Privy Council Appeal No. 16 of 1984

Eagle Star Insurance Company Limited and others — *Appellants*

v.

National Westminster Finance Australia Limited and others — *Respondents*

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY 1985

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD WILBERFORCE
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN

*[Delivered by **Lord Roskill**]*

This appeal by a number of insurance companies, several English and one French and one Belgian, arises out of insurance cover afforded by those companies ("underwriters") in respect of a valuable stallion named *Asian Beau*. The stallion died on 4th March 1982 when so insured for $1,000,000 (their Lordships would mention that all references in this opinion to dollars are Australian dollars.) The initial beneficiaries of that cover were two, National Westminster Finance Australia Ltd., formerly called Lombard Australia Ltd., ("Nat-West") in whom legal title to the stallion was vested, and Mr. and Mrs. Goldberg ("the Goldbergs") as lessees of the stallion from that company. This leasing arose out of arrangements made for financing the purchase of the stallion and is not relevant to the present dispute. For all practical purposes, the Goldbergs were the stallion's owners and, as a result of arrangements made since the trial of the action out of which this appeal arises, are alone interested in that cover. It should be explained that Mr. and Mrs. Goldberg have wholly discharged their remaining obligations to Nat-West, and that although Nat-West are also respondents to this appeal, having initially

[2] been properly joined with the Goldbergs as plaintiffs

in the action, they were not separately represented before the Board, nor was any argument advanced on their behalf.

The Goldbergs had been owners of racehorses since the early 1970s - Mr. Goldberg had originally been an architect. In about 1979, they started a stud. To this end they bought the Jane Brook Stud, some five miles from their own racing establishment at Shamrock Park. The Goldbergs naturally kept their racehorses insured and for this purpose employed Australian Insurance Brokers Ltd. ("AIB") with whom Mr. Goldberg had had a long-standing business relationship with regard to many insurances other than those which related to racehorses.

Their Lordships will, in due course, have to relate in considerable detail how the cover underwritten on the stallion came to be arranged. Suffice it to say at this juncture that, following the stallion's death, a claim was made upon underwriters. Underwriters rejected the claim and sought to avoid the policies on the grounds both of misrepresentation and of non-disclosure. The Goldbergs thereupon sued underwriters in the Supreme Court of Western Australia to recover $1,000,000. But, lest their claim against underwriters should fail and underwriters be held entitled to avoid the policies, they joined AIB as co-defendants alleging in the alternative against them that they had been guilty of breach of contract and of negligence in arranging a cover which, in the event, proved to be voidable and thus ineffective. The case appears to have been argued in the court below on the basis that if the claim against underwriters failed, the claim against the AIB must succeed and to the same extent.

The trial of the action occupied five days between Monday, 20th June and Friday, 24th June 1983 in the Supreme Court of Western Australia sitting in Perth, before Wallace J. The learned judge gave his judgment on 15th July 1983. That judgment was in favour of the Goldbergs and Nat-West for the full amount of their combined claims. He dismissed the claim against AIB. But while ordering underwriters to pay the whole of the Goldberg's and Nat-West's costs, he only ordered them to pay one half of AIB's costs for reasons which he gave in a short supplementary judgment. It was in this latter judgment alone that the learned judge dealt with the alternative claim against AIB. He did this very briefly, no doubt for the reason that in the light of his decision against underwriters, the alternative claim against AIB ceased to be of importance. It should, however, be noted at this stage that the learned judge held that AIB had been guilty of breach of contract and of negligence in the performance of their duties to the Goldbergs and to Nat-West.

Subsequently, on 28th October 1983, Kennedy J. granted underwriters leave to appeal to this Board.

It now becomes necessary for their Lordships to relate in considerable detail the confused and complex story which has led to this litigation. For the sake of simplicity, they will endeavour to do so in chronological order. Early in March 1981, the stallion suffered an attack of sand colic. On 11th March 1981, the stallion was taken to hospital. On 11th March 1981, a clinical examination revealed that it was suffering from severe abdominal pain. Ultimately, a big bowel obstruction was removed when the stallion passed a large quantity of sand in its manure. On 16th March 1981, the stallion was discharged from hospital. Two reports by veterinary surgeons on the stallion's condition, one dated 18th March and the other dated 7th April 1981, were in evidence at the trial. The latter read, so far as material, thus:

> "He appears to have recovered from his recent bouts of colic. He has lost some condition but appears to be recuperating satisfactorily. His appetite and demeanour are excellent and there has been no recurrence of any colic since hospitalisation."

