2/85

IN THE PRIVY COUNCIL No. 16 of 1984

O N A P P E A L

FROM THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

EAGLE STAR INSURANCE COMPANY LIMITED
ENNIA INSURANCE COMPANY (UK) LIMITED
ASSURANCES GENERALES de FRANCE (London Branch)
PRUDENTIAL ASSURANCE COMPANY LIMITED
A.A. MUTUAL INTERNATIONAL INSURANCE CO LIMITED
EQUINE & LIVESTOCK INSURANCE CO LIMITED and
UNION ATLANTIQUE d'ASSURANCES S.A.

Appellants

AND

NATIONAL WESTMINSTER FINANCE AUSTRALIA LIMITED

First Respondent

AND

JOSEPH MAXIM GOLDBERG and
VIVIENNE GOLDBERG t/a 'SHAMROCK PARK'

Second Respondent

AND

AUSTRALIAN INSURANCE BROKERS LIMITED

Third Respondent

CASE FOR THE SECOND RESPONDENTS

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Record

1. This is an appeal from the decision of Mr Justice Wallace after trial in the Supreme Court of Western Australia given on 15th July, 1983 whereby His Honour granted judgment in favour of the first and second respondents against the appellants and dismissed the action as against the third respondents. Vol.1 pp.37/20 -38/16

THE ISSUES

2. The appellants are underwriters against whom the first and second respondents claimed indemnity as a result of the death of a stallion known as "Asian Beau". The claim was made under interim contracts of insurance, or alternatively, under four virtually identical policies of insurance. The claim was resisted on the grounds that a proposal prepared by the third respondents (insurance brokers for the second respondents) contained false answers and that the truthfulness of the answers was the basis of the contracts; alternatively that material facts had not been disclosed to them and that it had been misrepresented to them that an Australian underwriter was a co-insurer. As the claims against the appellants succeeded, the first and second respondents' alternative claims against the broker, the third respondent, for damages for negligence or breach of contract, fell away. The appeal is contested, but to the extent if any to which the appeal may succeed, it will be contended that the claims against the third respondents should succeed.

FACTS

Record

3. At all material times the first respondent has carried on business as a finance house, and the second respondents ("the Goldbergs") have run a stud for race horses known as the Jane Brook Stud near Perth in Western Australia. The first and second respondents will be referred to collectively as "the insured". In May, 1980, at the Goldbergs' instance, the first respondent bought a stallion, "Asian Beau", and leased him to the Goldbergs under a written lease. The lease required the Goldbergs to insure the horse, and this they did at a sum insured of $650,000.00. The insurance was arranged through the Goldbergs' insurance broker, the third respondent ("A.I.B.").

4. In March 1981, Asian Beau suffered an attack of colic, as a result of ingesting sand. The facts concerning this attack were summarised in His Honour's judgment as follows - Vol.1 p.39/19-43

> "In March of 1981 Asian Beau suffered an attack of colic. Because of its value it was conveyed to the equine hospital at Murdoch University on March 11th 1981. Senior lecturer in equine medicine and surgery, Bryan J. Hilbert, reported on the 18th March 1981 that clinical examination revealed that the horse was suffering from severe abdominal pain. "There was gaseous distention of the large bowel and the horse was showing signs of severe intermittent intestinal spasm. Rectal examination was unrewarding and passage of a stomach tube did not show evidence of a build up of fluid in the upper small intestine. The horse was treated conservatively by administering fluids intravenously and walking him quietly.

> Over the following 48 hours, a large bowel obstruction was relieved when the horse passed large amounts of sand in his manure. The horse continued to improve and was discharged from Murdoch University veterinary hospital on March 16th 1981. The horse is presently being treated with high molecular weight dęxtrans for parasite induced arteritis". A.I.B. was immediately advised of the colic attack and entered that fact on its file record of the animal. A.I.B. advised the existing insurer through its agent in Sydney."

