

2/85

O N A P P E A L

FROM THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N

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

Appellants

AND

NATIONAL WESTMINSTER FINANCE AUSTRALIA LIMITED

First Respondent

AND

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

Second Respondent

AND

AUSTRALIAN INSURANCE BROKERS LIMITED

Third Respondent

CASE FOR APPELLANTS

1. The Appellants have been held liable by Judgment Record of the Honourable Mr. Justice Wallace in the Supreme Court of Western Australia dated 15th July 1983 to pay to the First and Second Respondents as owners and lessees of the stallion "ASIAN BEAU" the sums of A\$433,500.19 and A\$ 731,704.81, respectively, consequent upon the stallion's death on 4th March 1982. The basis on which

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pp37-47

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they were found liable was the learned Judge's conclusion that they were parties to and bound by valid and enforceable contracts of insurance. The Appellants' claim to have avoided any contracts of insurance which did come into existence for misrepresentation, non-disclosure or breach of condition was rejected. An alternative claim by the First and Second Respondents against the Third Respondents as insurance brokers was dismissed.

Volume 1
P.49.

2. This Appeal is brought with leave of the 10.
Supreme Court of Western Australia. The Appellants ask your Majesty in Council to reverse the Judgment and to dismiss the First and the Second Respondents' claims against them with costs here and below.

Alternatively, in the circumstances set out in paragraph 14 below, the Appellants ask that the Judgment be set aside and a new trial ordered.

THE ISSUES 20.

3. The main issues on this appeal are:
- (1) Were any contracts made between the First and Second Respondents and the Appellants? This issue involves a contention by the Third Respondents that such contracts as

were purportedly made with the Appellants were made without the First and Second Respondents' authority and were incapable of ratification after the stallion's death. The Appellants themselves do not advance any such propositions.

Insofar as contracts were made:-

(2) Are any contracts made now to be found -

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(i) in the insurance slip or (in the case of one Appellant) telex exchange by which they were made?

(ii) in the cover note thereafter issued by the placing brokers (the Third Respondents) to those in Australia instructing them to place insurance?

(iii) in the policies later executed by the Appellants at the placing brokers' request?

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This issue arises from contentions below by the First, Second and Third Respondents. In the Appellants' submission, the policies replaced the slip and telex exchange, but it makes no material difference which govern,

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and the cover note has no contractual force: see paragraphs 9 and 10 below.

(3) Were the Appellants entitled to avoid any such contracts as having been induced by material misrepresentation by the First and Second Respondents? The representation was that the proposed risk was one of co-insurance, on which the Appellants were to be the following insurers, following the lead and policy terms of the Australian Bloodstock Insurance Pool ("A.B.I.P."), a pool of insurance companies managed in Australia by Hudig Langeveldt Pty Ltd. This is considered in paragraphs 11/12 and 18 below. 10.

(4) Was it an essential condition (i) of any insurance (ii) of the attachment of any risk to the Appellants under any insurance 20.

that the insurance or risk should be co-insurance, as aforesaid? The Appellants seek leave to raise this issue as a new point (one of contractual construction and law) in their case: see paragraph 13 below. The extent to which

it was raised below is there indicated. Record

- (5) Were the Appellants entitled to avoid any such contracts for material non-disclosure of
- (i) previous illness and hospitalization of the stallion in March 1981?
 - (ii) the existence of other insurance and of a refusal thereunder to increase cover from A\$650,000 to A\$1,000,000, in June 1981?

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Paragraphs 14 and 15 below cover this issue.

- (6) Were the Appellants entitled to avoid any such contracts for non-disclosure and mis-statement of the matters mentioned in sub-paragraph (5) above in a proposal form signed on behalf of the Second Respondent (see paragraphs 16 and 17 below)?
- (7) If the First and Second Respondents are unable to recover from the Appellants, are they entitled to recover in whole or part from the Third Respondents as brokers? This issue arises between the First and Second and the Third Respondents.

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THE FACTUAL CIRCUMSTANCES

4. The factual circumstances are as follows.

(i) The Second Respondents own the Jane Brook Stud in Western Australia, at which "ASIAN BEAU" was put out to stud. The acquisition of "ASIAN BEAU" in January 1980 was financed by a lease agreement dated 23rd May 1980, as a result of which the First Respondents became owners and the Second Respondents lessees of the stallion.

Volume 3
pp 3-18

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(ii) Clause 13 of the lease agreement obliged the Second Respondents to keep the stallion fully insured in the names of both the First and Second Respondents.

Volume 3
pp 8-9

(iii) Up to the end of July 1981 "ASIAN BEAU" was insured for A\$ 650,000 with Lloyd's Underwriters. The insurance was arranged by the Third Respondents as brokers through Butcher & Hall (Australia) Pty. Ltd.

Volume 2 p538
lines 4-6, 21-26,
Volume 3 p29

20.

(iv) Whilst this insurance was in force the stallion in March 1981 suffered an attack of sand colic (caused by ingesting sand while grazing). He

Volume 1 p39
lines 19-43

recovered after 5 days in the equine Record
hospital at Murdoch University. The
existing insurers were informed.

