

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
ENNA 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

RECORD OF PROCEEDINGS - VOLUME 1

BARLOW LYDE & GILBERT
DRAKE HOUSE
3/5 DOWGATE HILL
LONDON EC4R 2SJ

LINKLATERS & PAINES
BARRINGTON HOUSE
59/67 GRESHAM STREET
LONDON EC2V 7JA

REYNOLDS PORTER CHAMBERLAIN
CHICHESTER HOUSE
278/282 HIGH HOLBORN
LONDON WC1V 7HA

Solicitors for the
Appellants

Solicitors for the
Second Respondent

Solicitors for the Third
Respondent

O N A P P E A L
FROM THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

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RECORD OF PROCEEDINGS

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No.	Description of Document	Date
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	(47) - Telex from Mal Brown to Bert Clarke	5 March 1982

O N A P P E A L
FROM THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

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ASSURANCES GENERALES de FRANCE (London Branch)
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Appellants

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

Second Respondent

AND

AUSTRALIAN INSURANCE BROKERS LIMITED

Third Respondent

RECORD OF PROCEEDINGS

No. 1

AMENDED STATEMENT OF CLAIM

AMENDED AT TRIAL

No.1.
Amended State-
ment of Claim
23 June 1983

1. The First Plaintiff is NATIONAL WESTMINSTER FINANCE AUSTRALIA LIMITED, a company incorporated in New South Wales of 251 Adelaide Terrace, Perth in the State of Western Australia.

No. 1
Amended
Statement
of Claim
23 June
1983
(cont'd)

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2. The Second Plaintiffs are JOSEPH MAXIM GOLDBERG and VIVIENNE GOLDBERG, trading as "Shamrock Park".

3. The First Defendants are:-

- (a) Eagle Star Insurance Company Limited a company incorporated in England, of 1 Threadneedle Street, London EC2.
- (b) Ennia Insurance Company (UK) Limited a company similarly incorporated of Fountain House, 136 Fenchurch Street, London EC3.
- (c) Assurances Generales de France (London Branch) a company incorporated in France, of 87 Rue de Richelieu, Paris.
- (d) Prudential Assurance Company Limited a company incorporated in England, of care of Equine Underwriting Agencies Limited Marlow House, 610-616 Chiswick High Road, London W4.
- (e) A A Mutual International Insurance Company Limited a company similarly incorporated, of care of Equine Underwriting Agencies Limited aforesaid.
- (f) Equine & Livestock Insurance Company Limited a company similarly incorporated, of care of Equine Underwriting Agencies Limited aforesaid.
- (g) Union Atlantique d'Assurances S.A. a company incorporated in Belgium, of Rue Belliard 7 Brussels 1040.

4. The Second Defendant is AUSTRALIAN INSURANCE BROKERS LIMITED, a company incorporated in the State of New South Wales, whose head office is at 3 - 5 Bennett Street, Perth aforesaid.

5. At all material times the First Plaintiff was the owner of a stallion known as "Asian Beau".

6. By a lease in writing the First Plaintiff leased the said horse to the Second Plaintiffs for a term of 36 months at a monthly rental of \$18,696.76, totalling \$676,083.36, plus the amount of stamp duty totalling \$10,096.20 payable by the Second Plaintiffs to the First Plaintiff in reimbursement of the stamp duty paid by the latter. The said term commenced on 23rd May, 1980.

At the trial of this action the Plaintiffs will refer to the said lease for its full terms and effect.

No.1.
Amended
Statement
of Claim
23 June 1983
(cont'd)

7. The Second Plaintiffs covenanted in the said lease inter alia to insure the said horse and to keep it insured during the period of the lease for its full insurable value.

7A. During or about July 1981, the Plaintiffs, (represented by the Second Defendants) for their respective interests in the said horse, entered into a contract of insurance with the First Defendants (represented by Hudig Langeveldt Pty Ltd and/or by the Australian Bloodstock Insurance Pool) whereby the First Defendants agreed to indemnify the Plaintiffs against loss arising inter alia from the death of the said horse in the sum of \$1,000,000.00 plus loss of use, for the period 1st August, 1981 to 1st November, 1982, at a premium equivalent to 3.25% per annum on the said sum of \$1,000,000.00.

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Particulars of the Contract

(i) By a telex dated 23rd July, 1981 from the Second Defendant to Hudig Langeveldt Pty Ltd (hereinafter referred to as "Hudig") the latter was requested to obtain insurance for the Plaintiffs on the said terms.

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(ii) Hudig obtained such insurance cover from Chandler Hargreaves Whittal & Co of London (hereinafter referred to as "Chandlers"), and by telex dated 28th July, 1981 offered such cover to the Second Defendant.

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(iii) By a telex dated 30th July, 1981 the Second Defendant notified Hudig that such insurance was accepted.

(iv) Hudig was Chandlers agent for the purpose of receiving the said acceptance, and the Plaintiffs' agent for the purpose of ascertaining who the insurers of the said horse were.

(v) A contract of insurance on the said terms was thereby concluded between the Plaintiff and Chandlers.

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(vi) Chandlers had entered into the said contract of insurance without disclosing (as was the fact) that it had been act-

No.1. ing as the agent for the First Defendants.
 Amended
 Statement of (vii) On or about 25th August, 1981, Chandlers
 Claim issued a cover note addressed to the
 23 June 1983 Australian Insurance Bloodstock Pool
 (cont'd) received by Hudig, disclosing the
 identities of the First Defendants, and
 their respective proportionate liabilities
 as set out in paragraph 7B below.

10 7B. By the said cover/debit note the First
 Defendants notified the Second Defendant, as agent
 for the Plaintiff, of the percentages in which
 they undertook to indemnify the Plaintiffs in
 relation to the said sum insured, namely:

	Prudential Assurance Co Limited	8%
	A A Mutual International Insurance Co Limited	8%
	Equine & Livestock Insurance Co Limited	4%
	Eagle Star Insurance Co Limited	20%
20	Union Atlantique D'Assurances S.A.	20%
	Assurance Generales de France	30%
	Ennia Insurance Co (U.K.) Limited	10%
		<hr/>
		100%
		<hr/>

30 7C. In the alternative to paragraphs 7A and 7B
 hereof, Chandlers issued a cover note dated 25th
 August, 1981 on behalf of the First Defendants,
 which cover note provided interim cover to the
 Plaintiffs in respect of the said horse against
 loss arising inter alia from the death of the said
 horse in the sum of \$1,000,000.00 plus loss of use
 for the period 1st August 1981 to 1st November 1982.

40 8. Alternatively to paragraph 7 by a "Companies
 Combined Policy" comprising policies issued by the
 First Defendants in or about October and November
 1981, but delivered to the Second Defendant on behalf
 of the Plaintiffs in June 1982 in consideration for
 a total premium of \$40,692.00, they severally agreed
 each for the proportion set out against its name to
 indemnify inter alia the First Plaintiff and the
 Second Plaintiffs, as to their respective interests
 in the said horse, against loss inter alia by reason

of all risks of mortality, accident, sickness and disease. The sum assured was \$1,000,000.00 plus loss of use.

No.1.
Amended
Statement
of Claim
23 June 1983
(cont'd)

At the trial of this action the Plaintiffs will refer to the said policies for their full terms and effect.

9. Under the said policies (issued on identical printed forms) the Defendants agreed to share the said total premium and liability for the said sum assured among them in the following proportions:-

Eagle Star Insurance Company Ltd	20%	10
Ennia Insurance Company (UK) Limited	10%	
Assurance Generales de France (London Branch)	30%	
Prudential Assurance Company Limited	40%)	
)	20%
A A Mutual International Insurance Co Limited	40%)	
Equine & Livestock Insurance Co Ltd	20%)	
Union Atlantique d'Assurances S.A.	20%	

10. The Second Defendants duly paid the said total premium.

11. During late February and early March, 1982 the said horse suffered from colic resulting in generalised peritonitis, and on 4th March 1982 he was properly put down by the veterinary surgeons attending him. 20

12. The death of the said horse resulted from risks insured against under the said contract of insurance or alternatively under the said policies, and the Plaintiffs are entitled to indemnity under the said contract of insurance or alternatively under the policies. 30

13. At the material time the loss of the value of the said horse was at least \$1,000,000.00.

14. Alternatively, the loss of the value of the said horse and the value of the loss of its use were at least \$1,000,000.00.

15. The Second Plaintiffs were entitled to the use of the said horse.

16. The First Defendants have wrongfully refused

No.1.
Amended
Statement
of Claim
23 June
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(cont'd)

to indemnify the Plaintiffs or any of
them in respect of the said loss.

10

17. If and to the extent that the First Defendants are not liable to indemnify the Plaintiffs or one or more of them in respect of the said losses the Plaintiffs plead as follows as against the Second Defendant, in the alternative to their respective claims to indemnity under the said contract of insurance or alternatively under the said policies.

18. At all material times the Second Defendant has been the Second Plaintiff's insurance broker in relation to the insuring of horses against the risk of loss by divers perils.

19. In July, 1981 there subsisted a policy of insurance in respect of the said horse, in favour of the First Plaintiff and the Second Plaintiffs, procured by the Second Defendant, the sum insured being \$650,000.00.

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20. At all material times the Second Defendant well knew (as were the facts) :-

- (a) that the First Plaintiff was the owner of the said horse;
- (b) that the Second Plaintiffs were the lessees of the said horse;
- (c) that the said horse was a stud stallion whose use was valuable to the Second Plaintiffs;
- (d) that the Second Plaintiffs were interested in the value of the said horse as at the end of the said Lease.