5. In June, 1981, the Goldbergs received and declined an offer to purchase the horse for $1,000,000.00. (It is common cause that that was his value shortly before his death in March, 1982). The Goldbergs requested A.I.B. to arrange for the insurance to be increased to $1,000,000.00. The then insurers refused to increase the cover. On 16th July, 1981, Mr Malcolm Brown of A.I.B. sent a telex to Mr Albert Cecil Clarke, who was employed by Hudig Langeveldt Pty. Ltd. ("Hudig"), insurance brokers of Sydney, enquiring whether he would insure Asian Beau for $1,000,000.00. Hudig managed the Australian Bloodstock Insurance Pool ("A.B.I.P.") for a group of insurance companies, for whom Clarke acted as an accounts executive. On 27th July 1981 Clarke sent a telex to Lloyds brokers Chandler, Hargraves, Whittal and Co. (Chandlers) London requesting them to place cover for the horse from 1st August 1981 to 1st November 1982. Following an exchange of telexes on 27th and 28th July 1981 Chandlers informed Clarke that the horse had been insured as requested and that a cover note would follow. It appears that a "slip" had

been initialled by the participating underwriters and a Cover Note was in fact raised by Chandlers on 25th August 1981. A detailed account of the facts relating to interim cover with reference to the relevant portions of the Record is contained in paragraphs 11 to 14 below.

6. In the meantime steps were being taken by A.I.B. to obtain a proposal for the insurance. A.I.B. had been the Goldbergs' insurance brokers for more than ten years. A.I.B. always completed proposals for the Goldbergs in relation to the insurance of horses, and obtained signatures by or on behalf of the Goldbergs. A.I.B. completed and sent a proposal for the insurance of Asian Beau to Mr Frank Wright, the Goldberg's racing manager under cover of a letter dated 23rd July 1981. On 30th July, 1981, Wright checked the sum proposed to be insured and the description of the horse, but did not read the rest of the proposal. (See paragraph 64 below). He signed the proposal and returned it to A.I.B. On 31st July, 1981, A.I.B. wrote to Clarke enclosing the proposal and a veterinary certificate. Vol.3 p.46 Vol.2 p.107-8/11-18

7. Clarke did not forward the proposal to Chandlers in London, but kept it in a file in Sydney until after the horse's death. (See paragraph 23 below.) Vol. 2 pp.138-9

8. The proposal contained answers to the effect that Asian Beau had not suffered from Vol. 1 p.40/18-31 Vol. 3 pp. 44-5

defects, ailments, illness or disease in the previous 12 months, was not then insured and that no insurer had declined or refused to renew the Goldbergs' livestock insurance.

9. In November, 1981, Chandlers sent the policies issued on behalf of the appellants to A.B.I.P. The policies were not forwarded to A.I.B. or anyone else representing the Goldbergs until after the death of Asian Beau. (See paragraph 23 below.)

10. On 4th March, 1982, Asian Beau died. The events leading up to his death and the cause of death were described by His Honour as follows - Vol.1 p.41/39-p.42/15

> "On the 24th February 1982 Asian Beau was again admitted to Murdoch University Veterinary Hospital. The animal was showing clinical signs of severe acute abdominal pain (colic) of unknown origin. After treatment lasting some days a tentative diagnosis of ruptured bowel and exploratory laparotomy under anaesthetic revealed the horse had incurred a large tear at the base of the caecum and that there was extensive faecal (manure) contamination of the abdomen. It was agreed by all veterinarians present the horse should be destroyed on humane grounds. The Necropsy report prepared by Dr. Huxtable concluded:
>
> > "The findings indicate caecal impaction and focal rupture with resultant acute peritonitis. The cause of the impaction and rupture could not be determined but it is a disorder not infrequent in horses. The rupturing of the wall of the caecum in this case was not associated with any underlying

> disease of the tissue but appeared to have been caused by purely mechanical factors associated with some functional disturbance of motility."
>
> There was a fourteen centimetre tear at the base of the caecum with leakage of contents. The caecum was over-engorged with ingesta (food). Only a small amount of sand was found in the dorsal colon."

INTERIM COVER

11. This issue arises from paragraphs 7A and 7B of the statement of claim, paragraphs 12, 13 and 14 of the defence of the first defendants (the appellants) and paragraph 7 of the reply. Vol. 1 pp. 3-4, pp. 17-18, p. 36

12. His Honour made the following relevant findings - Vol.1 p.42/17-p.43/3

> "In mid July 1981 Brown communicated with both Clarke and Willis of A.B.I.P. for the purpose of obtaining $1,000,000 insurance cover on Asian Beau. I accept his evidence that he was informed by either Clarke or Willis that the insurer would be Lloyds. On the 23rd July 1981 he confirmed in telex form the telephone conversations previously held with A.B.I.P. staff. Pursuant to that enquiry on the 27th July 1981 Clarke telexed Lloyd's brokers Chandler, Hargreaves, Whittal and Co of London (Chandlers) for the purpose of placing the cover sought by Brown. On the same day Chandlers advised that the cover sought inclusive of all risks, mortality and accident, sickness and disease had been placed. On the 30th July 1981 A.I.B. telexed Clarke that such insurance was accepted. On the 13th August 1981 A.I.B. issued an invoice to Goldberg for the premium involved and gave confirmation of cover effected to National. On the 25th August 1981 Chandler issued a Cover Note to A.B.I.P.