The Goldbergs had at once notified AIB of this attack of sand colic, and they in turn notified the agents of the underwriters with whom the stallion was then insured in the sum of $650,000. It is important to note that AIB, and in particular one of their employees named Mr. Brown, were thus at all times well aware that the stallion had suffered this illness.

In June 1981, some three months after the sand colic attack, the Goldbergs were offered $1,000,000 for the stallion. It is clear from the documents that the stallion had considerable potential for breeding purposes. This offer was refused but the fact that it had been made showed that the stallion was then substantially under-insured at $650,000. On 30th June 1981, Mr. Wright, the Goldberg's racing manager, wrote to Mr. Carter of AIB, Mr. Brown's subordinate, stating at considerable length why he thought the stallion was under-insured. Mr. Brown thereupon approached the agents of the underwriters on the existing cover. They refused to agree an increased value of $1,000,000. Mr. Brown thereupon first telephoned to a Mr. Willis, informed him of this refusal and asked if Mr. Willis could arrange the $1,000,000 now required. Mr. Brown then followed this conversation with a telex, dated 16th July 1981, to a Mr. Clarke who was Mr. Willis's subordinate, asking for this increase and informing him "existing underwriters won't increase from $650,000".

It is necessary now to explain that Mr. Clarke was an account executive with Hudig Langeveldt Pty Ltd. ("Hudig"), insurance brokers of Sydney, and Mr. Willis was his superior. Hudig, in addition to being insurance brokers, also managed the Australian Bloodstock Insurance Pool ("the Pool"). The Pool is sometimes referred to in the documents as "ABIP". The Pool appears to have been a syndicate of insurance companies, the composition varying from time to time, who insured bloodstock in Australia. But the Pool at all material times had an underwriting agreement with AIB under which AIB was authorised, albeit within strict limits, to issue policies up to $20,000 on any one horse. Any proposal for insurance for a greater amount than $20,000 up to $150,000 had to be referred to Hudig as managers, and it appears that it was not the practice of the Pool or of Hudig to accept insurances beyond that higher figure though they might in such cases arrange what was described as co-insurance in excess of that amount. It is clear from the evidence given at the trial and indeed from many of the documents that AIB, the Pool and Hudig and their various respective employees were closely associated with one another. It is also apparent that those employees frequently failed to distinguish between the several capacities in which each was, from time to time, called upon to act and that this failure was responsible for much of the confusion which subsequently arose. What is especially important to note at this stage is that AIB told both the Pool and Hudig of the refusal of the underwriters then on risk on the stallion to increase the cover to the figure for which AIB had been instructed by the Goldbergs to seek cover.

On, or shortly before 23rd July 1981, there was another telephone conversation between Mr. Brown and Mr. Willis, as a result of which, on the same day, Mr. Brown sent Mr. Clarke another telex reading - so far as material - "*Asian Beau* will be covered for $1,000,000 from 1.8.81 ... Can we insure *Asian Beau* from 1.8.81 to 1.11.82 so we don't have to worry about renewing again at 1.11.81 ...". That last mentioned date was the expiry date of the then cover.

It is at this point that the well-known Lloyds brokers, Chandler, Hargreaves and Whittall ("Chandlers") come into the story. On 27th July 1981, Hudig in the person of Mr. Clarke, telexed Mr. Trend of Chandlers as follows:-

"Please place the following cover with effect from 1.8.81 to 1.11.82 and confirm.
Insured: J. and V. Goldberg
.....
Lombard Australia Ltd (lessee).
Interest: Stallion 'Asian Beau'

Age: rising 6 years old
Colour: black
Cover: ARM plus ASD Rate 3.25%
Sum insured: $1,000,000.
Await your confirmation."