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21. In or about July 1981, at the instance of the Second Plaintiffs, the Second Defendant requested the then insurers of the said horse to agree to increase the insurance at an increased sum assured of \$1,000,000.00 plus loss of use.

22. Such insurers declined the said request.

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23. On or about 23rd July, 1981 the Second Defendant by letter advised the Second Plaintiffs' manager, one Wright, that it had found an Underwriter who would insure the said horse for \$1,000,000.00 from 1st August, 1981 to 1st November, 1982 and requested him urgently to sign and return a proposal for such insurance, which had been completed, save for the signature thereto by or on behalf of the

Second Plaintiffs.

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of Claim
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(cont'd)

24. The said proposal was signed by the said Wright on behalf of the Second Plaintiffs and returned by him to the Second Defendant forthwith, without having noticed the errors mentioned herein-after.

25. In or about July or August 1981, the Second Defendant purported to issue a policy of insurance on behalf of certain insurance companies, in respect of the said horse, the sum insured purportedly being \$1,000,000.00 plus loss of use, the period of insurance purportedly being 1st August, 1981 to 1st November, 1982.

10

26. The Second Defendant was not authorised to issue the said policy.

27. In or about July, 1981 the Second Defendant requested Hudig Langeveldt Pty Ltd of Sydney in the State of New South Wales to arrange for the insurance of the said horse for £1,000,000.00 plus loss of use, from 1st August, 1981 to 1st November, 1982, on behalf of the Second Plaintiffs as lessees thereof, on the basis that they were leasing the said horse from the First Plaintiff.

20

28. At such time the Second Defendant well knew that the Second Plaintiffs had covenanted with the First Plaintiff to keep the said horse properly insured during the currency of the said lease.

28A. During or about July 1981, the said contract of insurance was concluded as aforesaid.

29. On or about 31st July, 1981 the Second Defendant sent the said proposal to Hudig Langeveldt Pty Limited.

30

30. Hudig Langeveldt thereupon arranged for the said policies to be issued.

31. The said proposal prepared by the Second Defendant, its servants or agents, contained inter alia answers:-

(a) that the said horse had not suffered from any defects or ailments, illness or disease in the previous twelve months;

40

(b) that no insurer had ever declined or refused to renew the Second Plaintiffs' livestock insurance;

No.1.
Amended
Statement
of Claim 32.
23 June 1983
(cont'd)

- (c) that the said horse was not insured and had not been insured previously.
- To the knowledge of the Second Defendant:-
- (a) the said horse had suffered from colic in or about March, 1981;
- (b) the said horse was currently insured by insurers who had declined to increase the insurance at a sum insured of \$1,000,000.00.

10

- (c) the Plaintiffs would not themselves be making any disclosure to the First Defendants of any material facts;
- (d) the Plaintiffs were relying upon the Second Defendant to disclose material facts within its knowledge to the First Defendants and to check the correctness of any relevant proposal.

20

33. The First Defendants have repudiated liability to the Plaintiffs by reason of the matters mentioned in paragraph 31(a) and (b) and further that there had not been disclosed to the First Defendants facts alleged to have been material to the risks accepted by the First Defendants, namely, that:-

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- (a) the said horse had suffered from an ailment or illness during the preceding 12 months, had been hospitalised at Murdoch University from 11th March, 1981, to 16th March, 1981 suffering from severe abdominal pain, gaseous distension of the large bowel and severe intermittent intestinal spasm, and had been found to have large amounts of sand in his manure;
- (b) the said horse had been previously insured and that the previous insurer had declined to renew the insurance for the sum of \$1,000,000.00.

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34. It was the duty of the Second Defendant owed to the Plaintiffs or alternatively to the Second Plaintiffs to exercise reasonable care and skill in preparing the said proposal and in checking the same before despatching it to Hudig Langeveldt as aforesaid and further to disclose to the First Defendants on behalf of the Plaintiff any facts within their knowledge material to the risks to be accepted by the First Defendants and further yet to ensure that insurance

cover for the sum of \$1,000,000.00 against loss inter alia by reason of death was duly placed for the said horse, that the identity of the insurers was duly ascertained, that a policy of insurance was duly issued and that the terms on which the said horse had been insured provided satisfactory protection for the insured.

No. 1.
Amended
Statement
of Claim
23 June 1983
(cont'd)

35. In breach of the said duty, the Second Defendant, its servants or agents, negligently failed to exercise reasonable or any care and skill in preparing or checking the said proposal and neglected to disclose to the First Defendants material facts within its knowledge and further neglected to ensure that insurance cover had been duly placed for the said horse, for the sum of \$1,000,000.00 against loss inter alia by reason of death or to ascertain the identity of the insurers, or that a policy of insurance had been duly issued or that the terms on which the said horse had been insured provided satisfactory protection for the insured.

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Particulars of Negligence

- (a) Inserting incorrect information in the proposal which the Second Defendant, its servants or agents, knew to be incorrect, as aforesaid.
- (b) Failing to check, properly or at all, for errors in the said proposal before despatching the same to Hudig Langeveldt Pty Limited.
- (c) Failing to disclose to the First Defendants the said facts concerning the said illness or ailment of the said horse during 1981 that the said horse had been and was insured and the said refusal to increase the said previous insurance which facts were material.
- (d) Failing to observe and investigate contradictory information received from Hudig Langeveldt Pty Ltd or the Australian Insurance Bloodstock Pool concerning the insurance of the said horse;
- (e) Taking no or insufficient steps to establish that such insurance cover had been duly placed for the said horse, or the identity of the insurers, or that a policy of insurance had been duly issued, or that the terms on which

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No.1.
Amended
Statement of
Claim

the said horse had been insured
provided satisfactory protection for
the insured.

23 June
1983
(cont'd)

36. In consequence of the said negligence, the Plaintiffs or alternatively the Second Plaintiffs have suffered damages, in that they are unable to enforce their claims to indemnity under the said contract of insurance or alternatively under the said policies as against the First Defendants and the Second Plaintiffs have not been secured against their full liability to the First Plaintiff under the said Lease.

10

Particulars of damages calculated as at the date of trial will be furnished before trial.

Further or in the alternative:-

37. At all material times the Second Defendants were the Second Plaintiffs' insurance brokers pursuant to an agreement entered into between them in or about 1977.

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38. It was an implied term of the said agreement that the Second Defendant would exercise reasonable care and skill in preparing proposals including the said proposal and in the case of the said proposal in checking the same before despatching the same to Hudig Langeveldt Pty Limited and in making disclosure to the First Defendants of material facts arising from the premises and the following further facts -

30

(a) at all material times the Second Defendant was well acquainted with the facts relevant to the insuring of horses owned or leased by the Second Plaintiffs;

40

(b) the Second Defendant had in the past, as in the instant case, assumed responsibility for preparing correctly proposals, for signature by or on behalf of the Second Plaintiffs and for ensuring that insurance cover for the sum of \$1,000,000.00 against loss inter alia by reason of death was duly placed, that the identity of the insurers was duly ascertained, that policies were duly issued and that the terms of the insurance provided satisfactory protection for the insured.

(c) the Second Defendant well knew (as was the fact) that the Second Plaintiffs relied

upon the Second Defendant, its servants and agents, to prepare correctly for signature by them or on their behalf, proposals (including the said proposal) for the insurance of horses owned or leased by them and in disclosing material facts to insurers on their behalf.

No.1.
Amended
Statement
of Claim
23 June 1983
(cont'd)

39. In breach of the said implied term the Second Defendant, its servants and agents, negligently failed to exercise reasonable or any care in the preparation of the said proposal or in checking it before despatching it to Hudig Langeveldt Pty Ltd and in making disclosure to the First Defendants of material facts.

10

Particulars of Negligence

- (a) Inserting incorrect information in the proposal which the Second Defendant, its servants or agents, knew to be incorrect, as aforesaid.
- (b) Failing to check, properly or at all, for errors in the said proposal before despatching the same to Hudig Langeveldt Pty Ltd.
- (c) Failing to disclose to the First Defendant the said facts concerning the said illness or ailment of the said horse during 1981 the facts that the horse had been and was insured and the said refusal to increase the said insurance which facts were material.
- (d) The Plaintiffs repeat sub-paragraphs (d) and (e) of paragraph 35.

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40. By reason of the said breaches of duty, the Second Plaintiffs have suffered damages, in that they are unable to enforce their claim to indemnity under the said contract of insurance or alternatively under the said policies as against the First Defendants.

Particulars of damages calculated as at the date of trial will be furnished before trial.

41. All the said damages sustained by reason of breaches of contract as aforesaid were in the contemplation of the parties thereto at the time such contracts were made, as being liable to be sustained by reason of the breach thereof by the Second Defendant.

40

42. On or about 8th June, 1982 notice was given to

No.1. the Defendants, in terms of Section 32 of the Supreme
Amended Court Act, of the Plaintiffs' intention to claim
Statement interest.

of Claim

23 June

1983

(cont'd)

AND the First and Second Plaintiffs claim as against
the First Defendants in the said proportions the sum
of \$1,000,000.00 together with interest pursuant to
statute.

Alternatively

A. The First Plaintiff claims -

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(1) As against the First Defendants -

(a) a declaration that they are
obliged to indemnify it under
the said contract of insurance
or alternatively under the said
policies;

(b) indemnity, in the said propor-
tions, in respect of its interest
under the said contract of
insurance or alternatively under
the said policies;

20

(c) interest pursuant to statute.

(2) Alternatively, as against the Second
Defendant, damages and interest
pursuant to statute.