identifying the first defendants as the insurers showing A.B.I.P. "as co-assured" - whatever that was meant to mean, and providing as a condition:

> "All terms, clauses and conditions, additional premiums and return premiums as Australian Bloodstock Insurance Pool policy and to follow their settlements. Australian Bloodstock Insurance Pools acceptance of Veterinary Certificate and/or reports accepted by underwriters hereon."

That Cover Note was never forwarded to A.I.B. but remained on the A.B.I.P. file relating to the horse in Sydney. Clearly once the "slip" was taken up by all the first defendants an interim contract of insurance existed and Chandlers were authorised to deliver the Cover Note, MacGillivray 7th Edn., para 277."

13. His Honour also said - Vol. 1 p.45 22-48

"The plaintiffs first sue on the interim cover. In their amended defence of the 11th February 1983 the first defendants admitted that Chandlers on their benalf issued the Cover Note of the 25th August 1981 to the second defendant as the plaintiffs' agent and therein evidence the proportion of cover which each of the first defendants had agreed to take by initialling the back of the "slip". That admission has now been withdrawn by the first defendants and the relevant authority denied. They now contend that the only relevant contract of insurance is that contained in the policies which resided in the files of A.B.I.P. in Sydney and were never issued to and received by the plaintiffs. To sustain this argument it is submitted that Hudig or A.B.I.P. received the policies issued by Chandlers as agents for the plaintiffs.

In my opinion at no stage could it be said that either Hudig or A.B.I.P. were the plaintiffs' agents. At no stage did

they purport to act in that capacity. Indeed on the contrary they regarded themselves as the agents of the placing broker, Chandlers and as having a duty to protect the first defendants' interests. Again the condition endorsed on Chandler's Cover Note document 42 leaves no doubt that A.B.I.P. was regarded by the first defendants as their agent."

14. The evidence with respect to the placing of the cover was -

(a) Brown sent a telex message to Clarke dated 16th July, 1981 - Vol. 3 p.29

"Re: Goldberg - "Asian Beau".

Can you insure Asian Beau for $1,000,000.00 for which they have had an offer. Renewal due on 1/11/81. Total account $2 million.

Existing underwriter won't increase from $650,000.00. Service fee $5,000.00. Mares booked 1982 60. Await your reply."

(b) At about that time there were also discussions on the telephone between Brown and Malcolm Willis, the manager of A.B.I.P. Brown sent a telex to Clarke and a letter to Wright on 23rd July, 1981. Vol. 2 p.520/15-p.522/32 Vol.3 pp.29, 30, 31

(c) On 27th July, 1981 Mr Clarke sent a message to Mr Trend of Chandlers by telex, the relevant part whereof reads as follows - Vol. 3 p.33 Vol. 2 p.103/1-6

"2. Please place the following cover with effect from 1/8/81 to 1/11/82 and confirm.

Insureds: J & V Goldberg Optimist Syndicate Goldberg and Cockes Shamrock Park Jane Brook Stud - Lombard Australia Limited (Lessee)
Interest: Stallion "Asian Beau"
Age: Rising 6 years
Colour: Black
Cover: ARM plus ASD
Rate: 3.25%
Sum insured $1,000,000.00.

Await your confirmation."

("ARM" means all risks mortality "ASD" means accident, sickness and disease)

(d) The relevant part of Mr Trend's telex dated 27th July, 1981 reads - Vol. 3 p.37 Vol. 2 p.103/29-34

"Bert Clarke - Goldberg et al Asian Beau 1,000,000 insured ARM/ASD 1 Aug until 1 Nov Rate 3 point 25 pct and pro rata C/N follows"

(C/N means "cover note")

On 28th July, 1982 a further exchange of telexes established that the period of insurance was from 1st August 1981 to 1st November, 1982. Vol.3 pp. 38,39