Chandlers in accordance with the normal practice of the London Insurance Market prepared a slip bearing their name. It appears that the learned trial judge was not only not vouchsafed a sight of the original slip but was not even given a complete copy. Their Lordships asked to see the original which ultimately they were shown together with a further slip which had been sent to Brussels for formal acceptance by the Belgian insurance company already mentioned. It is necessary to set out in full most of the contents of the slip:

"TYPE: Bloodstock Co-Insurance. All risks of Mortality and Accident, Sickness or Disease Infertility

FORM: 'J'

CO-ASSURED: Australian Bloodstock Insurance Pool

ASSURED: J. & V. Goldberg ... and Lombard Australia Ltd. (Lessee) A.T.I.M.A.

PERIOD: From 1st August 1981 to 1st November 1982 both days inclusive

INTEREST: "Asian Beau" (1975) Stallion

SUM INSURED: As $1,000,000

SITUATION: Whilst anywhere in Australia &/or New Zealand including transits within and between said countries.

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

PREMIUM: 3.25%

30% Discount including tax

INFORMATION: Use: at stud."

A number of minor points arising from these documents may conveniently be mentioned at this stage. First in the telex already quoted, the reference to ARM plus ASD means, as the slip shows, "all risks of mortality and accident, sickness or disease, infertility." Second, the rubric "co-assured" is plainly an error for "co-insurer". Third, the word "lessee" though obviously derived from the telex is plainly a mistake for "lessor". Fourth, A.T.I.M.A. in the slip means "as their interests may appear".

Their Lordships need not refer to the several acceptances of underwriters in detail. Suffice it to

observe that the business offered was accepted by or on behalf of underwriters in its entirety on 27th July 1981, the Belgian insurance company having signified their acceptance of their line by telephone or telex to Chandlers on the same day. This is evidenced by a pencilled note on the original slip made by Chandlers in advance of that company's own signature to the separate slip shortly afterwards.

Their Lordships have no doubt, indeed the contrary was not argued before the Board, that on the conclusion of the slip on 27th July 1981 there were brought into being binding contracts between the Goldbergs and Nat-West, on the one hand, to the extent of their respective interests, and underwriters on the other to the extent of theirs. This binding contract was made by Chandlers acting as agents for the Goldbergs and for Nat-West. Their Lordships will consider the terms of that contract in more detail hereafter. On the same day, Mr. Trend of Chandlers telexed Mr. Clarke of Hudig as follows: "Bert Clarke - Goldberg ETAL, 'Asian Beau' $1,000,000 insured ARM/ASD. Trend. 1 Aug. until 1 Nov. Rate 3.25 p.c.t. and pro rata C/N follows." "C/N", of course, means cover note. This telex was acknowledged by Mr. Clarke on 28th July. He asked for confirmation of the period of the cover which was given by Mr. Trend later the same day.

Notwithstanding what their Lordships have just related, on 30th July 1981, a Miss Fletcher, also an employee of AIB, telexed Mr. Clarke telling him to hold the stallion covered. She thereupon completed an AIB proposal form for the stallion. The proposal form included among the questions to be answered "Give full particulars of defects, illness or disease during the last 12 months" and "has any insurer ever declined or refused to renew your livestock insurance?". Though AIB must have known what the true answer to each question was, Miss Fletcher herself wrote "No" as the relevant answer in each case. She then sent the form to Mr. Wright. Mr. Wright signed it without reading it through or checking any of the detail in the form. On receiving the form back, Miss Fletcher, on 4th August, sent it so completed and signed to Mr. Clarke, acting for the Pool, "so you can now place cover". Incredibly and certainly without any actual authority, express or implied, or, as their Lordships think, ostensible, Miss Fletcher then on 13th August 1981 signed on behalf of the Pool a "Bloodstock policy effected through Australian Bloodstock Insurance Pool", on a form bearing AIB's name on the top. On the same day, she also on behalf of AIB signed a "memorandum of insurance" effected with the Pool which was sent to the Goldbergs and a "confirmation of cover" of that purported cover with the Pool which was sent to Nat-West.