10. (v) After receipt of an offer of A\$1,000,000
for the stallion in June 1981, the
Second Respondents instructed the
Third Respondents to increase the
amount insured. The existing insurers
declined to do so, without giving
reasons. Volume 3
p25

Volume 3
pp 28-29

20. (vi) The Third Respondents then approached
other insurance brokers, Hudig Langeveldt
Pty Ltd ("Hudig"), by telephone and by
telexes of 16th and 23rd July 1981,
seeking insurance for A\$1,000,000 for
the period from 1st August 1981 to 1st
November 1982. The Third Respondents
indicated to Hudig that they had or
were getting a veterinary certificate,
valuation and proposal "as if new
business"; they also sent the Second
Respondents a proposal form for signature
and requested a veterinary certificate
and valuation. Volume 8
pp 29-30

- (vii) Hudig as well as acting as insurance
brokers were also managers (meaning in

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this context that they held an underwriting authority) on behalf of a "pool" of eight international insurers known as Australian Bloodstock Insurance Pool ("A.B.I.P."). The names of these eight insurers, led by Manufacturers Mutual Insurance Company Limited with a 35% share, appear in Volume 3 page 54. Such underwriting authority was limited to A\$ 150,000.

Volume 3
p.54

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Volume 3
pp 77-83

By an insurance underwriting agreement made between Hudig and the Third Respondents dated 2nd June 1980, Hudig had sub-delegated to the Third Respondents authority to issue policies up to A\$ 20,000 any one horse on behalf of A.B.I.P. This agreement recited :

"Animals insured for a greater sum must be referred to the Managers [i.e, Hudig] who have the right of acceptance up to \$150,000.

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Co-insurance in excess of \$150,000 may be arranged at rates to be agreed."

(viii) In circumstances where Hudig utilized its underwriting authority up to

A\$150,000 it not uncommonly approached Chandler, Hargreaves, Whittall & Co Ltd ("Chandlers") as Lloyd's and London market insurance brokers, in order to place any excess over A\$ 150,000.

Record
Volume 2
P97 lines 19-40
P103 line 41 to
P105 line 15;
P137 lines 8-16.

In the present case, Hudig did not utilize any part of its underwriting authority.

10. (ix) Hudig, following the Third Respondents' approach referred to in (vi) above, telexed Chandlers on 27th July 1981 asking them to place cover on Volume 3 P.33 "ASIAN BEAU" for the period required in the sum of A\$1,000,000.

(x) Chandlers in accordance with London market practice prepared a slip setting out their understanding of the insurance required, and then presented the risk to potentially interested underwriters.

Volume 3 pp35-36, 42 and 70

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On or about 27th/28th July 1981 Chandlers procured acceptances by underwriters of lines totalling 100% of A \$1,000,000, as follows:

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PLACED IN LONDON BY SLIP (80%)

1. Eagle Star Insurance Company Limited 20%
2. Ennia Insurance Company (UK) Limited 10%
3. Assurances Generales de France (London Branch) ("A.G.F.") 30%
4. Prudential Assurance Company Limited 40%) 10.
5. A.A. Mutual International Insurance Company Ltd 40%)
6. Equine & Livestock Insurance Company Limited 20%) 20%

[Lines 4, 5 and 6 being underwritten through the agency of Equine Underwriting Agencies Limited]

PLACED IN BELGIUM BY TELEX (20%) 20.

7. Union Atlantique d'Assurances S.A. ("U.N.A.T.") 20%

(xi) Chandlers evidently understood the risk to be one of co-insurance with A.B.I.P. The slip which Chandlers prepared and presented thus provided, inter alia :

"TYPE : Bloodstock Co-Insurance. All risks of Mortality and Accident, Sickness or Disease Infertility. 30.

CO-ASSURED: [An obvious mistake for "CO-ASSURER"]; AUSTRALIAN BLOODSTOCK INSURANCE POOL

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 Pool's acceptance of Veterinary Certificates and/or Reports accepted by Underwriters hereon"

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The standard printed terms of an A.B.I.P. policy appear in volume 3 at page 55.

Volume 3
p.55.

They contemplate that a written proposal and declaration should have been completed and should be "the basis of this contract and be considered as incorporated herein."

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(xii) On 28th July 1981 Chandlers confirmed the placement to Hudig; on 25th August 1981, they sent to Hudig their Cover/Debit Note setting out the terms of insurance, including "CO-ASSURED" and "CONDITIONS" clauses as above, and, instead of the "TYPE" clause, a clause reading :

Volume 3
p37 and 39

Volume 3
pp56 - 57

30.

"AGAINST: All risks of Mortality and Infertility (Accident Sickness or Disease)..."

(xiii) On 28th July 1981 Hudig also informed the Third Respondents by telex that cover had been placed.

Volume 3
P.40

Record

Volume 3
pp45-46

On 30th July 1981 the Second Respondents signed and handed back to the Third Respondents the proposal form, together with a veterinary certificate; the Third Respondents on the same day telexed Hudig asking them "please hold covered stallion" and sent by letter the proposal and certificate "so you can now place cover."

Volume 3
P.43

Volume 3
P.46

On 31st July 1981 Hudig sent the Third

Volume 3
P.51

Respondents a Debit Note, stating

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"Insurer: Lloyds-Chandler
Hargreaves Whittall & Co"

(xiv)The Third Respondents on 13th August 1981

Volume 3
P.52

issued to the Second Respondents a "Memorandum of Insurance effected in accordance with your instructions with

Volume 3
pp54-55

Australian Bloodstock Pool" and a (purported) "Bloodstock Policy" referring to insurance by the eight (named) insurance companies constituting A.B.I.P. for their respective proportions of the sum of A\$ 1,000,000. This purported Policy referred to the Third Respondents "and/or nominees" as insured who had applied to A.B.I.P. for insurance:

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"on a written proposal and declaration...which proposal

and declaration the Insured has agreed shall be the basis of this contract and be considered as incorporated herein."