B. The Second Plaintiffs claim -

(3) As against the First Defendants -

(a) a declaration that they are
obliged to indemnify the Second
Plaintiffs under the said contract
of insurance or alternatively
under the said policies;

30

(b) indemnity, in the said proportions
in respect of their interest under
the said contract of insurance or
alternatively under the said
policies;

(c) interest pursuant to statute.

(4) Alternatively, as against the Second
Defendant, damages and interest pursuant
to statute.

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- | | | |
|-----|--|---|
| 43. | The Plaintiffs claim interest on the whole amount of each of their respective claims against each Defendant. | No.1.
Amended
Statement
of
Claim
23 June
1983
(cont'd) |
| 44. | The Plaintiffs' claims for interest - | |
| | (a) are based upon Section 32 or 33 of the Supreme Court Act 1935 as amended by Act 47 of 1982 or alternatively before such amendment; | |
| | (b) the rate of interest claimed is 15%; and | |
| | (c) the date from which interest is claimed is 8th June 1982. | 10 |

R.H.B. PRINGLE
COUNSEL

NO.2

REQUEST FOR FURTHER AND BETTER PARTICULARS
OF THE STATEMENT OF CLAIM

Filed the 25th day of November, 1982

TAKE NOTICE that the First Defendants require the Plaintiffs to supply the following Further and Better Particulars within one day of the date hereof:-

No.2.
Request for
Further and
Better
Particulars
of the
Statement of
Claim
25 Nov 1982

With respect to Paragraph 8 of the Plaintiffs' Particulars of Claim served on the First Defendants on 9th July, 1982 that the Plaintiff:-

20

1. Identify -

- (a) the number of and
- (b) the policy numbers of

the "Companies Combined Policies" pleaded as having been issued by the Plaintiffs in or about October and November 1981.

2. Identify all documents or parts thereof of whatsoever nature which the Plaintiffs allege are incorporated in the said policies by reference therein and supply the First Defendants with copies of the same.

30

3. Identify any other documents or parts thereof of whatsoever nature other than those revealed in paragraphs 1 and 2 above which the Plaintiffs allege form part of the contract of insurance between the Plaintiffs and the First Defendants.

No.2. 4. Supply the First Defendant with copies of all Request documents disclosed in the answers hereto.
for Further
and Better
Particulars
of the Statement
of Claim
25 November 1982
(cont'd)

Northmore Hale Davy & Leake
Solicitors for the First Defendants

No.3.
Amended Further
and Better
Particulars of
the Statement
of Claim
10 March 1983

NO.3

AMENDED FURTHER AND BETTER PARTICULARS
OF THE STATEMENT OF CLAIM

Filed the 10th day of March 1983

Of Paragraph 8 of the Statement of Claim:-

- 10 1. The policy number of each of the four "Companies Combined Policies" is 514/B1/0542Z.
2. The Plaintiffs allege that no other documents or parts of other documents were incorporated in the said policies by reference.
- 20 3. In the alternative to the averment that the contract of insurance was entered into as alleged in Paragraph 7A of the Amended Statement of Claim the Plaintiffs allege that no other documents or parts thereof other than the said "Companies Combined Policies" formed part of the contract of insurance between the Plaintiffs and the First Defendants.
4. Copies of the "Companies Combined Policies" are being supplied separately.

Solicitors for the Plaintiffs

No.4
Amended Defence of
First
Defendants
23 June
1983
30

NO. 4

AMENDED DEFENCE OF FIRST DEFENDANTS
AMENDED AT TRIAL

1. The First Defendants admit paragraphs 1, 2, 3, 4, 10, 11, 13, 14, 26, 29 and 31 of the Statement of Claim.

2. The First Defendants do not know and therefore do not admit any of the allegations contained in paragraphs 5, 6, 7, 15 and paragraphs 18 to 25 inclusive, 27, 28, 30 and 32 to 42 inclusive.
3. Each and every allegation contained in paragraphs 12, 16 and 28A is denied.
4. The First Defendants admit that the Plaintiffs and the Defendants were parties to contracts of insurance issued by the First Defendants in or about October and November 1981 which contracts are embodied in the policies particularised by the Plaintiffs ("the policies") the full force and effect of which will be referred to at trial. Each and every other allegation contained in paragraphs 8 and 9 is denied. 10
5. It was a condition of the policies that all terms clauses and conditions of the then standard printed form of Australian Bloodstock Insurance Pool policy should be incorporated in the policies.
6. It was a condition of the then standard printed form of Australian Bloodstock Insurance Pool policy that the Plaintiffs had completed a written proposal and declaration which should be the basis of the contract of insurance and be considered as incorporated therein. 20
7. The Plaintiffs did complete a proposal and declaration dated 30th July 1981 which contained the following questions and which were answered by the Plaintiffs as indicated hereunder.
- "3(a) Are the animals sound and healthy? 30
- ANSWER: YES
- (b) Give full particulars of defects of ailments, illness or disease, during the last 12 months.
- ANSWER: NO
- 6(a) Are the animals now insured or have they been insured previously? If so give details including names of insurers?
- ANSWER: NO 40
- (b) Has any insurer declined or refused to renew your livestock insurance? If so, give details.

No.4.
Amended
Defence of
First
Defendants
23 June 1983
(cont'd)

No.4.
Amended Defence
of First De-
fendants
23 June 1983
(cont'd)

ANSWER: NO

9. Are there any other circumstances within your knowledge or opinion not already disclosed, affecting or likely to affect the proposed insurance?

ANSWER: Two dashes were inserted.

DECLARATION

10 I/WE, the undersigned, hereby propose to insure the animals noted on the Schedule herein and owned by me/us, subject to the terms and conditions of the policy to be insured, and I/WE declare that the same animals are sound and in good health and that to the best of my/our knowledge and belief the above statements are true and complete and I/WE have not withheld any material information....".

8. In fact "Asian Beau" had:

20 (a) suffered from an ailment or illness during the preceding 12 months, and had been hospitalised at Murdoch University from 11th March 1981 to 16th March, 1981 suffering from severe abdominal pain, gaseous distension of the large bowel, and severe intermittent intestinal spasm, and had been found to have large amounts of sand in its manure.

30 (b) been previously insured, was then presently insured and the previous insurer had declined to increase the insurance for the sum then proposed by and on behalf of the Plaintiffs.

40 9. The Plaintiffs did not prior to the time of making any of the alleged contracts of insurance disclose to the First Defendants certain material facts which were facts likely to have affected the judgment of a prudent insurer in deciding whether or not to accept the insurance then proposed on behalf of the Plaintiffs, and if so, upon what terms and at what premium, by reason whereof the First Defendants avoided the contracts of insurance.

PARTICULARS

No. 4.
Amended
Defence of
First
Defendants
23 June 1983
(cont'd)

The Plaintiffs did not disclose to the First Defendants the fact that "Asian Beau" had suffered the ailments or illnesses described above in paragraph 8.

The Plaintiffs did not disclose to the First Defendants that "Asian Beau" had been previously insured, was then presently insured and that the previous insurer had declined to increase the insurance for the sum insured then proposed by and on behalf of the Plaintiffs.

10

10. When all relevant information was made available to the First Defendants they elected to and did avoid the contracts of insurance.

11. The Plaintiffs are not entitled to the relief claimed or any relief.

12. With respect to paragraph 7A the First Defendants:

(a) admit that telexes were sent by and received by the parties as specified in Particulars (i) and (iii) and

20

(b) admit that on or about 25th August 1981 Chandlers issued a document entitled Cover/Debit Note addressed to and received by ABIP disclosing the identities of and setting out the respective proportion of liability of the parties referred to in Particular (vii)

but otherwise denies each and every other allegation contained therein.

30

13. The First Defendants deny each and every allegation contained in paragraph 7B.

14. The First Defendants deny that there was any contract between the Plaintiffs and First Defendants other than in terms of the policies referred to in paragraph 8 of the Statement of Claim and admitted in paragraph 4 hereof.

15. In the alternative if there was a contract between the Plaintiffs and the First Defendants other than in the terms of the policies then such contract (hereinafter referred to as "the

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No.4.
Amended
Defence of
First
Defendants
23 June 1983
(cont'd)

contract providing interim cover") lapsed when the proposal submitted by the Plaintiffs to the First Defendants was accepted by the First Defendants by the issue of the policies. The particulars of the contract providing interim cover are given in paragraph 17 hereof:

16. The policies were issued by Chandlers and sent to Hudig which

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- (a) received them on or about 27th November 1981 but in any event before the death of "Asian Beau" and
- (b) held the policies as agents for and on behalf of the Plaintiffs

17. If there was a contract providing interim cover (which is denied) then it was constituted by

20

- (a) Chandlers' insurance slip variously dated, alternatively
- (b) a telex dated 27th July 1981 from the Second Defendant to Hudig requesting cover on "Asian Beau" for the risks and amounts and period and subject to the conditions detailed in telexes from the Second Defendant dated 16th July 1981 and 23rd July 1981.

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- (c) a cover/debit note dated 25th August 1981 from Chandlers a copy of which document was sent to and received by the Second Defendant and held by the Second Defendant as agent for the Plaintiffs.

18. If there was a contract providing interim cover (which is denied) then it:

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- (a) contained a term on the slip, alternatively on the first page of the cover/debit note that the cover/debit note and therefore the contract providing interim cover was subject to "all terms, clauses and conditions as per policy" which on a proper construction means on the terms clauses and conditions of the policies which did issue and
- (b) contained a term on the slip,

alternatively on the second page of the cover/debit note that the cover/debit note and therefore the contract providing interim cover was subject to "all terms, clauses and condition, additional premiums and return premiums as Australian Bloodstock Insurance Pool policy...."