At about this time, Hudig prepared a debit note datd 31st July relating to the insurance on the stallion effected in London. They sent it to AIB. The debit note incorrectly described this insurance as "Lloyds-Chandler, Hargreaves, Whittall and Co.". The debit note bears AIB's receipt stamp dated 25th August 1981. It was agreed that this was when this document was received in AIB's office. Only Miss Fletcher saw it there. She observed that the document related to the stallion. She thereupon filed it. Also on 25th August, Chandlers prepared a cover/debit note addressed to the Pool which recited the terms of the slip. This, or a copy of it, was forwarded to AIB.

On 19th October 1981, the various company policies were issued in London, collected by Chandlers, and in due course sent by Chandlers to Hudig, who received them on 27th November 1981. Hudig did not send them on to AIB but retained them on the file relating to the stallion.

There matters remained until after the death of the stallion from an insured risk on 4th March 1982. Much correspondence then ensued to which it is not necessary to refer. Underwriters repudiated liability and there was much mutual recrimination in Australia and debate where the blame for the confusion and the repudiation really lay. Ultimately, on 2nd July 1982, the Goldbergs and Nat West issued a writ against underwriters and AIB in the Supreme Court of Western Australia, basing their former claim, in their Lordships' opinion entirely correctly, upon the several policies issued by underwriters. Underwriters sought to avoid those policies. The alternative claim against AIB was based upon breach of contract and negligence. But early in 1983 AIB saw fit to amend their defence to allege that the relevant contract of insurance was contained in Chandlers' cover note. This somewhat remarkable and indeed untenable plea led to still further amendments to the pleadings and unnecessarily complicated this case to such an extent that the volume containing the supplementary record of proceedings in the Supreme Court occupies no less than 134 pages.

Their Lordships think it convenient at this stage to dispose of a number of matters which though raised at various stages of the proceedings are no longer relevant. First, after the subscription to the slips on 27th July 1981, those slips were or evidenced the sole contract between the Goldbergs and Nat-West, on the one hand and underwriters on the other. Second, once the several policies were issued, those and those alone became the contracts between the Goldbergs and Nat-West on the one hand and underwriters on the other. Third, the claim against

underwriters was therefore correctly based upon the policies. Fourth, as already mentioned, the plea by AIB that the Chandler cover note contained or evidenced the relevant contract was untenable. Fifth, the so-called Pool policy issued without authority by Miss Fletcher was never a valid policy of insurance. Sixth, it follows that the highly misleading completion of the proposal form by Miss Fletcher which Mr. Wright thereupon signed, though deplorable and upon which much time was spent at earlier stages of this litigation, is in truth wholly irrelevant. Seventh, at all times Chandlers were the agents of the Goldbergs and of Nat-West. They were never at any time the agents of underwriters. Similarly, AIB, Hudig and, to the extent that the Pool as distinct from Hudig was involved in arranging the insurance with underwriters, also the Pool were at all times the agents of the Goldbergs and Nat-West and never the agents of underwriters. Their Lordships venture to lay some stress upon these points because much of the learned judge's judgment against underwriters is based upon the contrary view. After discussing the pleadings, the learned judge said:-

> "In my opinion at no stage could it be said either Hudig or ABIP were the plaintiffs' agents. At no stage did they purport to act in that capacity. Indeed, on the contrary, they regarded themselves as agents of the placing broker, Chandlers, and having a duty to protect the first defendants' interests. Again the condition endorsed on Chandler's cover note leaves no doubt that ABIP was regarded by the first defendants as their agent."