(e) Mr Kevin Patrick Regan, a representative of a re-insurer, was called as a witness and produced a partially completed copy of the "slip". It is a fair inference from his evidence and the facts that a cover note dated 25th August, 1981 and the policies (signed in or about November, 1981) were sent by Chandlers to Hudig,that the "slip" was signed on behalf of all the appellants. Vol.3 p.70 Vol.2 p.443/12-p.451/48 cf.Vol.3 pp.41-2, 35-6, 56-7, 58-73 Vol.2 p.471/26-p.472/5,p.472/21-p.474/4, p.480/4-p.484/33

Record

(f) On 28th July, 1981 Clarke informed Brown by telex that cover had been placed. On 30th July, 1981 Glenyse Fletcher, an employee of A.I.B., sent a telex to Clarke requesting him to "hold covered" Asian Beau. Vol. 3 pp.40,43

15. Binding contracts may be said to have come into existence as the "slip" was signed by or on behalf of each underwriter (General Reinsurance Corporation v Forsatringsaktiebolaget Fennia Patria (1983) Q.B. 856; The "Zephyr" (1984) 1 Lloyd's L.R. 58, 69-70); or when, having received Chandlers' telex dated 28th July, 1981, on the same date Hudig informed A.I.B. that cover had been placed: Stockton v Mason (1978) 2 Lloyd's L.R. 430.

16. The cover note sent by Chandlers to Hudig dated 25th August, 1981 evidences the interim cover. Chandlers had the implied authority of the appellants to issue interim cover: Mackie v The European Assurance Society (1869) 21 L.T. 102; Murfitt v Royal Insurance Co. Ltd. (1922) 38 T.L.R. 334. Vol. 3 pp. 56-7 Vol.2 p.473/1-3

17. Insofar as it may be relevant, on 30th July, 1981 A.I.B. on behalf of the insured accepted the interim cover. Vol.3 p.43

18. That the identity of the appellants was not disclosed to the insured until after the death of Asian Beau does not affect their liability: Mackie v The European Assurance Society (1869) 21 L.T. 102, 105. Vol.2 p.106/1-4 p/223/18-29

Record

TERMS OF THE INTERIM COVER

19. The appellants pleaded that if there was interim cover, the terms of the standard A.B.I.P. policy were incorporated in the interim contracts, and in particular, a condition to the effect that the insured had completed a written proposal and declaration which was the basis of the contract of insurance and incorporated therein.

Vol. 1 pp.18-20 paras 17-20
Vol. 1 p.15 paras 5 & 6

20. It is submitted that the conditions in the slip and in the cover note described in general terms the conditions which would be incorporated in the policies to be issued in due course, but did not incorporate any standard conditions in the interim cover. The slip did not incorporate the proposal which had not then been signed: Neil v The South East Lancashire Insurance Company Ltd. (1932) S.C. 35, 38-9, 40-41, 42, 43-4, 44-5. Unless the interim contract of insurance could be avoided on the ground of misrepresentation by Chandlers concerning A.B.I.P.'s position as a co-insurer, the proposal was not the basis of the contract. The sole question would then be whether there was non-disclosure of a material fact.

Vol. 3 pp.35-6 41-2
Vol. 3 pp.56-7
Vol.2 p.451/16-46

21. The references in the "slip" and in the cover note to an A.B.I.P. policy were to what may have been thought to have been an actual policy, and not to standard provisions. No relevant policy subsisted.

Record

22. In the cover note, the percentages of the risk add up to 100. At least one of the appellants was in the position to know that fact, namely the last of the appellants to initial the "slip". In fact it may be inferred that each underwriter subsequently recovered a photocopy of the "slip" showing that 100% of the risk had been written in London and Belgium. The policies subsequently signed on behalf of the Appellants were checked against a copy of the "slip".

Vol.2p.472/3-11
p.482/5-p.484/29
p.495/6-p.496/15
p.498/5-34

Alternatively it is submitted that Chandlers knowledge that 100% of the risk had been taken up in London and Belgium was and is imputable to the Appellants. Not until at a very late stage a few days before the commencement of the trial did the Appellants seek to rely on an alleged misrepresentation by Chandlers.