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10. The Third Respondents' witnesses gave evidence that they believed that the risk had been placed by way of co-insurance with A.B.I.P. and Lloyd's. The Judge's findings leave their precise state of mind uncertain.

(xv) Following the issue on 25th August 1981 of their Cover/Debit Note, Chandlers as brokers in accordance with London market practice prepared four formal Company Combined (or "Collective") Policies dated 19th October 1981 and procured the signature and issue thereof by or on behalf of the Appellants as follows:-

Volume 3
pp58,62
66 and
145

- a) The first named Appellants : 20%
- b) The second and third named Appellants : 10% and 30%
- c) The fourth, fifth and sixth named Appellants : 20% in all
- d) The seventh named Appellants : 20%

Each policy provided inter alia:

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"The period of Insurance

From 1st August 1981 to 1st November 1982 commencing and expiring at the hour expressed in the Co-insurers Policy.

The Risks and Sum Insured hereunder

ALL RISKS OF MORTALITY, ACCIDENT, SICKNESS, DISEASE AND INFERTILITY POLICY AS PER CO-INSURERS POLICY.

This Policy is subject to all terms, clauses and conditions, Additional and Return Premium as the Policy issued by the Australian Bloodstock Insurance Pool (herein referred to as the Co-Insurers) and to follow their Settlements, the acceptance of Veterinary Certificates and/or Reports by the Co-Insurers being accepted by Insurers hereunder".

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Chandlers sent the policies (or the first three of them) to Hudig on or about 20th November 1981. The policy in respect of U.N.A.T. is now lost.

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Volume 3
pp 145, 147

(xvi) On 24th February 1982 "ASIAN BEAU" was admitted to hospital suffering from colic. On 4th March 1982 he was put down on humane grounds after discovery that he had ruptured a bowel.

Volume 1 p41
lines 39-50

(xvii) In March 1982 a claim was passed by the Third Respondents to A.B.I.P., to Chandlers and so to some or all of the underwriters in London and Belgium. Thereafter solicitors (Parish Patience of Sydney, N.S.W.) were appointed by

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Volume 3
p 93-95

A.B.I.P. to represent the Appellants and on 29th April 1982 wrote to the Third Respondents claiming to avoid the policies for non-disclosure and mis-statement of the matters mentioned in paragraph 3(5) above.

Volume 3
pp 121-122

(xviii) In June 1982 the first three policies were sent on request by Hudig to the Third Respondents.

Volume 3
pp 148-149

10. (xix) On 2nd July 1982 the present action was begun by the First and Second Respondents against the Appellants and Third Respondents.

Supplemental
Record
pp 3 - 4

THE ESSENTIAL CONSIDERATIONS

5. The essential considerations relevant to decide the issue as between the First and Second Respondents and the Appellants are, the Appellants submit, as follows:-

20. (i) So far as the Appellants knew, or had any cause to know, this was a straightforward risk placed with them by Chandlers acting as brokers for the proposed insured, the First and Second Respondents.

(ii) It was a risk placed by use of the

Record

Volume 3
pp 35-36, 42 & 70
Volume 2 p 471
line 28 to p 472
line 2

traditional London market slip,
or in the case of U.N.A.T. by telex.

(iii) Also in accordance with London
market practice (and as contemplated
by the slip reference to FORM: 'J')
the contract made by the slip (or
telex exchange) was in each case
formally embodied in a policy issued
by the Appellants to Chandlers as
placing brokers in October 1981
(paragraph 4(xv) above).

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pp 58, 62, 66
and 145

(iv) Whether regard be had to the terms
of slip or policy, it was of the
essence of the risk that it should
be one of co-insurance with
A.B.I.P., so that by the statements to this
effect in both slip and policy
wordings the risk was to be reviewed,
accepted and handled locally in
Australia by or on behalf of A.B.I.P.
as leading insurers and its terms,
clauses and conditions of insurance were
to be supplied by the policy issued by
A.B.I.P.

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(v) A.B.I.P. were in fact taking no part of
the risk; and there was no policy actually

issued by A.B.I.P., which could supply the terms, clauses and conditions of any insurance by the Appellants.

(vi) In consequence, there was also no applicable proposal as would have been the case had A.B.I.P. issued its policy. There was, further, no leading insurer in Australia, upon whose acceptance and handling of the risk the Appellants could rely.

10. (vii) No disclosure was made to the Appellants in Europe either of the absence of any participation by and policy issued by A.B.I.P. or of the stallion's illness in March 1981 or of the existing insurance and the refusal thereunder to increase cover to A\$ 1,000,000.

20. (viii) Finally, although A.B.I.P. did not in fact participate or issue any policy the Second Respondents nonetheless signed at the Third Respondents' request the proposal dated 31st July 1981. They also received from the Third Respondents the confirmation and policy purporting to show insurance with A.B.I.P. on the basis of and

incorporating that proposal. If the position were to be treated as if A.B.I.P. had participated as co-insurers, the mis-statements in the proposal would clearly have justified the Appellants' avoidance.

THE JUDGMENT

6. The learned Judge considered and rejected the Appellants' contentions of misrepresentation non-disclosure and mis-statement (paragraphs 3(3), 10. (5), (6) and (7) above). He held that the slip and policy terms were "complied with". In rejecting the Appellants' contentions, he reached conclusions on two other important matters :

- (i) the chain of agency;
- (ii) the relevant contracts (cf paragraph 3(2) above).

The two matters are connected. In the Appellants' submission the learned Judge erred on each. The Appellants therefore consider first these 20. matters, and then the issues mentioned in paragraph 3(3) to (7) above.

