LEGAL BUSINESS

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The next Lord Chancellor?

5 YEARS of LEGAL BUSINESS

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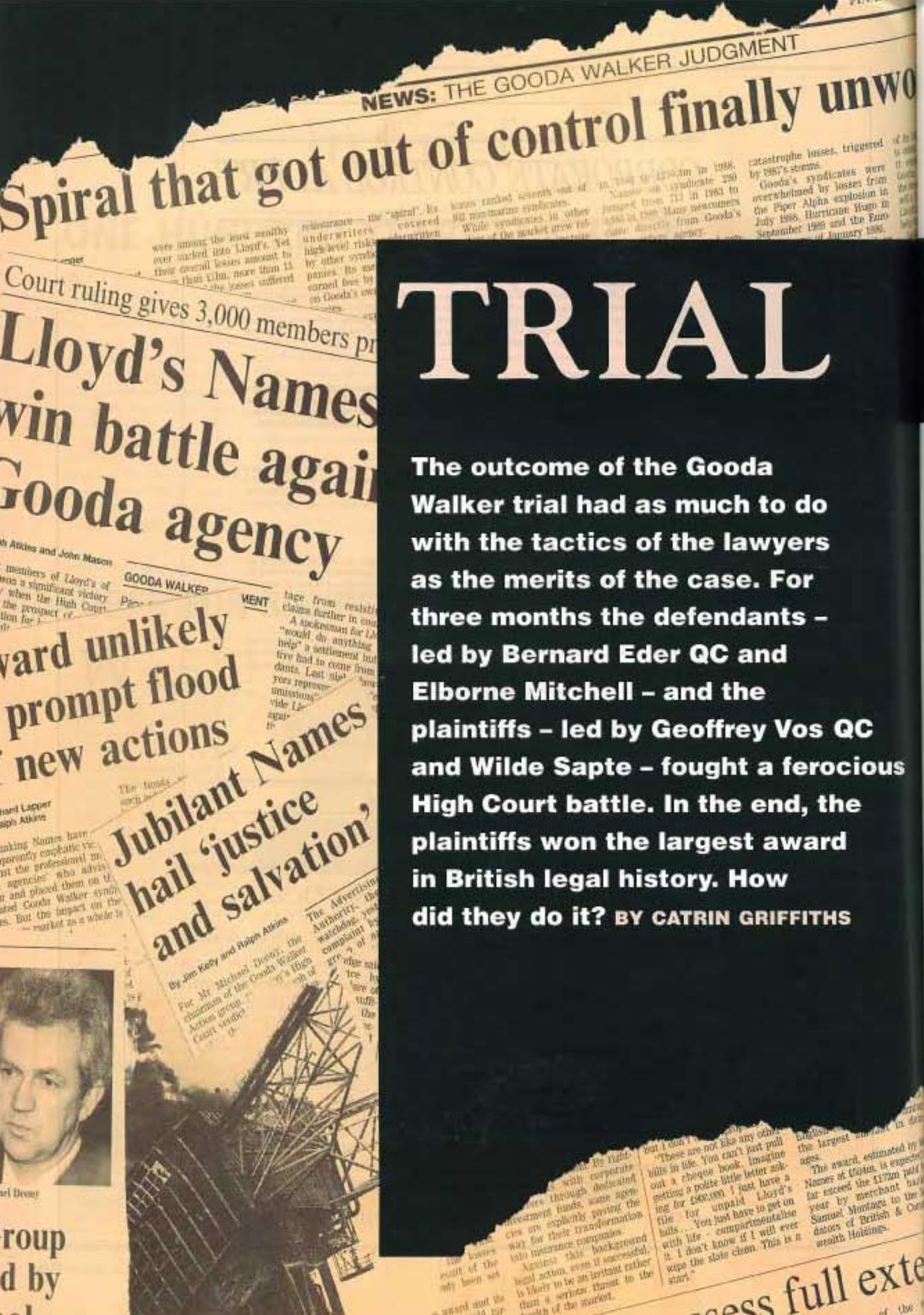