No.4.
Amended
Defence of
First
Defendants
23 June
1983
(cont'd)

and in consequence the condition pleaded in paragraph 6 hereof was a condition of the contract providing interim cover.

10

19. In any event whether the contract of insurance was that pleaded by the Plaintiffs in paragraph 7A (which is denied) or the contract providing interim cover (which is denied) or that embodied in the policies or any other contract then the condition pleaded in paragraph 5 hereof was to be implied from the following facts:

- (a) Hudig at all material times and inter alia carried on business under the business name Australian Bloodstock Insurance Pool ("ABIP") as the Manager and agent of a syndicate of Australian insurance companies.
- (b) ABIP as Manager and agent for the syndicate issued policies of indemnity against losses suffered by reason of death of bloodstock and in the case of stallions and colts as a result of accident sickness or disease which prevented the performance of stud duties.
- (c) ABIP had standing authority from the syndicate to issue policies up to a limit of \$150,000 subject to the conditions of the then standard printed form of Australian Bloodstock Insurance Pool policy which standard printed form of policy contained a condition that the assured had completed a written proposal and declaration which should be the basis of the contract of insurance and be considered as incorporated therein.
- (d) Where cover in excess of \$150,000 was sought ABIP was obliged to arrange for other insurers to act as co-insurer or as sole insurers.

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No.4.
Amended Defence
of First
Defendants
23 June 1983
(cont'd)

- 10 (e) On the 12th May 1980 ABIP entered into a written agreement with the Second Defendant whereby the Second Defendant was authorised to issue bloodstock insurance policies on behalf of the said syndicate members whose business was managed by ABIP. It was a term of the said agreement that the Second Defendant was authorised to issue policies providing for cover up to a limit of \$20,000 and \$150,000 must be referred to ABIP for approval and that in the case of requests for cover in excess of \$150,000 insurance would have to be arranged by ABIP with other insurers outside the said syndicate.
- 20 (f) The course of dealings between ABIP and the Second Defendant concerning insurance of bloodstock was always pursuant to the said agreement and on all occasions when policies issued pursuant to dealings between ABIP and the Second Defendant in relation to bloodstock such policies were subject to the conditions in the then standard printed form of Australian Bloodstock Insurance Pool policy which contained the term pleaded in paragraph 6 hereof.
- 30 (g) The Second Defendant was the agent of the Plaintiffs for all purposes material to the formation of the contract of insurance contained in the policies, the contract providing interim cover, the contract pleaded by the Plaintiffs in paragraph 7A or any other contract.

20. Further or in the alternative the implied term pleaded in paragraph 19 hereof arises from the following facts:

- 40 (a) in the telex dated 23rd July 1981 from the Second Defendant to Hudig the Second Defendant informed Hudig that the Second Defendant had or would forthwith obtain a proposal from the Plaintiffs.
- (b) the standard Horse Insurance Proposal form employed by the Second Defendant contained a term that the proposal form should be the basis of the contract should a policy be issued.
- 50

- (c) as pleaded in paragraph 7 hereof the Plaintiffs did complete a proposal on one of the said standard Horse Insurance Proposal forms. No.4.
Amended
Defence
of First
Defendants
23 June 1983
(cont'd)

21. Further and in the alternative the First Defendants say that whether the contract of insurance was that pleaded by the Plaintiffs in paragraph 7A (which is denied) or the contract providing interim cover (which is denied) or that embodied in the policies or any other contract they were induced to enter into such contract by the misrepresentations of Chandlers as agents for the Plaintiffs. 10

PARTICULARS OF AGENCY RELATIONSHIP

- (a) The Second Defendant at all material times was the agent of the Plaintiffs.
- (b) Expressly or impliedly the Second Defendant was authorised to act through sub-ordinates. 20
- (c) Hudig was instructed by the Second Defendant to place insurance cover of \$1,000,000.00 on "Asian Beau"
- (d) By reason of the matters referred to in paragraph 19(e) hereof, the Second Defendant knew Hudig Langeveldt as manager of ABIP would have to place the cover outside ABIP.
- (e) Hudig arranged insurance cover through Chandlers. 30
- (f) Chandlers as placing broker approached the First Defendants to place the cover sought.

PARTICULARS OF MISREPRESENTATION

- (a) Chandlers represented to a Mr. Thomson on behalf of Prudential Assurance Company Limited, A A Mutual Insurance Company Limited and Equine and Livestock Insurance Company Limited that the risk to be accepted was by way of co-insurance or re-insurance with ABIP sharing the risk. 40

No.4.
Amended Defence
of First
Defendants
23 June 1983
(cont'd)

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- (b) Subsequently Chandlers represented to a Mr. Regan on behalf of Assurances Generales de France that the risk to be accepted was by way of co-insurance or re-insurance with ABIP sharing the risk.
- (c) At some time (whether before or after the matters hereinbefore particularised is not known) Chandlers represented to the other First Defendants that the risk to be accepted was by way of co-insurance or re-insurance with ABIP sharing the risk.
- (d) The cover being placed was in fact primary insurance.

20

22. Had the First Defendants and each of them known that the risk being accepted was by way of primary insurance only, the First Defendants and each of them would have made more extensive enquiries concerning the risk and may have imposed additional terms and conditions on the Plaintiffs before accepting any part of the risk.

23. By reason of the misrepresentations pleaded the First Defendants and each of them claim rescission of the contracts of insurance.

TERRY McAULIFFE
COUNSEL

No.5.
Amended Defence
of Second
Defendants
23 June 1983

NO.5.

AMENDED DEFENCE OF SECOND DEFENDANT
AMENDED AT TRIAL

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- 1. Paragraphs 1, 2 and 4 of the Statement of Claim are admitted.
- 2. The Second Defendant makes no admissions as regards the allegations concerning the incorporation and addresses of the First Defendants as set out in paragraph 3 of the Statement of Claim.
- 3. (a) As regards paragraph 7A of the Statement of Claim:
 - (i) The Second Defendant denies that Hudig Langeveldt Pty Ltd or the Australian Bloodstock Insurance Pool were authorised by the First Defendants to enter into the contract referred to in

- | | | | |
|-------|--|--|----|
| | this paragraph; | No.5.
Amended
Defence of
Second
Defendants
23 June 1983
(cont'd) | |
| (ii) | The Second Defendant denies that it authorised in any way the entering into of a contract of insurance between the Plaintiffs and the First Defendant; | | |
| (iii) | The Second Defendant further denies that it made an offer (or authorised anyone else on the Plaintiffs' behalf to make an offer), to enter into a contract of insurance with the First Defendants; | | 10 |
| (iv) | The Second Defendant, acting on the Second Plaintiffs' behalf agreed with the Australian Bloodstock Insurance Pool that the latter would effect insurance of the horse on the basis that: | | 20 |
| | A. the horse would be insured for \$1,000,000.00 includes loss of use, for the period 1 August 1981 to 1 November 1982 at a premium equivalent to 3.25% per annum on the said sum of \$1,000,000.00; | | |
| | B. the Australian Bloodstock Insurance Pool would be the lead insurer in respect of the said cover together with Lloyds Underwriters (who were to be co-insurers); | | 30 |
| | C. the participation of Lloyds Underwriters would be effected by the Australian Bloodstock Insurance Pool as principals, and not as agents for the Plaintiffs. | | |

40

PARTICULARS OF THE AGREEMENT BETWEEN THE
SECOND DEFENDANT AND THE AUSTRALIAN BLOODSTOCK
INSURANCE POOL

A. At all relevant times there existed a written Agreement between the Second Defendant and the Australian Bloodstock Insurance Pool termed "Insurance Underwriting Agreement".

No.5.
Amended
Defence
of the
Second
Defendants
23 June 1983
(cont'd)

In terms of that Agreement:

- 10
01. the Second Defendant was authorised to issue policies for direct business up to \$20,000.00 for any one horse;
 02. animals insured for a greater sum had to be referred to the Managers of the Australian Bloodstock Insurance Pool who had the right of acceptance up to \$150,000.00;
 03. co-insurance in excess of \$150,000.00 could be arranged by the Australian Bloodstock Insurance Pool at rates to be agreed.

B. On or about 16th July 1981 M. Brown, of the Second Defendant, telephoned M. Willis of the Australian Bloodstock Insurance Pool and asked whether the Australian Bloodstock Insurance Pool could insure the horse for \$1,000,000.00.

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C. On 16th July 1981 Brown (for the Second Defendant) sent a telex to Bert Clarke (of the Australian Bloodstock Insurance Pool) and repeated the request referred to in sub-paragraph B above.

D. Between 16th July 1981 and 23 July 1981 Brown had a further telephone conversation with Willis and Clarke in which:

- 30
- .01 Brown was informed that the cover could be provided for the standard twelve month period as from 1 August 1981 at the rate of 3.25% on \$1,000,000.00;
 - .02 Brown asked Clarke in more or less the following words "what would the market be?". Clarke replied "Lloyds".

E. In relation to the period of cover Brown, by telex dated 23rd July 1981, asked Clarke "can we insure Asian Beau from 1st August 1981 to 1st November 1982?".

F. On 27 July 1981 Glenyse Fletcher of the Second Defendant sent a telex to Clarke asking "please advise if you will hold cover on Asian Beau for sum insured of \$1,000,000.00 as of 1 August 1981."

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G. On 28 July 1981 Clarke sent a telex to the Second Defendant saying that "cover placed W.E.F. (with effect from) 1/8/81 to 1/11/81 rate 3.25% S.I. (sum insured) \$1,000,000.00".