THE CHAIN OF AGENCY

7. The Appellants' Case

(i) Chandlers

In relation to the Appellants, Chandlers acted throughout as placing brokers on behalf of the First and Second Respondents. The Appellants never gave Chandlers and never held them out as having any authority to act on the Appellants' behalf. Moreover, Chandlers never purported to act on the Appellants behalf. This was in short, so far as the Appellants were concerned, an ordinary facultative (or "one-off") placing with the Appellants by London market brokers by the slip method of insurance, or by telex including the slip wording.

The authorities make clear that the broker acts solely as agent of the proposed insured on a slip placing on the London market of any kind of insurance, marine or non-marine :
cf:

20. (a) McGillivray and Parkington on Insurance Law (7th Ed) paragraph 817.
- (b) Rozanes v Bowen (1928) 32 L.L.R.98, C.A., a case which contains a classical exposition of Lloyd's marine and non-marine practice by Scrutton L.J.

Record

- (c) American Airlines Inc. v Hope [1974]
2 L1.R. 301, H.L. a case of aircraft insurance, where Lord Diplock's speech explains Lloyd's practice.
- (d) Express Assurance Corporation v C.T. Bowring & Co Limited (1906) Com. Cas. 107 (Kennedy J.) and Glasgow Assurance Corporation v Symondson (1911) 16 Com.Cas. 1009 (Scrutton J), both marine reinsurance cases showing the practice and brokers' position to be identical in the companies' and Lloyd's market. 10.
- (e) General Reinsurance Corporation and Others -v- Forsakringsaktiebolaget Fennia Patria [1982] 2 L1. R. 287, C.A. a case of non-marine facultative reinsurance on the companies' market, showing the same practice to apply slip placings whether the risk be marine or non-marine, by way of insurance or reinsurance and in the Lloyd's or companies' market [pp 92/93 and 290 resp.] 20.
- (f) General Accident Fire and Life Assurance Corporation Limited v Tanter and Others [1984] 1 L1.R. 58 (Hobhouse J), a case of marine

insurance and reinsurance with Lloyd's and companies, re-affirming the brokers' agency for the insured under the insurance and for the reinsured under the re-insurance (esp. at pp 64/67 and 80, column 2).

(ii) Other intermediaries

10. The chain of agents behind Chandlers leading back to the First and Second Respondents as proposed insureds was unknown and irrelevant to the Appellants. The Appellants were entitled to and did assume that Chandlers had, directly or indirectly, received instructions authorizing Chandlers to act as placing brokers.

(iii) A.B.I.P.

20. (a) The slip and policy wordings represented and provided that A.B.I.P. were to be co-insurers taking a leading Australian line which the Appellants in Europe could follow. In fact A.B.I.P. were not co-insurers, so there was nothing for the Appellants to follow. Neither the slip nor the policies, therefore,

constituted any relationship between the Appellants and A.B.I.P.

- (b) Further, even if A.B.I.P. had been co-insurers, the relationship of leading and following underwriters is not in law that of agent and principal. The following underwriter follows out of confidence in the leader.

Where, as here, he agrees with the insured to be bound by the same terms, clauses and conditions as, and the settlements and acceptances of, the leader, he does so by contract with the insured and not because the leader is or acts or purports to act as his agent.

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8. The Judge's conclusions on agency

The Judgment contains a number of relevant passages:

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- (i) The Judge appears (correctly) to have regarded Chandlers as acting on behalf of the First and Second Respondents when approaching the Appellants in person or by telex to procure the Appellants' acceptance of the risk set out in the

slip : cf paragraph 7(i) above.

- (ii) The Judge also states that once the slip was fully taken up "Chandlers were authorised to issue the Cover Note" of 25th August 1981, referring to MacGillivray and Parkington on Insurance Law (7th Ed.) paragraph 277. This statement probably reflects a submission by the First and Second Respondents that Chandlers having once placed the slips as brokers became, ex facto, underwriters' agents to issue a cover note. They were, it was said, a "double agent". Neither in law nor in practice nor evidence given in the case (so far as it could be material on this point) is there any basis for such a conclusion. The cover note was the usual cover note issued by any placing broker to his clients to confirm:

Volume 2
p 602
lines 41-50

20. "the following insurance effected
in accordance with your instructions"
(underlining added)

It had no contractual effect between the Appellants and the First and Second Respondents : cf General Accident Fire and Life Assurance Corporation Ltd v Tanter and Others [1984] 1 Lloyd's Rep. 58, at page 69 column 2.

If the Judge intended to suggest the contrary, he was in error and mis-read the paragraph in MacGillivray to which he referred.

Reference was made during the Respondents' arguments at trial to authorities on non-marine domestic insurance (e.g. householders and motor vehicle insurance) where brokers commonly have binding authority from specific named insurers to issue temporary

(or sometimes full cover): Woolcott v Excess Insurance Co Ltd and Another [1978] 1 Lloyd's Rep. 633 (where the binding authority is recited at page 634); reversed [1978] 1 Lloyd's Rep. 231, C.A. and Stockton v Mason and Others [1978] 2 Lloyd's Rep. 430, C.A. The latter

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authority contains statements which (taken entirely out of their proper context) might be relied upon to suggest

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that in all (other than "exceptional") cases of non-marine insurance all brokers are automatically held out by all underwriters as having authority to issue any "interim cover" they please. This suggestion would be and is clearly wrong. In any event the present type of international commercial risk emanating from

abroad falls into the quite different category of risks, whether marine or non-marine, presented by brokers on a facultative ("one-off") slip and accepted only if, when and to the extent insurers are found to take a line upon the slip terms : cf the authorities cited in paragraph 7(i) above.