TRIAL AND ERROR

The outcome of the Gooda Walker trial had as much to do with the tactics of the lawyers as the merits of the case. For three months the defendants – led by Bernard Eder QC and Elborne Mitchell – and the plaintiffs – led by Geoffrey Vos QC and Wilde Sapte – fought a ferocious High Court battle. In the end, the plaintiffs won the largest award in British legal history. How did they do it? BY CATRIN GRIFFITHS

On the stand in Court 36, former Gooda Walker underwriter Tony Willard was choking back tears. Asking if part of his evidence could be heard in camera, he said: 'I am very worried about what might happen to me personally when I say this... It will not incriminate me, but it might incriminate other people.' Willard, a witness for the defendants, was alleging under cross-examination by plaintiffs' counsel Geoffrey Vos QC that he had been forced to lie to names about his syndicate's performance. 'It caught everyone on the hop,' recalls one observer. 'People were rushing around at lunch and saying he was about to commit suicide'.

As soon as the court adjourned for lunch, Wilde Sapte partner and names solicitor Philip Rocher called the Gooda Walker Action Group (GWAG) to tell them of the dramatic events. By that afternoon, the press box was seething with reporters, many of whom had been tipped off by GWAG. The next day, the headlines were florid. 'Drama as Gooda Walker defence witness breaks down under cross-examination: Underwriter was "forced to lie",' screamed *Lloyd's List*. 'Gooda agent "told to suppress losses",' blazed the *Daily Telegraph*.

Right from the start, the Gooda Walker case has generated more publicity than the other Lloyd's names cases put together. This is only partly due to adroit press management by the Gooda Walker Action Group, led by Michael Deeny and advised by Wilde Sapte's Rocher. The largest mass action in UK legal history, the sheer size of the case guaranteed press coverage, while the ferocity of emotion generated set it apart from other commercial negligence cases. Finally, the sums claimed were huge: the Gooda Walker names had lost and were claiming £629m.

Gooda Walker's lawyers Wilde Sapte, led by partner Philip Rocher, had aggressively pushed their clients right to the front of the queue to get into court (see *Legal Business*, March 1994). In April this year, their time had come. The Gooda Walker names, advised by Geoffrey Vos and Wilde Sapte, now had a gruelling three months to prove liability on the part of the Gooda Walker underwriters.

In the end, the case hinged as much on the tactics of the lawyers as the merits of the case. Much of it would turn on expert evidence produced by both sides. This was in the main concerned with the LMX spiral, a reinsurance practice later described by Mr Justice Phillips in his judgment as 'rather like a multiple game of pass the parcel.'

On one side, the plaintiffs would call reinsurance expert Ulrich von Eicken. On the other, the defendants would call underwriter Richard Outhwaite – thereby setting up a rematch – some would say a grudge match – of the *Outhwaite* trial of three years previously, when von Eicken's evidence had effectively torpedoed the Outhwaite defendants' case. For the Gooda Walker defendants, Eder, Akeroyd and Stanley had to prove that everyone knew that the business written by the Gooda Walker syndicates was high-risk. Vos and Rocher contended the opposite. If Vos and Wilde Sapte were to fail, then it would send a message throughout the Lloyd's market. The stakes were enormous.

Section One

The Gooda Walker trial became a bitter battle between not only the names and managing and members' agents, but between the lawyers themselves. There seemed to be little love lost between Wilde Sapte and Geoffrey Vos QC on the one side, and Elborne Mitchell and Bernard Eder QC on the the other. At times the argument erupted into more personal dogfights between the lawyers.

In the courtroom, the bellicosity between the two sides was evident at an early stage. Despite Commercial Court practice that dictates that contentious speeches are made not at the beginning of the case but at the end, Geoffrey Vos QC's opening, for the names, was a model of controlled aggression. 'The sum was lost as a result of what the plaintiffs submit was incompetence on a spectacular scale,' accused Vos, adding later: 'These businesses simply were not sustainable in the way they were run.'

Vos's tactic drew an immediate and stinging response from Bernard Eder. 'Your Lordship may consider that at least certain parts of my learned friend's opening, perhaps for the benefit of others in the court and elsewhere, perhaps has transgressed [the] line to a certain extent,' he protested.

Eder declined to speak to *Legal Business*, but his instructing solicitor, Elborne Mitchell partner Ed Stanley, asserts in retrospect that 'It was done purely because a whole bank of people had turned out for the press – and a whole load of names. Mr Vos was simply making a peroration for the assembled masses – it was with a view to publicity rather than the substance of the case.'