- H. On 30 July 1981 Glenyse Fletcher sent a No.5. Amended
 telex to Clarke saying "please hold cover on stallion "Asian Beau". Defence of
 Second
 Defendants
 23 June 1983
 (cont'd)
- (v) Save as set out above the First Defendant denies each and every allegation in paragraph 7A of the Statement of Claim. 10
- (vi) As regards paragraph 7B of the Statement of Claim, after the death of the horse the Second Defendant received from the Australian Bloodstock Insurance Pool a copy of the cover/debit note referred to in paragraph 7A(vii) of the Plaintiffs' Statement of Claim. Save as aforesaid the Second Defendant does not know whether the allegations in this paragraph are correct. 10
- (b) (i) as regards paragraph 8 of the Statement of Claim: 20
- A. the Second Defendant denies that the policies constituted offers made by the First Defendants to the Plaintiffs or any person authorised by the Plaintiffs to receive it on their behalf, alternatively
- B. if the policies did constitute such offers they could not have been accepted by the Plaintiffs as:
- .01 such offers were to effect insurance as co-insurers with the Australian Bloodstock Insurance Pool, 30
- .02 it was a fundamental condition of the offers that the Australian Bloodstock Insurance Pool would be a co-insurer,
- .03 the Australian Bloodstock Insurance Pool was not a co-insurer. 40
- C. Alternatively, if the policies constituted offers made prior to the death of the horse, they lapsed when the horse died.
- D. Alternatively, if the policies

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Amended Defence
of Second
Defendants

23 June 1983
(cont'd)

constituted offers made after the horse died, they were made by the First Defendants with full knowledge of the alleged non-disclosures and the First Defendants cannot rely thereon.

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E. The Second Defendant further denies that the policies constituted an acceptance of any offer made by the Plaintiffs or any duly authorised person on their behalf.

F. Alternatively, if the policies did so constitute an acceptance:

.01 it was a fundamental condition of the contract thereby formed that the Australian Bloodstock Insurance Pool would be a co-insurer.

.02 the Australian Bloodstock Insurance Pool was not a co-insurer.

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G. Further, alternatively, if the policies did so constitute an acceptance the acceptance took place by the First Defendants with full knowledge of the alleged non-disclosures and the First Defendants cannot rely thereon.

(ii) Alternatively the Second Defendant says that:

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A. the policies purported to be an acceptance by the First Defendants of a request made to them by Chandler Hargreaves Whittal & Co on or about 27 July 1981 allegedly on the Plaintiffs' behalf, to insure the horse.

B. Chandler Hargreaves Whittal & Co., was not authorised by the Plaintiffs or anyone else of their behalf to make the said request.

40

C. Alternatively to sub-paragraph B above the acceptance by the First Defendants of the said request was communicated to the Plaintiffs after the horse had died.

D. In the circumstances a contract of insurance constituted by the policies does not exist.

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Defence
of
Second
Defendants
23 June 1983
(cont'd)
- (c) Accordingly this paragraph is denied.
- (d) Alternatively if it is held that an interim contract of insurance was entered into the Second Defendant says that:
- (i) the interim contract was entered into between the Second Plaintiffs, represented by the Second Defendant, and the Australian Bloodstock Insurance Pool; 10
- (ii) in entering into the interim contract of insurance the Australian Bloodstock Insurance Pool was acting as a co-insurer (i.e. as a principal) and on behalf of the First Defendants as co-insurers;
- (iii) alternatively to sub-paragraph (ii) above, in entering into the interim contract of insurance the Australian Bloodstock Insurance Pool was acting on behalf of the First Defendants as insurers, and to the knowledge of the First Defendants and with their authority or the authority of Chandler Hargreaves Whittal & Co., (given on behalf of the First Defendants) the Australian Bloodstock Insurance Pool held out to the Second Defendant that it (i.e., the Pool) was acting as a co-insurer; 20 30
- (iv) in terms of the agreement between the Second Defendant and the Australian Bloodstock Insurance Pool (referred to in sub-paragraph 3(a) (iv)above) the Second Defendant was authorised to issue a cover note or policy of insurance in circumstances where the Pool had agreed to effect co-insurance in excess of \$150,000.00; 40
- (v) accordingly the knowledge of the Second Defendant as to the matters referred to in paragraphs 32(a) and (b) of the Statement of Claim and paragraph 8 of the First Defendants' Defence are accordingly to be imputed to the Australian Bloodstock Insurance Pool, and also to the First Defendants;

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Amended
Defence of
Second
Defendants
23 June 1983
(cont'd)

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(vi) alternatively the First Defendants are, in the premises, estopped from denying that the knowledge of the Second Defendants as to the matters referred to in paragraph 32(a) and (b) of the Statement of Claim and paragraph 8 of the First Defendants' Defence should be imputed to them;

(vii) in the premises the First Defendants are not entitled to repudiate the contract for interim cover.

4. Paragraphs 18, 19 and 20 of the Statement of Claim are admitted.

5. (a) Paragraph 21 of the Statement of Claim is denied.

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(b) In or about July 1981, at the instance of the Second Plaintiffs, the Second Defendant requested the then insurers of the said horse to agree to increase the insurance cover in respect of the horse to the sum of \$1,000,000.00 plus loss of use.

6. (a) The Second Defendant admits paragraph 22 of the Statement of Claim.

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(b) As regards paragraph 23 of the Statement of Claim the proposal sent to Wright had only been partially completed by the Second Defendant; save as aforesaid this paragraph is admitted.

7. As regards paragraph 24 of the Statement of Claim the Second Defendant admits that the said proposal was signed by the said Wright on behalf of the Second Plaintiffs and returned by him to the Second Defendant forthwith. The Second Defendant does not know whether the said Wright noticed the errors referred to therein and does not admit that he did not notice them.

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7A. The Second Defendant does not plead to paragraphs 25 and 26 of the Statement of Claim, as they are not relevant to the matters in issue between the parties, and makes no admission in relation thereto.

8. (a) As regards paragraph 27 of the Statement of Claim the Second

- Defendant repeats paragraph 3(a) above and denies all allegations inconsistent therewith.
- (b) The Second Defendant admits paragraph 28 of the Statement of Claim. 10
- (c) The Second Defendant denies paragraph 28A of the Statement of Claim.
- (d) As regards paragraph 29 of the Statement of Claim, on or about 31 July 1981 the Second Defendant sent the said proposal to the Australian Bloodstock Insurance Pool and not to Hudig Langeveldt Pty Ltd.
9. As regards paragraph 30 of the Statement of Claim the Second Defendant does not know whether Hudig Langeveldt arranged for the said policies to be issued. If it did so it acted without authority from the Second Defendant.
10. Paragraph 31 of the Statement of Claim is admitted. 20
11. As regards paragraph 32 of the Statement of Claim:
- (a) The Second Defendant admits that it knew that the said horse had suffered from colic in or about March 1981.
- (b) The Second Defendant knew that prior to August 1981 the horse was insured by insurers who had declined to increase the insurance to a sum of \$1,000,000.00; accordingly paragraph 32(b) is denied. 30
- (c) The Second Defendant denies paragraphs 32(c) and (d) of the Statement of Claim."
12. As regards paragraph 33 of the Statement of Claim:
- (a) The Second Defendant admits that the First Defendants have repudiated liability to the Plaintiffs by reason of the matters mentioned in paragraph 31(a) of the Statement of Claim. 40
- (b) The Second Defendant denies that the

No.5.
Amended
Defence of
Second
Defendants
23 June 1983
(cont'd)

First Defendants have repudiated liability by reason of the matters mentioned in paragraph 31(b) of the Statement of Claim.

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(c) The Second Defendant admits that the First Defendants have repudiated liability on the grounds of its alleged non-disclosure of the matters referred to in paragraph 33(a) of the Statement of Claim.

(d) Save as aforesaid paragraph 33 of the Statement of Claim is denied.

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(e) As the grounds (set out in paragraphs 31 and 33 of the Statement of Claim) on which the First Defendant repudiates liability are not material, the Second Defendant denies that the First Defendants are entitled to so repudiate; alternatively for the reasons set out in paragraphs 3(b)(i)D and 3(b)(i)G the First Defendants have waived their right to so repudiate.

(f) The Second Defendant however says that the First Defendants have no liability to the Plaintiffs as no valid contract of insurance was entered into between them and the Plaintiffs.

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(g) Alternatively if there was a valid contract of insurance the Second Defendant repeats paragraphs 3(b)(i)D, 3(b)(i)G and 3(d) above.

13. As regards paragraph 34 of the Statement of Claim the Second Defendant denies that it had any duty whatever to the Plaintiffs which arose other than in terms of the agreement between the parties. In the circumstances this paragraph is denied.

14. (a) The Second Defendant denies paragraphs 35 and 36 of the Statement of Claim.