10. (iii) The Judge spoke in several places of Chandlers issuing the policies on behalf of the Appellants. Again there was no basis, in law, in practice or in the evidence (so far as this could be material) for any such conclusion. The standard London market practice was followed, with Chandlers preparing the policies and presenting them to the Appellants who signed and returned them.
20. The policies were issued in law by the Appellant to Chandlers as brokers for the First and Second Respondents. The policies then became the contracts between the First and Second Respondents and the Appellants.

Volume 1
p 43
lines 42-44
p 45
lines 36-48
p 46

(iv) Hudig and A.B.I.P.

Viewing the matter on the (erroneous) basis that Chandlers issued the policies on behalf of the Appellants, the Judge continued by considering whether Hudig or A.B.I.P., to whom Chandlers in October 1981 sent at least three of the four policies, received such policies as the First and Second Respondents' agents.

This question, in the Appellants' sub- mission, does not arise : Chandlers already held the policies on behalf of the First and Second Respondents. If it arises the Judge was again wrong : he said that at no stage did Hudig or A.B.I.P. purport to act as the First and Second Respondents' agents : 10.

Volume 1
p 45
lines 42-45

"Indeed on the contrary they regarded themselves as the agents of the placing brokers Chandlers, and as having a duty to protect the [Appellants'] interests." 20.

How parties "regarded themselves" is irrelevant. No evidence was given of Chandlers ever giving to Hudig, or in any way holding Hudig out as having, any authority on behalf of Chandlers. Chandlers at all times acted as sub-brokers to 30.

10. Hudig. Hudig, furthermore, were instructed as sub-brokers by the Third Respondents, who were brokers at the head of the chain and were in contractual relations with the First and Second Respondents. The Third Respondents knew that Hudig were placing the cover in London. Either the First and Second Respondents through the Third Respondents authorised the actual placing or they did not. If they did, then the chain of brokers and sub-brokers to the First and Second Respondents was complete from the start. If they did not, then it was incomplete, and there can have been no contract unless and until the chain of agency could be and was ratified cf paragraph 9(iii) below.

20. (v) A.B.I.P.

The Judge said :

"Again the condition endorsed on Chandler's Cover Note...leaves no doubt that A.B.I.P. was regarded by the First Respondents as their agent."

Volume 1
p 45
lines 45-
48

This view of the condition is erroneous in law and fact : paragraph 7 (iii) above.

THE CONTRACTS

9. The Appellants' Case

(i) As and when each line was put on the slip by each Appellant in London, or in the case of U.N.A.T. accepted by telex from Belgium, a contract was made between the First and Second Respondents through Chandlers as brokers and that Appellant : cf in particular the Fennia Patria and General Accident cases cited in paragraph 7(i) (e) and (f) above.

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(ii) As and when each Appellant executed and returned to Chandlers as brokers a formal policy, that policy replaced the relevant line on the slip or telex acceptance and became the contract between the First and Second Respondents and the Appellant.

(iii) The Third Respondents argued below that Hudig (and therefore Chandlers) had no authority to place any insurance in London other than with Lloyd's; and that no contract can have existed by ratification because a contract of

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non-marine insurance cannot be ratified after the insured is aware of the loss of its subject-matter: Grover & Grover Ltd v Mathews [1910] 2 K.B. 401. The Appellants do not advance such propositions. The decision cited with the consequent distinction between marine and non-marine insurance is criticised in Bowstead on Agency (14th Ed) at pages 51/52 (Rule 2(d)).

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10. The Judgment

(i) As to the slip, the Judge said :

"Clearly once the "slip" was taken up by all the [Appellants] an interim contract of insurance existed."

Volume 1
p 42 line 49
to p 43
line 1

To be strictly correct, each line accepted on the slip or by telex

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constituted a separate contract : paragraph 9(i) above. More significantly, there was nothing "interim" about the slip, unless the Judge means that it would in due course be replaced by one or more policies. It was a full contract in respect of a full 15 month period.

(ii) The Judge appears to have thought that Chandlers' Cover Note dated 25th August

Volume 1 p 43
line 1-3
p 45 line 49
to p 46 line 7

1981 was issued on behalf of and bound the Appellants. This view is in error: paragraph 8(ii) above.

Volume 1
p 46 lines
34-37

(iii) The Judge held :

"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 conclusion is also in error : paragraph 8(iii) above.

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In Neil's case provisional insurance cover was issued "subject to the usual terms and conditions of the Company's Policy".

But, before either a proposal had been completed or a policy issued, a claim arose under the insurance. Subsequently a proposal was completed, which (it was alleged) contained untrue answers. A policy was, still later, issued, the standard terms of which made the proposal the basis of the contract.

20.

The Court of Session held

- (a) that the issue of the policy, which on insurers' contentions was void, could not affect any right of recovery under the interim cover note in respect of the accident

occurring prior to both proposal and policy;

(b) that the clause in the interim cover note making it "subject to the usual terms and conditions of the Company's policy" was not apt to make the interim cover subject to subsequent correct completion of a proposal form; and accordingly there was a right of recovery under the interim cover.

10.

This decision has no bearing on the present case. The policies here represented the relevant contracts once issued to Chandlers in October 1981. Further, if there was any relevant proposal, it was completed in July 1981. The stallion's death occurred after both these events in March 1982.