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Vos himself is blithe enough about his tactic. 'I put the case high because the case could be put high,' he shrugs, 'and that decision was vindicated by the judgment.'

Vos's opening dwelled on how the Gooda Walker underwriters wrote their business. As he suggested in his opening, 'the nub of the plaintiffs' case is that the aim of reinsurance is to spread the loss. That is the whole purpose of it, but the Gooda Walker syndicate succeeded by the methods they employed in concentrating large parts of the market's losses in their own names. Whether they knew they were doing it or not, that was what they were doing, and it exposed the fact that they were not underwriting according to the proper principles.'

In other words, Wilde Sapte and Vos had to prove that the proper underwriting principles were being ignored wholesale by Gooda Walker underwriters Derek Walker, Tony Willard and Stan Andrews. They decided to call a key witness: Ulrich von Eicken, the Munich Re London head whose expert evidence on behalf of the Outhwaite syndicate names in 1991 had effectively kicked the *Outhwaite* case into touch. (Following von Eicken's evidence, the *Outhwaite* case reached a settlement.) Von Eicken was a well-known critic of the reinsurance method known as XL on XL, employed by Lloyd's syndicates such as Gooda Walker.

Equally, it was up to Eder and Elborne Mitchell to argue that the underwriters were working according to the standards of the time, and writing policies that were considered to be quite reasonable. 'The only reason why the names lost so much money was not because of the conduct of the underwriters but because there had been an unprecedented series of man-made and natural disasters between 1987 and 1990,' argues Elborne Mitchell's Stanley.

If Eder and Elborne Mitchell wanted to rubbish von Eicken's credibility as the plaintiffs' expert witness, they had a potentially difficult task ahead. After all, Saville LJ, when sitting on the Outhwaite case at first instance in1991, had been monumentally impressed by the German's performance. Eder and Elborne Mitchell's strategy was to call into question von Eicken's expertise right from the start. 'We take the position, so far as Mr von Eicken is concerned, that none of his evidence is admissible,' argued Eder in his opening. 'My Lord, we say – and it may be an exceptional submission to make in general – but his background is not from within the business of a Lloyd's syndicate carrying on XL business.' Eder and Elborne Mitchell would pit Outhwaite against the old adversary, von Eicken.

Dramatic change of tack

With the two sides gearing up for the battle between von Eicken and Outhwaite, they had little idea that the first witness would prove to be so fundamental to the outcome of the trial. David Jewell, who worked for GW Run Off, was there to provide a neutral statement on

Wilde Sapte partner Phil Rocher had to prove that proper underwriting principles were being ignored wholesale.

figures and so on. 'We put up David Jewell as a witness of fact,' emphasises Wilde Sapte's Rocher. 'We wanted to prove and establish the key numbers – total claims recorded by the syndicates, for instance.' Neither Vos nor Rocher could have foreseen that Jewell was to be their lucky break.

And so it was that Jewell, a calm and measured 49-year-old, sat in the witness box, coolly responding to the detailed technical questions put to him by the small, intense figure of Vos. 'I was struck by [Jewell's] mastery of his subject,' notes Gooda Walker name and former barrister Richard Maurice, who was present in the public box/gallery throughout much of the trial. 'He was a [Lloyd's] insider, but his answers were totally spontaneous and natural.'

Vos's questioning over, it was Eder's turn. In his eagerness to discredit von Eicken – due to give evidence shortly – Eder took a gamble and dramatically changed tack. He departed from the drier details of GW Run Off and started asking him for expert evidence on the Lloyd's market as a whole. 'The thinking behind it was that we were not impressed with Mr von Eicken's credentials, and we thought it would be of more assistance to the court if we were to press Mr Jewell on a number of matters of general interest,' explains Stanley. Vos, Rocher and the plaintiffs' team were on tenterhooks. After all, Jewell was the consummate Lloyd's insider; he could easily have stated that the XL underwriting practised at Gooda Walker was acceptable. ('On this side of the court we did hold our breath a little,' admitted Vos in his closing argument). But Jewell didn't.