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(b) (i) The Second Defendant repeats its denial that the First Defendants entered into any valid contract of insurance with the Plaintiffs;

(ii) Accordingly, even if it is held that the Second Defendant committed a breach of duty or was negligent is alleged (all of

<p>which is denied), the Plaintiffs did not, in consequence, suffer any loss;</p> <p>(iii) In amplification of the averment referred to in sub-paragraph (ii) above, had the Second Defendants not committed the alleged breach of duty, or had the Second Defendants not been negligent, the Plaintiffs would not have been entitled to recover any moneys from the First Defendants, as there was no valid contract of insurance between the parties.</p> <p>(c) Alternatively, if it is held that the contract alleged in paragraph 7A of the Statement of Claim is valid and binding, the Second Defendant denies that the First Defendants are entitled to deny liability as:</p> <p>(i) the Second Defendant denies that the said illness or ailment of the horse during 1981 was material;</p> <p>(ii) the Second Defendant denies that the previous insurance of the horse and the refusal of the previous insurer to insure the horse for \$1,000,000.00 were material;</p> <p>(iii) in any event the Second Defendant informed the Australian Bloodstock Insurance Pool, who were the First Defendant's agents for the purposes of receiving information as to the risk insured or who held themselves out to be such, the First Defendants' agents, by telex dated 16 July 1981 that there was an existing Underwriter in respect of the horse who had refused to increase the insurance cover then existing which was for an amount of \$650,000. This information was also given orally by Malcolm Brown (on behalf of the Second Defendant) to Malcolm Willis (on behalf of the Australian Bloodstock Insurance Pool between 16 July 1981 and 23 July 1981).</p> <p>(iv) Alternatively and in any event if</p>	<p>No.5. Amended Defence of Second Defendants 23 June 1983 (cont'd)</p> <p>10</p> <p>20</p> <p>30</p> <p>40</p>
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No.5.
Amended
Defence of
Second
Defendants

23 June (d)
(cont'd)

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there was an interim contract of insurance the Second Defendant repeats paragraphs 3(b)(i)D, 3(b)(i)G and 3(d) above.

Further and in the alternative, if it is held that a valid and binding contract exists between the Plaintiffs and the First Defendants, and that the debit note from Hudig Langeveldt to the Second Defendant dated 31 July 1981 formed part of the contract of insurance:

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- (i) the debit note stipulated that the insurance provided in terms thereof was to be "subject to the terms and conditions of the insuring company's policy";
- (ii) the said debit note provided that the insurer was to be "Lloyds-Chandler Hargreaves Whittal & Company";
- (iii) in the premises the insurance cover provided by the said debit note was subject to the terms and conditions of the appropriate insurance policy usually issued by Lloyds-Chandler Hargreaves Whittal & Company Limited
- (iv) an appropriate insurance policy issued by Lloyds Chandler Hargreaves Whittal & Co does not exist, accordingly the provision referred to in sub-paragraph 14(d)(i) above is meaningless and of no effect.
- (v) the matters referred to in paragraphs 31, 32 and 33 were not material to the risk.

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(e) In the further alternative, if it is held that the policies constitute a valid and binding contract of insurance:

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- (i) the Second Defendant denies that the Plaintiffs were, at the date of the horse's death, entitled to an indemnity under the said policies as the Plaintiffs had not agreed to accept those policies; alternatively
- (ii) the Second Defendant denies that it was a term of the policies that the proposal form was the basis thereof;

- No.5.
Amended
Defence
of
Second
Defendants
23 June
1983
(cont'd)
- (iii) further alternatively, the First Defendants agreed to insure the Plaintiffs prior to the receipt by them of the proposal form; accordingly the proposal form did not form the basis of and had no bearing on the policies.
- (f) In the further alternative, if it is held that a valid and binding contract of insurance exists between the Plaintiffs and the First Defendants and that such contract contains a stipulation that the proposal form was the basis of the contract of insurance between the parties the Second Defendant avers that:
- (i) As the insurance cover was granted before receipt of the proposal form such a stipulation was inapplicable to the cover in question.
- (ii) It was implicit in the contract of insurance that such a stipulation would have no effect. 10
- (iii) The matters referred to in paragraphs 31, 32 and 33 were not material to the risk".
15. Alternatively, the Second Defendant says that the cause of any damage suffered by the Plaintiffs was their own negligence in signing the proposal without noticing the errors therein.
16. The Second Defendant admits paragraph 37 of the Statement of Claim.
17. As regards paragraph 38 of the Statement of Claim: 30
- (a) The Second Defendant admits that it was an implied term of the said agreement that the Second Defendant would exercise reasonable care and skill in preparing proposals including the said proposal.
- (b) The Second Defendant denies that it was an implied term of the said agreement that, in the case of the said proposal, it would check the proposal after it had been signed on behalf of the Plaintiffs and before 40

No.5.
Amended Defence
of Second
Defendants
23 June 1983
(cont'd)

despatching it.

(c) The Second Defendant admits paragraph 38(a) of the Statement of Claim.

(d) The Second Defendant denies paragraphs 38(b) and (c) of the Statement of Claim.

18. As regards paragraph 39 of the Statement of Claim:

10 (a) The Second Defendant denies the allegations contained therein;

(b) (i) It was the duty of the Plaintiffs, as proposers for insurance, to ensure that the information given in the proposal was correct.

20 (ii) In breach of that duty, the Plaintiffs failed to rectify any erroneous answers inserted in the form by the Second Defendant.

(iii) In the premises the sole and effective cause of the Plaintiffs' loss is their own breach of duty.

(c) Alternatively the Second Defendant repeats paragraph 15 above."

19. The Second Defendant denies paragraphs 40 and 41 of the Statement of Claim and in any event repeats paragraphs 14(b) above.

30 20. The Second Defendant admits paragraph 42 of the Statement of Claim.

DAVID IPP
COUNSEL

No.6.
Amended Reply
to the Defence
of First
Defendants
23 June 1983

NO.6.

AMENDED REPLY TO THE DEFENCE OF FIRST DEFENDANTS
AMENDED AT TRIAL

1. The Plaintiffs deny the allegations in paragraph 5 of the Amended Defence.

2. The allegations in paragraph 6 are not admitted.

3. The Plaintiffs admit that the proposal and declaration dated 30th July 1981 contained questions which were answered and made respectively on behalf of the Second Plaintiffs as alleged in Paragraph 7 of the Defence of the First Defendants but otherwise deny each and every allegation therein.

No.6.
Amended
Reply to
Defence of
First
Defendants
23 June 1983
(cont'd)

4. The Plaintiffs admit the allegations in paragraph 8 of the Defence of the First Defendants save that it is denied that the previous insurer had declined to renew the insurance for the sum then proposed by and on behalf of the Plaintiffs.

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5. As to paragraph 9 the Plaintiffs say that:-

- (a) prior to the making of the said contract of insurance the First Defendants did not require the First Plaintiff to make any proposal or declaration in relation thereto;
- (b) the First Defendants thereby impliedly represented to the First Plaintiff that they did not require the First Plaintiff to make any proposal or disclose material or any facts to them for the purposes of the said contract of insurance;
- (c) the First Plaintiff acted upon the said representation by refraining from making any proposal or any disclosure to the First Defendants or taking any steps to propose any alternative insurance;
- (d) the First Defendants are estopped from asserting against the First Plaintiff non-disclosure as alleged or at all;
- (e) they do not admit that the Second Plaintiffs acted on behalf of the First Plaintiff in obtaining the said policy;
- (f) they do not admit that the fact that "Asian Beau" suffered the said ailments or illnesses was material;
- (g) the First Defendants were not entitled to avoid the policy;
- (h) save as aforesaid, they admit the allegations in paragraph 9 of the Defence of the First Defendants.

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No.6.
Amended
Reply to the
Defence of
First
Defendants
23 June 1983
(cont'd)

6. As to paragraph 10 of the Defence of the First Defendants the Plaintiffs say that:-

- (a) they admit that the First Defendants subsequently purported to avoid the policy;
- (b) save as aforesaid, they do not admit the allegations in paragraph 10 of the Defence to the First Defendants.

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7. As to paragraph 13 of the Amended Defence, the Plaintiffs aver that the First Defendants, by paragraph 13 of their Defence, ratified the issue of the said cover/debit note and that if (which is not admitted) the said cover/debit note was issued without the authority of the First Defendants, they are now precluded from relying upon want of authority.

8. The Plaintiffs aver as to paragraph 21 of the Amended Defence of the First Defendants:

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(a) that the risk was accepted by each of the First Defendants by way of co-insurance with the other First Defendants;

(b) that the First Defendants issued the Combined Companies Policies by way of primary insurance in relation to the whole of the risk, and to the Plaintiffs and not by way of reinsurance;

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(c) that if (which is not admitted) the alleged representation was made, it was made without the authority of the Plaintiffs;

(d) that by telex dated 7th May, 1982 Hudig Langeveldt Pty Ltd advised Chandler Whittall Hargreaves & Co Ltd as agents for the First Defendants that there was no other insurance in respect of the said horse than that placed with the First Defendants;

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(e) that in any event the First Defendants have waived any complaint they may have had in relation to the alleged misrepresentation by their conduct in these proceedings in failing to rely thereon until June 1983, and by retaining the premium.

9. The Plaintiffs do not admit the allegations in No.6. paragraph 22 of the Amended Defence of the First Defendants, and they do not admit that if the alleged misrepresentation was made (which is not admitted) it was material to the risk. Amended Reply to the Defence of First Defendants 23 June 1983 (cont'd)
10. As to paragraph 23 of the Amended Defence of the First Defendant the Plaintiffs aver that by retaining the premium, and by electing to avoid the policies by reason of non-disclosure the First Defendants waived any right they may have had to rescind the policies by reason of the alleged misrepresentations. 10
11. Save for admissions set out above the Plaintiffs do not admit the allegations in the Amended Defence of the First Defendants and join issue thereon.

R.H.B. PRINGLE
COUNSEL

NO.7.