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MISREPRESENTATION

11. The Appellants' case

(i) Both slip and policy represented in the clearest terms that A.B.I.P. were to participate in and lead the risk, underwriting a (leading) line in Australia

on policy terms, clauses and conditions which were also to govern any risk as between the Appellants and the First and Second Respondents.

- (ii) The representation affected the nature, type, terms, conditions, acceptance and handling of the proposed risk. It went to the root of every aspect of the proposed risk. It was a representation of a critical materiality to the Appellant's acceptance of both slip and policy: cf Evidence of Mr. K.P. Regan; and of Mr M.G. Brown of the Third Respondents. 10.
- (iii) The representation was contrary to the facts in every respect:
 - (a) A.B.I.P. were not underwriting any line.
 - (b) There was thus no A.B.I.P. policy which could establish the terms, clauses and conditions governing any risk. 20.
 - (c) There was also no proposal to be incorporated in any such policy.

(d) There was no Australian lead underwriter to follow in relation to the risk, its acceptance and handling.

(iv) The Appellants were entitled accordingly to avoid any contracts, whether contained in the slip or telex acceptance or in the policies issued or elsewhere. The Appellants were entitled to rely upon this ground of avoidance as a further justification for their original avoidance for non-disclosure or mis-statement paragraph 4 (xvii) above, and see Chitty on Contracts (25th Ed) Vol. 1. General Principles, paragraph 1599.

10.

Alternatively they were entitled to rely upon it as a fresh ground for avoidance in June 1983, if their original avoidance was not justified: cf paragraphs 21/23 of their [Re-]Amended Defence dated 23rd June 1983.

Volume 1
pp 21-22

20.

12. The Judgment

(i) The Judge said:

"I am unable to find that such a misrepresentation arose. Rather I am 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

Volume 1
p 46
line 49
to p 47
line 3

A.B.I.P. would represent the [Appellants]."

Volume 1
p 43 lines 24-37

This conclusion also reflects an earlier passage in the Judgment considering the evidence.

(ii) It is, the Appellants submit, impossible to justify the Judge's opinion that the slip was complied with cf paragraph 11(i), (ii) and (iii) above.

(iii) As to the statement that "at all times it was intended that A.B.I.P. would represent the [Appellants]", it is of course true that both the Appellants and no doubt Chandlers thought that A.B.I.P. were participating, and that the Appellants intended to write a line on that basis. If the learned Judge uses the word "represent" in an agency sense, that has already been submitted to be incorrect : paragraph 7(iii) above. What is presently important is that the Appellants neither thought nor intended to follow A.B.I.P. in circumstances where A.B.I.P. were not participating in any risk.

Volume 2
p 115 lines 7-30
p 120

The Judge seems to have had in mind evidence by Mr. A.C. Clarke, account

executive, and Mr. M.H. Willis, manager, both from Hudig. They appear to have thought that, though A.B.I.P. was not participating, Hudig still had some right to act for, and owed some duty to, the Appellants because of the terms of the slip and policies. On this basis apparently they appointed solicitors on behalf of the Appellants after the stallion's death despite the fact (unknown to the Appellants) that A.B.I.P. had not participated. But, whatever Hudig's thinking, they could never fill the void left by the absence of A.B.I.P: cf paragraph 11(ii) above.

10. (iv) The Judge was therefore in error in concluding that there was no misrepresentation.
20. (v) The Appellants deal in paragraph 18 below with the Judge's finding of waiver.

CONDITION OF INSURANCE

13.(i) This is the additional submission of law which with leave of your Majesty in Council the Appellants desire to raise

Record

as mentioned in paragraph 3(4) above. The submission is that the statements in the slip and policy wordings that the risk was one of co-insurance with A.B.I.P., upon the terms of A.B.I.P's policy, were, as a matter of law, not merely representations (though they were that), they were also conditions of any insurance, or of the attachment of any risk. The point was not advanced by the Appellants below, though they pleaded by Rejoinder, paragraph 3, that

10.

Supplemental Record
p 42 lines 13-16

"In the alternative if the policies did not incorporate by reference the terms clauses and conditions of the then standard policy of the Australian Blood-stock Insurance Pool then the policies are void for uncertainty."

It was, however, developed by the Third Respondents who, by their Defence as re-amended with leave during the trial, pleaded that insurance was sought on the basis that A.B.I.P. would be the lead insurer together with other co-insurers and that it was "a fundamental condition" of the Appellants' policies that

20.

A.B.I.P. would be a co-insurer,
whereas in fact they were not.

10. (ii) The submissions already made in the context of misrepresentation lead also to the conclusion that the participation of A.B.I.P. and the existence of terms, clauses and conditions to be derived from an insurance policy actually issued by A.B.I.P. were essential to any insurance or the attachment of any risk. Without such participation and terms, the suggestion must be that the Appellants are liable for

"ALL RISKS OF MORTALITY, ACCIDENT,
SICKNESS, DISEASE AND INFERTILITY"

20. in the period and territory stipulated without any qualifications, terms, clauses, conditions, proposal or protection at all. No such "insurance" was or could ever have been contemplated. Evidence of Regan Volume 1 pages cited in paragraph 11(ii) above.