With profound respect their Lordships are unable to agree. The learned judge was not reminded of the long line of authorities to the contrary and, in particular, of the well-known judgment of Scrutton L.J. in *Rozanes v. Bowen* [1928] 32 Lloyds L.R. 98, at page 101, as to the position in law where a Lloyds' broker (such as Chandlers), whether acting directly on a client's instructions or indirectly for the client on the instructions of another broker, seeks cover on that client's behalf on the London insurance market. Mr. Malcolm Q.C. by whom the Goldbergs and Nat-West were represented at the trial and who appeared for the former before the Board, frankly accepted that, in expressing this view, the learned judge was in error and that his conclusion who were principals and who were agents and for which principals those agents were acting in the various transactions could not be supported. He told their Lordships that the case went to trial on the footing that Chandlers were underwriters' agents and that both Hudig and the Pool had likewise thought that they represented underwriters, so that Mr. Clarke and Mr. Willis only appeared to give evidence at the

trial for the Goldbergs on subpoena and had not been willing to give statements in advance to the Goldbergs' solicitors. Their Lordships can only express their regret that this error persisted for so long, was allowed to mislead the learned judge, and unnecessarily obscured the essential issue in what should have been, but as presented was far from being a relatively simple case.

As between underwriters and the Goldbergs, the essential issue is whether, contrary to the learned judge's view, underwriters are entitled to avoid the policies for either non-disclosure or misrepresentation or both. There are two allegations of non-disclosure and one of misrepresentation. The two allegations of non-disclosure are first, of the stallion's previous illness and second, of the previous underwriters' refusal to increase the amount of the insurance, neither being disclosed. The allegation of misrepresentation was that on the slip Chandlers, on behalf of the Goldbergs and Nat West, represented to underwriters that the Pool was co-insurer with underwriters so that underwriters would in relation to any claim have the benefit of the experience and advice of the Pool, any settlements by whom underwriters bound themselves to follow.

Their Lordships will deal first with the two allegations of non-disclosure. Underwriters sought to adduce evidence from Mr. Regan, a deputy non-marine underwriter for one of the insurance companies involved, how he as a prudent underwriter and also how any prudent underwriter on the London insurance market would regard the materiality of the information of the non-disclosure of which complaint was made. This evidence was objected to on the ground that it was not the view of the London market which mattered but that of the Pool. It is of some interest in this connection to observe that, judging from the question regarding previous illness asked in the proposal form, both the Pool and AIB did regard this information as material. The learned judge upheld the objection and in the result had no evidence of the relevant materiality. Their Lordships regret that they cannot agree with the learned judge's ruling. This cover was written in London and not in Sydney, and the views of those in Sydney who, as already pointed out, were the agents of the assured and not of the underwriters, were irrelevant. The learned judge then decided the first issue of non-disclosure on the basis that he preferred the expert evidence from the veterinary surgeons called for the Goldbergs to that called for underwriters. He was, of course, entitled to decide for himself whose evidence he preferred. But their Lordships feel bound to point out that these questions fell to be determined by reference to the views of prudent insurers and not of veterinary

surgeons, even though prudent insurers, before deciding whether or not they would accept the risk, might well seek professional advice from such a source. In view of the exclusion of the relevant evidence, their Lordships cannot now decide this matter for themselves and were it necessary to decide this appeal by reference only to this issue, their Lordships would be reluctantly compelled to order a new trial. Happily, that course is not now necessary.

As to the second issue of non-disclosure, namely of the previous refusal to increase the insured value, it seems to their Lordships clear beyond argument that this was material and indeed here again the relevant question asked in the proposal form itself suggests that that was so. Mr. Malcolm did not contend otherwise.

As regards misrepresentation, their Lordships regard the slip as containing the plainest representation that the Pool were co-insurers. The intended obligation of underwriters to follow the Pool's settlements and to accept their reports and veterinary certificates shows that this was regarded as of importance, and there is nothing in the slip to suggest that, even though the slip was subscribed for 100 per cent of $1,000,000, there was not another parallel insurance written by the Pool in Australia.