JUDGMENT OF THE HONOURABLE MR. JUSTICE WALLACE

DATED AND ENTERED THE 15TH DAY OF JULY 1983

No.7.
Judgment of
Wallace J.
15 July 1983

THIS ACTION having been tried on the 20th, 21st, 22nd, 23rd and 24th days of June 1983, before the Honourable Mr. Justice Wallace at the Supreme Court, Perth in the presence of Mr. D.K. Malcolm, one of Her Majesty's Counsel, with him, Mr.R.H.B. Pringle of Counsel for the Plaintiff, Mr. T.W. McAuliffe of Counsel for the First Defendants and Mr. D.A. Ipp and Mr. K.J. Martin of Counsel for the Second Defendant and the Judge having ordered that the action for judgment and the same standing for judgment this day and the Judge having ordered that judgment as hereinafter provided by entered for the Plaintiffs and for the Second Defendant IT IS ADJUDGED AND ORDERED that:-

1. The First Defendants do pay the First Plaintiff \$433,500.19.
2. The First Defendants do pay the Second Plaintiffs \$731,704.81.
3. The Plaintiff's claim against the Second Defendant do stand dismissed out of this Court. 40
4. The First Defendants do pay the Plaintiff's

No.7.
Judgment
of
Wallace J.
15 July 1983
(cont'd)

costs of the action to be taxed, according to the scale in the Fourth Schedule to the Rules of the Supreme Court, without regard to the limit prescribed under Order 66 on the basis that the value of the subject matter of the Plaintiffs' claims is the sum of \$1,165,205.00 with certificates for two Counsel and 4½ extra days.

- 10 5. The First Defendants do pay half the Second Defendant's costs of the action to be taxed on the basis that the value of the subject matter of the action is the sum of \$1,165,205.00 with certificates for two Counsel and for 4½ extra days.
6. Execution of this judgment be stayed for 21 days.

No.8.
Reasons for
Judgment of
Wallace J.
15 July 1983
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NO. 8.

REASONS FOR JUDGMENT AND REASONS FOR JUDGMENT
ON COSTS

ORDER OF THE HONOURABLE MR. JUSTICE WALLACE

DATED 15TH JULY 1983

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In January 1980 the Second Plaintiffs (Goldberg) were desirous of purchasing Asian Beau a champion stallion racehorse for \$650,000. The purchase was ultimately financed by the First Plaintiff (National) acquiring the stallion and leasing it to the Goldbergs in May 1980. the lease terms obliged Goldberg to insure the stallion. A policy in accordance with the relevant covenant was effected with the stallion valued at \$650,000. The lease further provided that National is entitled to receive allmonies which may become payable to Goldbert under any policy of insurance effected.

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In June of 1981 an offer was made to Goldbert to purchase Asian Beau for \$1,000,000.00. The offer was declined but it immediate became apparent that the insurance cover on the animal should be increased at least to \$1,000,000.00. The Second Defendants (A.I.B.) who had been Goldbert's insurance brokers for in excess of ten years accepted the value of £1,000,000.00 placed upon the horse and the fact is now common

ground between the parties. In July 1981 A.I.B. set about increasing the insurance cover over Asian Beau but the existing insurer was not receptive to its request. An inquiry was then made of an account executive of the Australian Bloodstock Insurance Pool (ABIP), one Clarke, employed by Insurance Brokers Hudig, Langeveldt Pty Ltd (Hudig) in Sydney. Clarke was informed that the existing underwriter would not increase the existing cover over Asian Beau. See texel 16th July 1981 document No. 26. On the 23rd July 1981 Brown of A.I.B. advised Wright racing manager of the Goldbergs in writing that an underwriter for \$1,000,000.00 had been found and that cover had been placed from the 1st August 1981. A proposal form was enclosed in Brown's letter. He required the proposal duly signed and veterinary certificates and valuation returned to A.I.B.

No.8.
Reasons
for
Judgment
of
Wallace J.
15 July 1983
(cont'd)

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In March 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 dextrans 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.

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There is no dispute between Goldberg and Brown of A.I.B. that until the appointment of Wright, the Goldbergs were entitled to reply upon A.I.B. "completely" whatever that term may mean, for the purpose of providing valid and effective cover over all animals offered for insurance purposes. It is Brown's evidence that with the appointment of Wright this contractual position changed and that Wright assumed the responsibility formerly held by A.I.B. Goldberg's personal assistants, Geraldine

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No.8.
Reasons for
Judgment of
Wallace J.
15 July 1983
(cont'd)

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Langouland and Wright dispute this contention. At no stage did Brown or any of his staff inform Goldbert that A.I.B. was no longer contractually bound to attend to insurance matters for Goldberg as before. Wright was formerly a journalist and knew nothing about insurance. A.I.B. continued to answer all questions sought in its many proposal forms and tendered them to, inter alia, Wright to sign. Wright had been told by Goldberg that he could rely implicitly upon A.I.B. and he, rather unwisely, did not check the answers to questions posed in the proposal forwarded to him in Brown's letter of the 23rd July 1981. Wright's evidence is that he glanced at the proposal form to see that particulars of the horse were correct and the sum of insurance sought was as required and then signed the proposal. To the questions posed:

" 3(a) Are the animals sound and healthy?

Yes

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(b) Give full particulars of defects or ailments, illness or disease during last twelve months.

No.

6(a) Are the animals now insured or have they been insured previously. If so give details including names of insurers.

No.

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(b) Has any insurer ever declined or refused to renew your livestock insurance. If so, give details.

No.

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In view of the March 1981 colic attack and the existence of insurance cover to \$650,000 and the refusal of that insurer to increase such cover it is now contended that the answers so negligently provided by A.I.B. constitute misrepresentation and non disclosure. A.I.B. forwarded the proposal signed by Wright to Clarke in Sydney who filed that document away. It was never produced to the First Defendants. To the extent that it may prove relevant I do not accept Brown's evidence that the contractual position of A.I.B. changed once Wright was appointed by Goldberg.

On the 23rd July 1981 Dr. T.J. Ahern Bachelor of Veterinary Science certified that Asian Beau was "in good health and condition and external genital organs appeared normal and in my opinion a fit subject for insurance and breeding purposes." Dr. Ahern had treated Asian beau at the time of its March 1981 colic attack. In his opinion Asian Beau was then suffering from sand impaction colic. All of the evidence would suggest that with the first rains and appearance of fresh grass shoots horses in Western Australia are prone to sand colic. The grass and young shoots with roots containing sand are consumed and as a result the sand may gradually build up in the large colon from whence by virtue of physical action on the animals behalf it may progress to a smaller section of that organ, cause a blockage and subsequent pain "this is the syndrome, or whatever, of sand colic." Dr. Ahern's practice was equine in nature and he saw personally about 20 cases of sand colic in a year, sometimes up to 30 and 35.

No.8.
Reasons
for
Judgment
of
Wallace J.
15 July 1983
(cont'd)

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Dr. Ahern saw Asian Beau after its discharge from Murdoch University and expressed the opinion that it returned to a completely normal healthy state. In his further opinion once the horse recovered from the attack of sand colic it was not necessary for him to refer thereto in the July 1981 certificate which he gave for insurance purposes. He had never heard of sand colic associated with impaction of sand in the caecum of the animal. He was aware of the regular worming programme conducted at Jane Brook Stud where the horse was under expert care and attention. Such treatment would control development of parasites in the cranial-mesenteric artery and thus preclude affection of the blood supply to the gut and intestines. In his opinion Asian Beau was not suffering from any parasitic activity.

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On the 24th February, 1982 Asian Beau was again admitted to Murdoch University Veterinary Hospital. The animal was showing clinical signs of sever acute abdominal pain (colic) of unknown origin. After treatment lasting some days a tentative diagnosis of ruptured bowel and an 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:

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"The findings indicate caecal impaction and

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Judgment of
Wallace J.
15 July 1983
(cont'd)

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 mobility".

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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.

The Interim Contract of Insurance

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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 of 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 Lloyds brokers Chandler, Hargreaves, Whittal & 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:

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"All terms, clauses and condition , 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 except by Underwriters hereon."

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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.

No.8.
Reasons
for
Judgment of
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15 July 1983
(cont'd)

The First Defendants' only representative witness was non-marine Underwriter Kevin Patrick Regan whose company acted as a re-insurer of that portion of the cover taken by Assurances Generales de France. He was first approached by a representative of Chandler with that firm's insurance "slip". He initialled the back of the "slip" indicating his firm's willingness to re-insure Assurances Generales de France should that firm agree to take up portion of the cover sought. When first shown the "slip" he formed the opinion that A.B.I.P. as "co-assured" shown thereon would be lead insurer in Australia participating in the cover sought and looking after the interests of all other Underwriters involved. The "slip" contains the same condition which ultimately appeared in Chandlers Cover Note. Regan was quite unaware of the fact that A.B.I.P. had not participated as a co-insurer until such time as the claim arising out of the horse's death was made.

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Under cross-examination Mr. Regan conceded that it would not have mattered to him had A.B.I.P. taken up only 1% of the cover sought. He had made no enquiry to determine what amount of insurance would be retained by A.B.I.P. as I understand his evidence his agreement to bind his company was based upon the understanding that by virtue of A.B.I.P.'s participation in the cover an Australian firm with expertise of the local market conditions would handle the proposal forms, veterinary certificates and use the wording of their policy. Such a company would also handle any claims. Both Willis and Clarke considered that they were protecting the interests of the First Defendants at all stages.

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The Contracts of Insurance

On the 13th August 1981 A.I.B. issued a bloodstock policy to the Plaintiffs under the impression that the whole of the \$1,000,000 cover had been placed with A.B.I.P. Subsequently, on the 19th October 1981 Chandlers issued policies on behalf of the First Defendants in terms of the insurance "slip". Those policies, save one, were forwarded to A.B.I.P. in Sydney and as it appears was the position with all documentation, were retained there on the file relating to Asian Beau. It was not until the 9th June 1981 that the Plaintiff's solicitors came into the possession of those documents.