Vol.2 p.4/6-33
p.11/17-p.12/41
Vol. 3 pp.155-6
Vol. 1 p.46/1-12

THE POLICIES

Vol.3 pp.58-73

23. In November, 1981, Chandlers sent the policies to A.B.I.P., which did not send them to A.I.B. until about May, 1982.

Vol.3 p.89
Vol.3 p.118
Vol.2 p.133/26-31
p.526/42-p.527/2

24. His Honour held that neither Hudig nor A.B.I.P. was the insured's agent and thus that there was no delivery of the policies to the insured before the death of Asian Beau: Koon Wing Lau v Calwell (1949) 80 C.L.R. 532, 574; McGillivray & Parkington on

Vol. 1 p.45/22
p.46/21
Vol. 2 p.494/12-48

Record

Insurance Law (7th Ed.) paras 215, 322 and 326. The policies were not deeds, but were merely signed. — Vol.3 pp.60,62,66 Vol. 2 p.475/33-p.477/40

25. There was evidence supporting His Honour's finding that neither Hudig nor A.B.I.P. was the insureds' agent -

(a) Mr Regan regarded A.B.I.P. as representing the appellants' interests in Australia. — Vol.2 p.469/6-43 p.486/36-p.487/6

(b) So did Clarke and Willis. — Vol.2 p.120/13-23 p.199/38-p.200/4

(c) It is submitted that the terms of the "slip" and the cover note authorised A.B.I.P. to act as the appellants' agent.

(d) After Asian Beau died, Clarke in fact acted on behalf of the appellants on Chandlers instructions. — Vol.3 pp.93,98 104-9,111,116 Vol.2 p.132/8-15 p.141/36-p.143/12

26. His Honour rightly held that the policies did not come into effect. The policies did not supersede the interim contract: Neil v South Lancashire Insurance Co. (1932) S.C. 35. — Vol.1 p.46

27. Assuming that the policies did take effect in November, 1981, they did not incorporate the proposal, nor were they "subject to all terms" etc. of "the policy issued by" A.B.I.P. No relevant A.B.I.P. — e.g. Vol.3 p.59

policy existed then or at any other time. The proposal did not of its own force or because of anything contained within it become incorporated in the policies of insurance: Australian Provincial Assurance Association Ltd. v The Producers and Citizens Co-operative Assurance Co. of Australia Ltd. (1932) 48 C.L.R. 341, 352, 353, 353-355, 360-361, 363, 384-6, 387-8; Deaves v CML Fire & General Insurance Co. Ltd. (1979) 23 ALR 539, 549-550, 558, 570-571, 574, 580.

28. In the knowledge that there was no relevant A.B.I.P. policy the appellants affirmed the existence of the insurance. Indeed, up to judgment the appellants admitted that the policies were in force. Even if it were open to the Appellants to rely upon the non-existence of an A.B.I.P. policy as an independent basis for avoiding the policies they chose to affirm the policies and only at a very late stage seek to rely on misrepresentation by Chandlers. Vol.1 p.15 para 4 para 14

29. If Hudig and A.B.I.P. were the agents of the insured and not of the appellants, the proposal was not delivered to the appellants or their agents before the death of the horse. Vol.2 p.138/9-14

30. It is submitted that the proposal is irrelevant.

MISREPRESENTATION

31. His Honour held that there had not been misrepresentation. Vol.1 p.46/45-p.47/3

Record

32. His Honour also found that the plea of waiver in paragraph 8(e) of the reply had been established, in the following passage - Vol.1 p.45/49 — p.46/12

> "Should this be an erroneous approach Chandlers knew that A.B.I.P. had not participated on the 27th July 1981 when the Cover Note issued. They were expressly informed that A.B.I.P. had no retention, on the 7th May 1982. On the 8th March 1983 the first defendant amended defence affirmed the contracts of insurance in terms of the policies Chandler issued or, alternatively in terms of the interim contract. It is now far too late in the day to repudiate liability on the grounds of innocent misrepresentation whilst at the same time retaining the premium paid in 1981. In my opinion the plaintiffs' plea of waiver in para. 8 of their reply should be upheld."

