount of £71 900.36 (being the principal sum of £65 881, plus interest in the amount of £5 630.11, plus costs in the amount of £389.25);

(b) interest on the amount of £71 900.36 at the rate of 8 per cent per annum from 13 October 1997 to date of payment.

2). *In* ***Case No. 20764/03****, the defendant, Paul Lee, is ordered to pay the plaintiff:*

(a) the amount of £163 413.09 (being the principal sum of £153 719.64, plus interest in the amount of £9 104.20, plus costs in the amount of £589.25);

(b) interest on the amount of £163 413.09 at the rate of 8 per cent per annum from 27 June 1997 to date of payment.

3). *The defendants, Owen John Price and Paul Lee, are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of suit, including the costs occasioned by the employment of two counsel.*

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B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

HOWIE P

SCOTT JA

ZULMAN JA

CACHALIA AJA