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No.8.
Reasons for
Judgment of
Wallace J.
15 July 1983
(cont'd)

Materiality

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The First Defendants rely heavily upon the evidence of Professor Rex Milton Butterfield, Professor of Veterinary Anatomy at the University of Sydney. The Professor had ten years' experience as a private practitioner, predominantly with horses in South Australia, six years as a research Fellow in the University of Queensland and has been in his present post for approximately 15. He has had no experience of sand colic in Western Australia or for that matter, elsewhere. After reading the reports of Dr. Hilbert relating to the March 1981 colic attack and also that relating to the horse's death in March 1982, he found it difficult to say what relationship there would be between the March 1981 attack and the animal's eventual death. The Professor stated "the fact that he did suffer two distinct attacks of colic approximately a year apart suggests that the first attack may, in some way, have been related to the second but it is impossible to be sure of that. The only common factor between the two attacks is the presence of sand in the gut of the animal - a small quantity from the Necropsy report - and the sand impaction involved in the March 1981 attack".

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Nevertheless it was argued that because of the unknown aetiology of colic the treatment prescribed by Dr. Hilbert to combat parasites led the Professor to believe that he would have advised an insurance company to exclude the possibility of colic in any insurance cover at least until the animal had experienced good health for twelve months. I am quite unpersuaded by the Professor's evidence. The evidence of the four veterinary surgeons called on behalf of the Plaintiffs and their knowledge of conditions in Western Australia is far more persuasive. I accept the evidence that sand colic is common in the State of Western Australia, is treated regularly and upon recovery horses show no residual disability. The evidence of Dr. Huxtable excludes the possibility of parasitical infection as a cause of the death of the animal and the existence of compacted ingesta in the caecum is quite different to the sand impaction colic which occurred in March of 1981.

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Drs. Ahern, Williams and Smith would not have qualified Asian Beau for insurance purposes because of the 1981 colic attack. Each of those veterinary surgeons being experienced in the equine area had knowledge of Asian Beau personally and knew of the 1981 attack. Peter Gannon, former jockey and

bloodstock manager of a large stock firm knew Asian Beau, confirmed its value as being unaffected for insurance purposes and in his experience he has not found insurers reluctant to insure animals which have suffered from sand colic in the past nor has he experienced the imposition of any increased premium.

No.8.
Reasons
for
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of
Wallace J.
15 July 1983
(cont'd)

Finally the evidence of the only witness called by the First Defendants makes it clear that in the case of bloodstock co-insurance relating to a horse in Australia, London underwriters would be guided by Australian veterinary opinion in assessing any question of risk. A prudent insurer upon enquiry would surely have received the same veterinary certificate as issued from Dr. Ahern on 23rd July 1981. Nor is there evidence of the First Defendant's attitude had the existence of sand colic been revealed.

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Babatsikos -v- Car Owners Mutual (1970)
V.R. 297 at 312 Pope J.

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The Pleadings

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 behalf 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.

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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.

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Should this be an erroneous approach Chandlers knew that A.B.I.P. had not participated on the

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No.8.
Reasons for
Judgment of
Wallace J.
15 July 1983
(cont'd)

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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 Defendants' 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.

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There is ample authority to support the view that a policy is not issued to a person until it is delivered to him. See Koon Wing Lau v. Calwell (1949) 80 C.L.R. 532 at 574, McGillivray and Parkington on Insurance Laws 7th Edn., para 215 and 326 and the authorities therein mentioned.

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Goldberg never received the policies at all and his solicitors did not receive them until after the claim arose.

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Then the First Defendants plead that if there was a contract providing for interim cover both the "slip" and Cover Note issued on the 25th August 1981 incorporate "all terms, clauses and conditions as per policy"- meaning the A.B.I.P. Bloodstock Insurance Policy and it was a condition of the then standard printed form of the A.B.I.P. policy that the Plaintiffs had completed a written proposal and declaration which should be the basis of the contract of insurance and be considered as incorporated therein. The interim cover was effected prior to the proposal being signed by Wright only but in any event no A.B.I.P. policy issued. In my opinion the policies received by A.B.I.P. did not supersede the interim contracts. See Neil -v- South Lancashire Insurance Co (1932) S.C.35. This would not preclude, however, the First Defendants' right to repudiate liability if there had been a non-disclosure of a material fact. I have already said sufficient to indicate that in my opinion the 1981 colic incident was not a material fact which the Plaintiffs were obliged to disclose.

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Then, the First Defendants plead that the position was misrepresented to them by Chandlers in that they would not have entered into the contract for insurance if A.B.I.P. had not been represented to them as being involved. I am unable to find that such a misrepresentation arose. Rather am I of the opinion that the "slip" was complied with

by all participants in the cover sought and that at all times it was intended that A.B.I.P. would represent the First Defendants.

No.8.
Reasons
for Judgment
of
Wallace J.
15 July 1983
(cont'd)

Finally, there is the plea of nondisclosure of the existing insurance cover of \$650,000 and the fact that the relevant underwriter had declined to increase that cover. Prior to the interim contract being effected however A.B.I.P. was aware of both these facts. From the 16th July 1981 the first telex enquiry revealed this information. In addition Willis, the manager of A.B.I.P. knew of it from Booker the then existing insurer's agent shortly thereafter. And as I have said before A.B.I.P. was the agent of the First Defendants once each of them signed Chandler's "slip".

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For these reasons I am of the opinion that the Plaintiffs' claims succeed against the First Defendants in terms of paras. 42A(1) and B(3) of the Statement of Claim. The Plaintiffs are therefore not entitled to succeed against the Second Defendants on their claims. Since negligence on its part is properly conceded however and I am not of the opinion that the Second Plaintiff was guilty of contributory negligence there remains the issue of its costs to be determined. I invite further argument on the question of interest and costs with the request that a minute of proposed orders be prepared.

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NO.8.

REASONS FOR JUDGEMENT ON COSTS OF
MR. JUSTICE WALLACE

15 JULY 1983

No.8.
Reasons for
Judgment on
costs of
Wallace J.
15 July 1983

I have been asked to express reasons for limiting the Second Defendant's Order for costs as against the First Defendants to one half of the full entitlement had the Second Defendant been entirely successful. There is no argument but that the Second Defendant was properly joined in the alternative in the proceedings brought by the Plaintiffs. It was the broker which contracted to provide the Plaintiffs with the required insurance cover. At trial the Second Defendant conceded its negligence in the preparation of its proposal form but its pleading denied the existence of such negligence, pleaded the contributory negligence of the Plaintiffs and further pleaded the denial of the existence of any contractual duty to secure the insurance it undertook to provide. It failed on all of these issues. It succeeded only on the

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No.8. issue of materiality. In my opinion it was the
 Reasons for negligence and contractual breach of duty of the
 Judgment on Second Defendant in properly securing the necessary
 costs of insurance cover in the first place and making sure
 Wallace J. that such cover was in fact obtained in the second
 15 July 1983 place which brought about the litigation. Since
 (cont'd) it succeeded only on the issue of materiality it
 seemed to me as with Sholl J. in Craven v. South
 British Insurance Co Ltd (1952) V.L.R. 260 at
 10 p.272 that the Second Defendant's costs should be
 limited to a Taxing Order covering half of its
 costs without any enlargement of the scale.

No.9. NO 9
 Order of ORDER OF MR JUSTICE KENNEDY GRANTING FINAL LEAVE
 Kennedy J. TO APPEAL
 granting final leave to appeal 28 OCTOBER 1983
 28 October 1983

IN THE SUPREME COURT) NO: 1957 OF 1982
 OF WESTERN AUSTRALIA)

20 APPEAL TO HER MAJESTY) EAGLE STAR INSURANCE CO LTD
 IN COUNCIL) ENNIA INSURANCE CO (UK) LTD
 ASSURANCES GENERALES de
 FRANCE (London Branch)
 B E T W E E N : PRUDENTIAL ASSURANCE CO LTD
 A A MUTUAL INTERNATIONAL
 INSURANCE CO LIMITED
 EQUINE & LIVESTOCK
 INSURANCE CO LIMITED and
 UNION ATLANTIQUE
 d'ASSURANCES S.A.

30 Appellants
 (First Defendants)

-and-

NATIONAL WESTMINSTER
 FINANCE AUSTRALIA LTD

First Respondent
 (First Plaintiff)

-and-

JOSEPH MAXIM GOLDBERG and
 VIVIENNE GOLDBERG t/a
 "SHAMROCK PARK"

40 Second Respondents
Second Plaintiffs

-and-

AUSTRALIAN INSURANCE
BROKERS LIMITED

Third Respondents
(Second Defendant)

BEFORE THE HONOURABLE MR. JUSTICE KENNEDY the 28th
day of October, 1983.

No.9.
Order of
Kennedy J.
granting
final
final
leave to
appeal
28 Oct 1983
(cont'd)

Upon the application of the Appellants (First
Defendants) by Notice of Motion dated the 21st
day of October, 1983 and upon hearing the solicitors
for the parties IT IS ORDERED that:-

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1. The Appellants (First Defendants) have final
leave to appeal to Her Majesty in Council from
the judgment herein of the Honourable Mr.
Justice Wallace given the 15th day of July,
1983.
2. The costs of the application be costs in the
appeal.

By the Court

Bruce Dixon
DEPUTY REGISTRAR

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THIS ORDER was extracted by Messrs. Jackson
McDonald & Co., of 6 Sherwood Court, Perth:
Solicitors for the Appellants (First Defendants)
REF: KJL:BARL6110-001. TEL: 325 0291.