(iii) It is unnecessary to consider whether the pre-requisite of A.B.I.P.'s participation was one which had to be fulfilled by the time when the slip was accepted in London on 27th/28th July 1981 or whether it was

RECORD

a pre-requisite to insurance which could have been satisfied thereafter (before the inception date of the risk, namely 1st August 1981). The same legal principle applies. The participation of A.B.I.P. was a condition of insurance in the proper sense of the word: "Something demanded or required as a pre-requisite to the granting or performance of something else", so that "if it was not fulfilled there was no agreement [of insurance] at all...The risk never attached": see Wickman Machine Tool Sales Ltd v L. Schuler A.G. [1972] 1 W.L.R. 840, per Lord Denning M.R. at page 850: and cf per Edmund Davies L.J. at page 853 G/H, citing Thomson v Weems (1884) 9 App.Cas. 671. If A.B.I.P.'s participation was a condition which might have been fulfilled between 27th/28th July and 1st August 1981, the case is within the words of Lord Diplock in United Dominions Trust Ltd v Eagle [1968] 1 W.L.R. 74, C.A. at page 83 :

10.

20.

"The mutual obligations of parties to a synallagmatic contract may be subject to conditions precedent, that is to say they may not arise

until a described event has occurred."

Lord Denning's reference to the risk never attaching points the analogy from marine insurance of (a) a ship insured in or upon a certain event, e.g. upon or from arrival at or departure from a specified place: cf Arnould: Law of Marine Insurance (16th Ed) paragraph 574/5; Jones v Neptune Marine Insurance Co (1872) L.R.7. Q.B. 702; The Copernicus [189] P237, and (b) goods insured on a particular ship but shipped on another : cf Ionides v The Pacific Fire and Marine Insurance Company [1871] L.R. 6 Q.B. 674. Here the only contract was for "Bloodstock Co-Insurance" - which there never was.

10.

(iv) On this basis there was no insurance and no risk attached. No question of waiver can on this analysis arise. Nor can the First and Second Respondents show any fresh contract.

20.

(v) Alternatively if there was in these circumstances any onus on the Appellants to disclaim any insurance, they have done so from 29th April 1982

RECORD

onwards. They did so then on different grounds but their subsequent discovery that A.B.I.P. had not participated entitles them to rely upon this additional ground to justify their avoidance. They did nothing at any time to constitute affirmation of any insurance.

NON-DISCLOSURE

14. The Appellants' case

The following matters within the knowledge of the First and Second Respondents or of the Third Respondents as brokers were material to be but were not disclosed to the Appellants in London and Belgium: 10.

- (i) The stallion's illness in March 1981;
- (ii) The existing insurance and the refusal thereunder to increase cover from A\$650,000 to A\$1,000,000 in June 1981. 20.

The Appellants claimed to avoid any contracts on these grounds on 29th April 1982.

Volume 2
P 465 line 2
to P 466 line 16

The learned Judge ruled during the trial that materiality was to be assessed by reference

to the standard of an underwriter in the position of A.B.I.P. presented with the risk in Australia. He accordingly excluded evidence which the Appellants wished to adduce as to materiality to the Appellants as prudent insurers in Europe.

10. In the Appellants' submission, the Judge incorrectly excluded such evidence. It follows on this basis that there should be a new trial if and insofar as the learned Judge decided either of the matters mentioned to be immaterial.

So far as concerns (i), the stallion's prior illness, it is clear that he did so decide.

20. As to (ii), his Judgment appears to assume that the matters mentioned were material. Only if this assumption is successfully challenged by the other parties to this appeal, do the Appellants therefore require or seek a new trial on this aspect.

15. The Judgment

(i) The Judge considered the evidence of Australian veterinary opinion adduced

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before him, preferring that of the First and Second Respondents' witnesses.

Volume 2
P 513 line 1
to 514 line 22
P564 line 22
to P 566 line 35

He refused during the trial applications by the Appellants for an adjournment to enable them to adduce evidence of Australian insurance market practice. The Appellants do not seek to challenge this refusal. They accordingly accept that, if Australian insurance market practice is the relevant standard, then the stallion's prior illness was not shown to be material.

10.

- (ii) The Appellants challenge the Judge's exclusion during the trial of evidence of materiality to prudent insurers in Europe. Had A.B.I.P. participated the Appellants would have been prepared to follow their lead in Australia. A.B.I.P. did not participate. Any duty of disclosure was to the Appellants in Europe.

20.

- (iii) Despite the Judge's ruling, the Judgment deals with materiality to the Appellants, stating :

Volume 1
P 45 line 8-20

"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

10. 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 Defendants' attitude had the existence of sand colic been revealed.

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

The evidence referred to was that of Mr. Regan. The question asked (and the answer "Yes") dealt only with a case of bloodstock co-insurance relating to a horse in Australia [i.e., co-insurance with local Australian insurers]. It is irrelevant where there was as here no local Australian co-insurer.

Volume 2
P 487
lines 30-33

20.

(iv) Alternatively, if the question embraced a situation where there was no local Australian co-insurer, then it was inadmissible and should not have been relied upon. The Judge had already ruled out evidence of materiality to London insurers.

Volume 2
P 465 line 2
to 466 line 16

30.

(v) A similar point applies to the Judge's conclusion that "a prudent insurer upon enquiry would surely have received the same veterinary certificate as issued from

Dr. Ahern on 23rd July 1981". This cannot cover materiality to the Appellants in Europe since they were not permitted to adduce their evidence on that aspect.

(vi) Finally, the Judge states

Volume 1
P 45 lines 16-18

"Nor is there evidence of the [Appellants'] attitude had the existence of sand colic been revealed."

The reason there was no such evidence was the Judge's refusal to admit it. However, 10.

the case cited by the Judge,

Babatsikos v Car Owners' Mutual

Insurance Co Ltd [1970] 2 Lloyd's

Rep. 314 does not require evidence of materiality to the particular insurer writing the risk, only of materiality to a prudent insurer in his position.