As already stated, the learned judge's rejection of these two last defences to the claim was founded on his view that the relevant knowledge was possessed either by underwriters' agents or by those, such as the Pool, whose duty he thought it was to represent underwriters' interest. But Mr. Malcolm though unable to support this reasoning, strenuously contended first, that underwriters had ample means of knowledge after the slip was issued that there was no co-insurance in Australia, second, that the reference in the slip to the Pool meant that underwriters delegated to the Pool authority to deal with any proposal made in connection with the acceptance of the risk and that therefore anything which the Pool knew should be treated as the knowledge of underwriters, and third, that by the manner in which underwriters' defence had been pleaded, they had affirmed the policies instead of seeking to avoid them. As to the first and second of these submissions, though Mr. Malcolm disclaimed that these in any way involved reviving the contention that the Pool were the agents of underwriters, it seems to their Lordships that on no view can the knowledge of the Pool or of Hudig that there was no Pool co-insurance be the knowledge of underwriters in the light of the express statements to the contrary both in the slip and in the policies. There was no duty on underwriters to investigate before or after the acceptance of the slip whether the statements in it

were correct. As to the third submission, nothing short of a waiver by underwriters of their right to repudiate with knowledge of the facts giving rise to that right will suffice. These policies were never void. They were voidable and the defence was pleaded in an entirely proper way asserting that the policies, which remained valid until avoided, were voidable on the grounds subsequently set out in the pleading.

It follows, therefore, that in their Lordships' view this appeal by underwriters must succeed both for non-disclosure of the prior refusal and for misrepresentation in the slip regarding the existence of co-insurance with the Pool. Underwriters are therefore entitled to judgment against the Goldbergs and Nat-West and to an order against the Goldbergs for the repayment of the moneys paid by underwriters, together with interest, pursuant to the learned judge's judgment. It thus becomes unnecessary to decide the other points raised on underwriters' behalf, namely, whether the policies sued upon on their true construction were conditional for their efficacy upon the existence of co-insurance with the Pool, and that, that condition never having been satisfied, the risk under the policies never attached or, alternatively, the condition as to co-insurance with the Pool became a condition of policies any breach of which, though not preventing the risk attaching, nonetheless gave underwriters an independent right to rescind. It was common ground that if underwriters' appeal succeeded, the premiums paid through Chandlers must be refunded.

As already stated, the Goldbergs contended in the alternative that if underwriters' appeal succeeded, they were entitled to recovery in full from AIB. Their Lordships have already mentioned that the trial seems to have proceeded on the basis that this was correct. But their Lordships had the benefit of an argument of conspicuous ability from Mr. Rupert Jackson for AIB to the effect that a new trial ought to be ordered both on the question of AIB's liability and, if they were to be held liable at all, also on damages and interest.

The case against AIB on liability was founded on two grounds, first, their own breach of contract and negligence and, secondly, vicarious liability for the negligence of Hudig whom AIB instructed to seek to effect the cover in question in London. The learned judge, in finding against AIB on the issue of breach of contract and negligence, held that they had failed "in properly securing the necessary insurance cover in the first place, and making sure that such cover was in fact obtained in the second place which brought about this litigation". Their Lordships do not find it in the least surprising in the light of

the facts already related that the learned judge should have been highly critical of AIB's conduct. But with respect in the first part of the sentence just quoted, he stated their duty too high. Their duty was to use all reasonable care and skill in seeking to obtain the cover in London which had been sought by their principals, and if for any reason, notwithstanding that they had used that reasonable care and skill, their efforts failed, it was then their further duty to report their failure and, if necessary, to seek further instructions. But they did not undertake that that cover would be procured. AIB knew both of the previous illness and of the refusal to insure on a higher value. Though they passed the latter information to Hudig they did not pass on the former. But more important, when first Hudig's debit note and later Chandlers' cover note reached them, the slightest enquiry should, in their Lordships' view, have revealed the discrepancy and confusion which had arisen and should have made AIB realise that the unauthorised issue of the Pool policy was meaningless and that the promise of co-insurance with the Pool had not been fulfilled. In their Lordships' view, the learned judge was entirely right in his conclusion that AIB were gravely at fault even though he stated their duty too high.

This conclusion makes it unnecessary for their Lordships to express any final view whether Hudig were also negligent and if so whether AIB are vicariously liable for their negligence. Hudig were not a party to this litigation though their Lordships were told that AIB had reserved all their rights against them. It may be that AIB are entitled to complain both of Hudig's actions and inactions and of their confusion of their roles between acting as brokers and as managers of the Pool. But the case against AIB as liable for any misdoings of Hudig was barely pleaded and certainly was not investigated at the trial. Their Lordships, therefore, prefer to rest their conclusion that AIB are liable to the Goldbergs on the clear proof of AIB's own breach of contract and negligence and to leave AIB to such remedies hereafter against Hudig as they may be shown to be entitled to. Accordingly, they express no view on the question whether if Hudig were also at fault AIB are vicariously liable for that fault in addition to the liability arising from their own fault.