Eder didn't mince his words. 'On the basis of what you told my Lord a few moments ago, someone from Munich Re who did not have the experience of being a reinsurer of the market would be, at the very least, at a great disadvantage in giving independent and reliable advice as to how the market operated. Would that be fair?'

But the answer that Eder got was not the one he wanted. 'I find some difficulty in answering that, as I am a witness of fact,' replied Jewell slowly. 'I think that, to some extent, is opinion that I would prefer not to discuss. However, if my Lord wished me to, I am happy to... Someone outside that market my Lord, with a good understanding of fundamental business, may actually be able to see the wood for the trees clearer than those within the wood.'

On and on went Eder's cross-examination of Jewell, with the Lloyd's man standing his ground. The frustration showed. One observer reports that Eder saw Rocher shaking his head at one point. Betrayed into irritation, Eder snapped: 'I wonder if I could ask Mr Rocher either to keep still or to withdraw.' Nothing came of it.

But the judge was attentive in the extreme. 'Mr Eder, having regard to your objection to Mr Jewell giving evidence other than as to fact, I found this afternoon an interesting afternoon,' commented Phillips cryptically at the end of that day. Eder's decision to press Jewell had backfired. Jewell's evidence was to prove crucial in backing up von Eicken.

'Mr Jewell was called by the plaintiffs to give factual evidence about, *inter alia*, the exposures, reinsurances and losses of the Gooda Walker syndicates,' noted Phillips in his judgment. 'Mr Eder chose, however, to cross-examine him at length on matters of expert evidence. I am glad that he did, for Mr Jewell impressed me as a witness of high standing, ability and experience in the field of excess of loss reinsurance.'

Willard

The examination of Jewell over, on 18 May it was time for the two silks to question the first of the Gooda Walker underwriters, Anthony

'You are a charlatan,' exploded Eder. 'You come to this court, giving the impression that you know about LMX business... and you know absolutely nothing about it'.

Willard. For Vos, Wilde Sapte and the names, he was the hardest nut to crack. 'The losses on his syndicate were less than on the others. To some extent he was our hardest case,' admits Rocher. Of the three Gooda Walker underwriters, his syndicate had made the fewest losses.

A small, agitated man in a bomber jacket, Willard was clearly uncomfortable about giving evidence. 'Mr Willard, you may remember back in 1992 you gave evidence to the Loss Review Committee looking into the Gooda Walker losses – do you remember that?' asked Vos as soon as Willard came onto the stand. 'Indeed I do,' offered Willard wanly. 'I was even more scared there than I am here.'

By his second day on the stand, Willard was starting to break down under the strain. But nobody in the courtroom was quite prepared for the emotional outburst that occurred just before lunch. 'I had an horrendous time at Gooda Walker,' he admitted tearfully. 'I was taking considerable stick from some fellow directors, who suggested that, instead of telling the truth, I should be keeping quiet, putting my head down and writing more business.'

Although Willard's allegation that he had been pressurised to conceal information from the names was dramatic, it was Vos's pitiless dismantling of Willard's evidence which was to prove more important to the plaintiffs' case. Under cross-examination, Willard accepted that he had not told the truth to the Lloyd's Loss Review Committee about the losses incurred on his syndicate. 'I just made a mistake. I was wrong,' he admitted.

But Vos was relentless. 'You see,' he said, 'it's a funny mistake to make, Mr Willard, because you actually say something very specific: you say "I always basically kept roughly a $30m gap".'(Willard had suggested to the committee that he had deliberately under-reinsured himself by $30m.) Replied Willard: 'I know I said that, but it is patently not so when we look at the figures. I do not know why I said it.'

By the end of his evidence, Willard's credentials were effectively blown. Although in his final speech to the court Vos described Willard as a 'broken man', he is now reluctant to comment on witnesses, saying only that 'If Willard had come across well, it would have been a good step forward [for the defendants].'

But Willard, who struggled throughout with his emotions, had painted a black picture of what it was like to work at Gooda Walker. Phillips's final reckoning of Willard was broadly sympathetic. 'He was certainly an emotional witness and at times showed deep distress,' he noted in his judgment. 'Some areas of his evidence I have been unable to accept, but I think that they may well result from Mr Willard deceiving himself rather than attempting to deceive me.'