33. Save that the date 27th July, 1981 should have been 25th August, 1981, the facts stated by his Honour are correct. Vol.3 p.130 Vol.2 p.488/19- p.493/3

34. Waiver was also pleaded in paragraph 10 of the reply. The defences of non-disclosure and misrepresentation are mutually exclusive. Joel v Rawlinson and Crown Insurance Co. (1908) 2 K.B. 863, 885-6. Halsbury (4th edition) volume 25 paragraphs 377 and 379. Vol.1 p.37

SEPARATE INTERESTS OF THE FIRST RESPONDENT

35. The policy provided several and not joint cover so far as the first and second respondents were concerned. Wright was not acting as the agent of the first respondent

Record

in signing the proposal: MacGillivray & Parkington on Insurance Law (7th edition) para 822. The respondents were insured in respect of their interests as lessee and lessor. The policy was a composite policy rather than a joint policy: General Accident Fire & Life Assurance Corporation v. Midland Bank (1940) 2 K.B. 388, 404-6; Central Bank of India v. Guardian Insurance Co. (1936) 54 LL. L.R. 247, 260; Re King (1963) 1 Ch. 459; Re an Arbitration between Lombard Australia Ltd. and N.R.M.A. Insurance Ltd. (1968)3 N.S.W.R. 346, 347: Deaves v. CML Fire & General Insurance Co. (1979) 23 A.L.R. 539, 552, 575, 580; Petrofina (U.K.) Ltd. v. Magnaload Ltd. (1983)3 W.L.R. 805.

Vol. 2 p.331/20-p.332/12

36. Moreover the declaration in the proposal did not purport to have been made on behalf of the first respondent. The appellants, however, pleaded their case on the footing that it was. At best if the appellants were entitled to avoid the policy by reason of anything in the proposal, that right was only available against the Goldbergs: Woolcott v. Sun Alliance & London Insurance Ltd. (1978) 1 All E.R. 1253, 1256, 1257 h.j; (1978) 2 W.L.R. 493.

Vol. 1 pp. 15-16

37. Having failed to obtain a proposal from the first respondent, the appellants are in the position of the defendants in Pearl Life Assurance Co. v. Johnson (1909) 2 K.B. 288.

Vol. 2 p.329/8-10

Record

NON-DISCLOSURE

38. It is conceded that the first and second respondents respectively were obliged to disclose facts known to them which would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium: Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. (1925) A.C. 344; Lambert v. Co-operative Insurance Society (1975) 2 Lloyd's L.R. 485.

39. Brown disclosed to Clarke by telex dated 16th July, 1981, that the existing underwriter would not agree to increase the sum insured from $650,000.00 to $1,000,000.00. Willis also spoke to Booker (who acted for the previous insurers). Vol. 3 p.29 Vol. 2 p.98/2-21 p.189/4-10

40. If Hudig was the appellant's agent for the purpose of considering the proposal, it had received and it held the telex in the same capacity. Consequently the facts in the telex were disclosed.

41. It is conceded that the facts concerning the attack of colic in March, 1981, were not disclosed. The questions which arise are whether they were material, and whether they were known to the first respondent.

Record

MATERIALITY

42. The facts concerning the refusal to renew the insurance at a sum insured of $1,000,000.00 were not material.

43. His Honour held that the colic attack suffered by Asian Beau in March, 1981, was not a material fact which ought to have been disclosed. Vol. 1 p.44/2-p.45/17 p.46/40-44

44. The evidence supported His Honour's conclusion.

45. Dr Huxtable, a pathologist, performed the post-mortem. He was unable to link the attack of sand colic in 1981 with the impaction of the caecum which led to Asian Beau's death in 1982. He examined the cranial mesenteric artery and found no sign of parasitic activity, which his examination would have revealed had there been such activity. The only injury was the ruptured caecum. There was no evidence of weakening of the organs or of diseased tissue. Vol.3 pp.102-3 Vol.2 p.386/5-p.388/24

Dr Hilbert's report dated 18th March 1981 prompted the investigation at the trial concerning parasite activity. Vol. 3 p.23

46. Dr Ahern, veterinary surgeon practising in Western Australia, attended Asian Beau in March, 1981. He had seen between 20 and 30 cases of sand colic a year for some $5^1/2$ years. Dr Ahern regarded "colic" as a symptom of abdominal pain. In his opinion

Record

Asian Beau made a complete recovery. On 23rd July 1981 he certified that Asian Beau was a fit subject for insurance. He was not aware of a history of attacks of colic, and did not consider that Asian Beau had suffered from parasite - induced arteritis, although he could not exclude the possibility. Vol.3 p.32 Vol. 2p.390-21-p.398/8 p. 402/7-44 p. 404/8-48

47. Dr Williams had had $6\frac{1}{2}$ years' equine practice in Western Australia, and had often examined horses for insurance purposes. He attended Asian Beau in March, 1981, and on 7th April, 1981 certified that he had recovered. He considered the recovery to have been complete. He was not aware of any predisposition of the horse to eat sand. There was no evidence that Asian Beau suffered from parasite-induced arteritis. Vol. 3 p.24 Vol.2 p.407/12-p.411/46 p.414/1-p.415/6