Mr. Jackson further argued that, even if AIB were liable, it did not follow that they were liable for the whole amount for which the stallion was insured, and which, though the policies were unvalued policies, appears to have been accepted at the trial as the amount for which underwriters were liable if the policies could not be avoided. It was also suggested that it was not shown that the cover sought by the Goldbergs could necessarily have been obtained

had there been full disclosure and no misrepresentation, and that even if AIB had investigated the position at the end of August 1981, it did not follow that they would have discovered what had gone wrong.

Their Lordships have considered these submissions with care but, with all respect to the persuasive skill with which they were advanced, these submissions are in the nature of ingenious afterthoughts. It has never been suggested that this cover could never have been obtained or that it would have required exceptional expertise on the part of AIB to discover the muddle when the opportunity first arose. Indeed, the devastating cross-examination to which Mr. Brown was subjected by Mr. Pringle, the Goldbergs' junior counsel, seems to their Lordships to show that the truth was not as deeply submerged between the surface of the paper as Mr. Jackson invited them to accept, and that it would have been perfectly simple to have ascertained the truth had the slightest effort been made by AIB so to do.

Their Lordships are, therefore, of the opinion that AIB must pay the Goldbergs $1,000,000. They do not accept that AIB are entitled to credit for the premiums which the Goldbergs will recover from underwriters. The measure of damages is for the loss which the Goldbergs suffered by not recovering $1,000,000 under the policies. That is $1,000,000.

Their Lordships, therefore, refuse to order a new trial on the issues either of liability or damages. With the help of counsel as to the prevailing right to interest on damages in Western Australia, their Lordships are of the opinion that they are now in a position to make the appropriate orders in this respect. They therefore propose that the following orders should be made:

1. Underwriters' appeal should be allowed.

2. The judgments and orders for costs made in favour of the Goldbergs, Nat-West and AIB in the Supreme Court should be set aside.

3. The Goldbergs and Nat-West should pay underwriters' costs of this appeal to be taxed if not agreed.

4. The Goldbergs and Nat-West should pay underwriters' costs of the action to be taxed if not agreed without regard to the limit prescribed under Order 66 of the Rules of the Supreme Court on the basis that the value of the subject-matter of the Goldberg's and Nat-West's claims is the sum of $1,165,205 with certificates for two counsel and for 4½ extra days.

5. The Goldbergs should repay to underwriters within 30 days of such Order in Council as Her Majesty may be graciously pleased to make following receipt of this humble advice:

(a) $1,165,205 and

(b) Interest on $1,165,205 at the rate of 15 per cent per annum from 15th July 1983 to 15th March 1984, and at the rate of 14 per cent per annum from 16th March 1984 to the date of the Order in Council.

6. Underwriters should repay the premium received in account with Chandlers for the ultimate credit of the Goldbergs.

7. AIB should pay as damages to the Goldbergs $1,165,205 together with interest on $1,000,000 at the rate of 15 per cent per annum from 8th June 1982 to 15th March 1984, and thereafter at the rate of 14 per cent until the date of the Order in Council.

8. AIB should pay to the Goldbergs their costs of this appeal to be taxed if not agreed.

9. AIB should pay Nat-West and the Goldbergs their costs of the action to be taxed if not agreed without regard to the limit prescribed under Order 66 of the Rules of the Supreme Court on the basis that the value of the subject matter of the Goldbergs' claims is the sum of $1,165,205 with certificates for two counsel and for 4½ extra days.

10. AIB should pay to the Goldbergs the amount of the costs of this appeal and of the action payable by them to underwriters under paragraphs 3 and 4 of this Order.

Their Lordships will therefore humbly advise Her Majesty accordingly.