Derek Walker

Derek Walker was the next witness called by Eder and Elborne Mitchell. Previously under investigation by the SFO, Walker – advised by Ian Burton at Burton Copeland, who instructed Clare Montgomery of 3 Raymond Buildings – was not keen to give evidence, concerned as he was about self-incrimination. Even after the SFO enquiry had been dropped, Walker was so reluctant to co-operate that Elborne Mitchell had served a subpoena. Walker's lawyers were present every day of his evidence, but his time on the stand passed without great incident. Perhaps surprisingly, Walker was a docile witness, described by Phillips as 'admirably candid'.

Not everyone was impressed, however. 'Derek Walker was cocky and arrogant right to the end, although a little more chastened,' claims name Richard Maurice with feeling.

Von Eicken

At last, on 21 June – the 20th day of the trial – Ulrich von Eicken took the stand. The former head of the London operation of the world's biggest reinsurance company, Munich Re, von Eicken was convinced to the point of dogmatism that LMX underwriting of the sort undertaken by Gooda Walker violated all principles of reinsurance. 'Von Eicken was credible to the extent of being almost offensive in his certainty,' asserts observer Richard Maurice. 'He could have easily rubbed up the judge in the wrong way, though he wasn't abrasive. He was just incapable of saying yes or no – every question drew a stream of words.'

Eder was back on the offensive. 'We thought tactically that one of our best ways forward was to attack the credentials of Mr von Eicken,' reveals Elborne Mitchell's Stanley. Ignoring David Jewell's remark that someone outside the market could see the wood for the trees, Eder pressed von Eicken again and again that he could have no real idea on how the LMX market actually worked. It was a furious onslaught. 'Eder was trying to break through von Eicken's absolute certainty,' remembers Maurice, 'but [von Eicken] was disinflatable.'

'My only point to you is that however you describe it, class of business, type of business, type of cover, you have no experience of how the market worked,' rapped out Eder to von Eicken. The German was unruffled. 'Mr Eder, first of all, you are not correct in assuming that I do not or did now know who the players in XL on XL were,' he replied. 'They were known... It was a bad business altogether and it is in your accusation of my being an expert witness in a case where I have not really been engaged in the precise activity you are talking about, is like demanding that in a trial against a thief you need a thief, because unless you have stolen, you do not know what a thief is motivated by. That, I think, is wrong.'

Two days into von Eicken's evidence, the two men lapsed into a bitter exchange. 'You are a charlatan,' exploded Eder. 'You come to this court, giving the impression that you know about LMX business and as we know now, you deliberately decided not to engage in that business and you know absolutely nothing about it, other than by putting together this mass of material and it is all a part of the overall scheme to give the impression to his Lordship that you have some knowledge of it?'

Von Eicken was unmoved. 'That was not a question. That was a statement.' Eder tried again. 'I put it to you, Mr von Eicken, that you are a charlatan and if you wanted to comment on that, please do so.' 'Mr Eder, I am not going to comment on it,' replied von Eicken. Eder's aggressive questioning may have failed to shake von Eicken's composure, but it also showed that von Eicken was absolutely unbending – something which did not endear the plaintiffs' expert witness to the judge.

Indeed, von Eicken's absolute moral cer-

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tainty did not help the plaintiffs' case. At least two observers assert that Phillips J was indeed rubbed up the wrong way by the names' expert witness. Certainly, the judgment more than suggests this. 'Mr von Eicken was not an ideal expert witness,' concluded Phillips, damningly. 'He showed a keen appreciation of his own abilities and a contempt for any challenge to his views... He adopted, throughout, a vigorously partisan approach and could scarcely ever be induced by Mr Eder to make a concession, however clear it might be that a concession was due.' Von Eicken, the plaintiffs' star witness, had been a failure.

'It is how Lloyd's has always worked'

After hearing from the third Gooda Walker underwriter Stan Andrews, Eder and Elborne Mitchell called their key expert, Richard Outhwaite. Outhwaite took the stand with some confidence. He was the quintessential Lloyd's insider, having worked there since 1957 and having served on many committees at Lloyd's including the Joint Excess of Loss Committee, formed in 1987.