48. Dr Smith has practised in Western Australia, exclusively in the equine field, since 1974, and in the year before the trial he had seen 140 cases of colic. He would not have advised an underwriter to exclude from cover a horse which had made a prompt recovery from a severe attack of sand colic, and he did not think that such a horse would be any different from any other horse for insurance purposes. He would not have suspected that Asian Beau had suffered any parasitic lesions. He would have been prepared, on the facts known to Dr Ahern, to have given a certificate for insurance purposes in the same form. Vol. 2 p.425/2-p. 433/48 p. 437/20-p.441/40

Record

49. Peter Gannon, a bloodstock agent, involved in the racing industry since 1946, had not found insurers to be reluctant to insure horses which had suffered from sand colic, nor had they required increased premiums. Vol.2 p.323/4-43

50. Professor Butterfield, a professor of veterinary anatomy in the University of Sydney, said in evidence that he would have recommended to underwriters that they exclude liability for death from gastro-intestinal accident, in the case of a horse which (like Asian Beau) had recently recovered from a severe attack of colic, the exclusion to fall away a year after the attack if in the meantime no further attack of colic had occurred. Vol. 1 p.361/3-27 p.366/19-47 p.372/20-47

However Professor Butterfield had not had any experience of sand colic, and had only once had occasion to advise underwriters concerning a horse which had a previous history of colic. Vol. 2 p.360/49-p.360/3

It is submitted that he gave too much weight to two factors:

(a) the severity of Asian Beau's attack of colic in March, 1981; Vol. 2 p. 392/22-41 p. 426/2-p.427/7 p.419/12-28

(b) his belief that the cause of that attack had not been completely diagnosed, because Dr Hilbert treated Asian Beau as if he was suffering from parasitic lesions. (See also the passages in the Vol.2 p.396/28-44 p. 431/32-47 p. 423/27-45,

Record

Record referred to in paragraphs 45-48 above).

51. Dr McGill assisted Dr Hilbert in treating Asian Beau in March 1981. He conceded that the fact that Àsian Beau passed large amounts of sand in his manure fairly led to the inference that he was suffering from sand colic. He had had little or no experience of advising underwriters concerning the fitness of horses for insurance. (Vol.3 p.23) Vol. 2 p.510/43-p.512/6 p.508/42-p.509/11

52. His Honour preferred the evidence of Drs. Ahern, Williams and Smith to that of Professor Butterfield. His Honour also relied upon the evidence of Gannon, which correctly reflects the effect of Regan's answer. Vol. 1 pp.41-3 Vol.2 p.484/30-33

53. His Honour did not refer to Brown's evidence. Vol.2 p.526/25-33 p. 546/35-p.547/11

54. There was no evidence that the first respondent knew that Asian Beau had suffered a severe attack of sand colic in March, 1981.

ALTERNATIVE CLAIM AGAINST THE THIRD RESPONDENT

55. In the alternative to the claim against the appellants, the insured claimed damages for breach of contract or in tort against A.I.B., relying in each case on the same particulars (statement of claim, paragraphs 17-41) Vol. 1 p.6/3-p.11/44

Record

56. The proposal in question was prepared by Miss Glenyse Fletcher, an employee of A.I.B., and signed and returned by Mr. Frank Wright, the Goldbergs' racing manager, on 30th July, 1981.

It was conceded on A.I.B.'s behalf at the trial that Miss Fletcher had been negligent in filling in the proposal. Vol. 2 p.516/8-11 p. 559/28-p.560/6

57. His Honour held that the concession had been properly made, and that Frank Wright had not been at fault. Those findings are supported. Vol. 1 p.47/21-25 p.47/33-p.48/6

58. In the first half of 1980, the Goldbergs engaged Mr. Frank Wright as their racing manager, and purchased Asian Beau. In the middle of 1980 they acquired a property known as Jane Brook, where Asian Beau was kept until his death in April, 1982. Vol. 2 p.213/3-39