As Eder's cross-examination would bring out, Outhwaite's testimony was diametrically opposed to von Eicken's. The defendants' expert enlarged on Eder's previous theme of hindsight and argued forcefully against von Eicken's assertion that there were certain fundamental principles of insurance which a competent underwriter must observe. According to Outhwaite, everything was a matter of underwriting judgment, which could not fairly be criticised with hindsight. 'Basically what Outhwaite was saying was that you can never say never,' asserts Elborne Mitchell's Stanley.

In one exchange, Outhwaite contended that while an underwriter would prepare detailed plans when setting up a new syndicate, there would be no formal planning thereafter. Was it not strange, asked Eder, that underwriting should be conducted on such an ad hoc basis? 'I do not find it strange at all,' answered Outhwaite simply, 'it was the environment in which I was brought up in Lloyd's; it is how Lloyd's has always worked.'

Vos's questioning could not shake Outhwaite, who simply stood his ground. 'I found him, in general, an impressive witness,' commented Phillips in his judgment. 'Nevertheless I did not find him wholly objective. While he did not demonstrate the partisan enthusiasm of Mr von Eicken, he was, I felt, careful insofar as he could to avoid answers which might further the plaintiffs' case.'

So who had won the battle of the experts, von Eicken or Outhwaite? Given von Eicken's rather poor showing, what tipped the balance was Jewell's testimony on the Lloyd's market – testimony that backed-up von Eicken's position and testimony that he gave only because of Eder and Elborne Mitchell's decision to treat him as an expert witness. Phillips himself made this clear in his judgment: 'I found the evidence that [Jewell] gave in relation to the practice of excess of loss reinsurance more compelling than that of the witnesses who had been called specifically to give expert evidence on this topic,' he concluded. The inference is clear: Jewell's unexpected testimony, which was sympathetic to the plaintiffs, was crucial in the making up the final picture. Eder and Elborne Mitchell's decision to treat Jewell as an expert witness on the Lloyd's market, instead of a witness of fact, had backfired badly. 'Broadly, David Jewell did support a lot of what the plaintiffs said,' sighs Elborne Mitchell's Stanley. 'But it was worth trying him.' (According to one lawyer, Jewell has now been inundated with requests to serve as an expert witness in other cases.)

Gooda Walker sets the tone

Phillips's judgment on Gooda Walker made national headlines. It was the biggest award in legal history. Unsurprisingly for a judge of his independent reputation, Phillips had steered his own course on assessing quantum, awarding some £504m in damages to the plaintiffs.

Phillips slammed Eder and Elborne Mitchell's argument that the names knew that the business written by the Gooda Walker syndicates was high risk. 'It is one of the cornerstones of the defence that LMX business was, and was generally known to be, high risk – indeed, Mr Eder QC, for the defendants, has chosen to describe it as dynamite. It is quite plain from the evidence before me that this was not the perception of LMX business shared by many of the defendants at the time. I have no doubt that there are many plaintiffs who would understandably have felt outraged had they heard the plea being advanced on behalf of their members' agent that names had no cause for complaint because the type of business they had chosen to write was well known to be dynamite.'

In setting the tone for the rest of the Lloyd's cases, Gooda Walker may be more significant than the names ever realised. The judgment was trenchant in its analysis of the Lloyd's market and the LMX spiral in particular. 'Suppose a profession collectively adopts extremely lax standards in some aspect of its work. The court does not regard itself as bound by those standards and will not acquit practitioners of negligence simply because they complied with those standards,' proclaimed Phillips. 'In these circumstances, I do not consider that one can automatically regard the practices of those who wrote spiral business as constituting strong evidence of what constituted the exercise of reasonable skill and care. It is necessary to approach this case with the possibility in mind that, for many involved, a significant involvement in spiral business may not have been compatible with competent underwriting.' In many ways, what was on trial was Lloyd's itself. ❑

Gooda Walker win revives hopes for Lloyd's names

By Sarah Bagnall and Jon Ashworth

THOUSANDS of Lloyd's names and insurance companies around the world will feel the impact of yesterday's High Court victory by 3,096 Gooda Walker names.

The judgment also revives hopes for ... ...mpt to ... result of yesterday's judgment. The next case in court, due to start on October 17, is the Feltrim Names Association, which is trying to recover £590 million ... insurance losses. ...ny, a concert ... who suffered losses of £120,000 in two years, shot himself.

The worst affected were names who signed up at the top of the ... ...ere to face ... a ...