59. A.I.B. acted as the Goldbergs' insurance brokers for 10 - 15 years, for the last 7 of which they acted for the Goldbergs on their own account. From the outset A.I.B. had offered, and provided, as part of their services as brokers, the completion of all proposals for insurance of horses, on the footing that A.I.B. and not the Goldberg organisation would be responsible for the correctness of the proposals and the making of any necessary disclosures to the underwriters. All proposals were in fact prepared by A.I.B., and signed by Mr Goldberg or his secretary Mrs. Geraldine Langoulant, on his behalf. Vol. 2 p.518/21-31 p.214/11-28 p.216/4-p.217/26 p.219/10-17 p.233/23-44 p.245/12-p.246/37 p.253/33-p.257/33

Record

60. When Mr. Wright had settled into his job as racing manager, he signed many proposals (all of which had been prepared by A.I.B.) on behalf of the Goldbergs. Vol. 2 p.308/1-p.310/19

61. During 1980 Mr. Brown delegated much of his day to day work to Mr. Noel Carter and Miss Glenyse Fletcher. Nevertheless the relationship between Mr. Goldberg and Mr. Brown continued and Mr. Brown remained involved in obtaining cover on behalf of the Goldbergs. Vol. 2 p.236/15-p.237/20

62. It was A.I.B.'s case that full responsibility for the correctness of proposals was a service provided only by Mr. Brown himself, and that when he moved into finance broking, in early 1980, responsibility for the correctness of proposals passed from Mr Brown to Mr. Wright. Vol. 2 p.517/1-p. 518/23
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63. Neither Mr. Goldberg nor Mr. Wright was told or warned that Mr. Wright was responsible for the correctness of proposals. A.I.B. continued to complete all proposals. Miss Fletcher knew that Mr. Wright did not read the proposals before signing them. Mr. Brown dealt with the placing of the cover in the case of Asian Beau and instructed Miss Fletcher to prepare the proposal. All relevant information was in A.I.B.'s files, and A.I.B. was thus in a position to make proper disclosure. The shift of emphasis in Mr. Brown's activities happened (as Gibbon would have said) "insensibly". His Honour Vol. 3 p.31
Vol. 2 p.528/2-p.531/36
p.554/18-24
p.559/6-p.560/24

Record

rejected the contention that the contractual position changed when Wright was appointed. Vol. 1 p.40/40-44

64. Mr. Wright checked that the proposal in question related to Asian Beau that the sum insured was $1,000,000.00 and that Mr. Goldberg was the insured, but otherwise did not read the proposal before signing and returning it. Miss Langoulant had told him that A.I.B. was responsible for completing proposals and he did not think it was his duty to check the proposal. Vol. 2 pp.281/17-p.282/7 p.297/9-40 p.311/4-p.315/9

65. In view of the terms on which A.I.B. acted as the Goldbergs' broker, A.I.B. is virtually in the position of Stenhouse (which prepared and signed the proposal and did not give its client the opportunity of reading it) in Ogden & Co. v. Reliance Fire Sprinker Co. (1975) Lloyds L.R. 52, esp. at 67-8, 76.

66. That Mr Wright would not read the proposal before returning it to A.I.B. was foreseeable. Vol. 2 p.560/7-21

67. Miss Fletcher's reaction when the mistake in the proposal came to light, and the attitude of Mr. Coppin and Mr. Brown when the appellants denied liability, evidence their appreciation that A.I.B. alone was to blame. Vol. 2 p.229/18-31 p.230/8-20 p.538/9-12

68. Even if Mr. Wright was negligent it is submitted -

    (a) that such negligence does not provide an answer to the claim of the first respondent, as Mr. Wright was not acting as its servant or agent;

(b) that such negligence is no defence to the Goldbergs' claim for damages for breach of contract: Simonius Vischer v Holt & Thompson (1979) 2 N.S.W.L.R. 322, esp. at 340A, 351A-355A, 329A; Read v Nerey Nominees (1979) V.R. 47, 53-4; but see De Meza & Stuart v Apple, van Straten, Shena & Stone (1974) 1 Lloyd's L.R. 508, 517-9. The relevant statute is the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947 of Western Austraia, as amended.

69. It was argued on behalf of A.I.B. that no contract of insurance came into existence between the appellants and the insured. If that was so, A.I.B. was in breach of contract and liable in tort for failing to obtain an enforceable contract of insurance, as alleged in paragraphs 35(d) and (e) and 39(d) of the re-amended Statement of Claim.

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Vol.1 pp.9-11,
Vol.3 pp. 40, 54-5, 51, 52, 53, 149
Vol.2 p.531/37-p.537/46
Vol.3 pp.51,53 and 54-5
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