At the time of the trial, the English authorities were to different effect, 20.

indicating that an insurer must adduce evidence not only that the matter not disclosed was material to a prudent insurer but also that it would (not might) have led to the actual insurer refusing to write the risk or to do so on the same terms and/or at the same rate; Berger and Light Diffusers Pty

Ltd v Pollock [1973] 2 Lloyd's Rep.
442; Container Transport International
Inc v Oceanus Mutual Underwriting
Association (Bermuda) Ltd [1984] 1
Lloyd's Rept. 476, C.A. This more stringent
test has now been disapproved by the Court
of Appeal in the latter case.

10.

(a) The Court of Appeal held the only
relevant test is of materiality
to a prudent insurer.

(b) A matter is material if it would
influence the judgment of a
prudent insurer, in the sense that
he would take it into account in
making his decision, regardless
whether his ultimate decision
would differ.

20.

The Appellants were precluded by the
Judge's ruling from leading evidence of
materiality which would have satisfied
both these criteria (and indeed the more
stringent previous criteria) in relation
to insurers reviewing the risk in Europe.

(vii) The Judge's conclusion that there was no
right to avoid for non-disclosure of the

Volume 1
P 47 lines
4-15

RECORD

Volume 3
P. 28

existing insurance and refusal thereunder to increase cover appears, as stated, to have turned solely upon Hudig/A.B.I.P's knowledge of these matters from 16th July 1981:

"As I have said before A.B.I.P. was the agent of the [Appellants] once each of them signed Chandlers' slip"

This, however, was not so : paragraph 7(iii) above.

10.

MIS-STATEMENTS IN PROPOSAL

16. The Appellants' Case

If the contracts made are to be treated as giving rise to enforceable insurance, this must, in the Appellants' submission, be because they can be supplemented by the printed terms of A.B.I.P's standard policy form and by the contents of the proposal which was actually submitted to A.B.I.P. The Appellants' submissions in this respect are accordingly alternative to their primary case (paragraphs 11 to 15 above).

20.

Volume 1
P.47 lines 1-3
and 13-15

If there is any justification for the Judge's conclusion that the slip and policy wordings were "complied with", then it is that the slip and policy

wordings can be supplemented in this manner.

If there is any justification for the Judge's conclusion that A.B.I.P. represented and "became the Appellants' agents once each signed Chandlers' slip", then it follows that the proposal submitted by the Third Respondents was received by A.B.I.P. on behalf of the Appellants.

10.

Once these conclusions are reached, then there is no answer to the Appellants' claim to treat any contracts as avoided, because of the mis-statements in the proposal for which the Second Respondents and/or Third Respondents as their brokers were responsible. This was conceded below in relation to the Second Respondents' claim

Volume 2
P.604
lines
44-55

20.

In relation to the First Respondents, it is argued that the Second Respondents were not the First Respondents' agents to sign and submit the proposal. But the logical consequence of this argument is that the Second Respondents were not the First Respondents' agents to effect the insurance. In this case the Second Respondents could have no claim. The lease constituted

the First Respondents such agents for all such purposes, including any proposal. The unreported decision of Comptoire Nationale v Law Car and General cited in McGillivray at paragraph 822 concerns a wholly different situation. The dictum of Buckley L.J. at least if construed as being of general application cannot be accepted. If it were, then, as said, the Second Respondents would have no claim at all. 10.

Volume 1
P.46
lines 22-37

17. The Judgment

- (i) The Judge's reasoning on this point was as set out in paragraph 10(iii) above.
- (ii) The proposition that the policies did not replace the slips as from October 1981 is incorrect: paragraph 10 above. The proposition that cover could continue under a slip after and irrespective of any inaccurate proposal is also unsupported by Neil's case. 20.
- (iii) The Judge also relied upon the fact that no A.B.I.P. policy issued. He therefore appears to accept the proposition that there could be an insurance contract without any terms, clauses or conditions at all, apart from a completely unqualified acceptance of liability for

"All risks of Mortality and Accident
Sickness, Disease and Infertility".

If there was any insurance contract, no-one
ever thought or intended it to be on that
basis. If there was any insurance
contract, it must in the Appellants' sub-
mission have been on the basis stated in
paragraph 16 above.

18. WAIVER

10.

- (i) The Judgment includes a paragraph (apparently
misplaced) holding that the Appellants Volume 1
affirmed the contracts and waived "any P 46 lines
right to repudiate liability on the grounds 3 - 12
of innocent misrepresentation". This
upholds a plea in the First and Second
Respondents [Re-]Amended Reply re- Volume 1
lating to the mis-representation of P 36 lines
A.B.I.P's participation. 17 - 46

20.

- (ii) The plea of waiver was founded upon
allegations :

- (a) that Chandlers "as agents for
the [Appellants]" knew from a
telex sent by Hudig on 7th May Volume 3
1982 that A.B.I.P. had no P 130
participation: paragraph 8(d) Ex.1(92)

of the Amended Reply.

(b) that the Appellants had retained the premium: paragraphs 8(e) and 10.

(c) that the Appellants elected to avoid the policies by reason of non-disclosure: paragraph 10.

(d) that the Appellants had failed to rely upon the misrepresentation regarding A.B.I.P's participation until June 1983: paragraphs 8(e) and 10. 10.

(iii) The Judge erred in law and in fact in accepting the plea.

The legal requirements for waiver of the right to avoid, for misrepresentation or non-disclosure or breach of condition in a contract of insurance are stated in MacGillivray and Parkington on Insurance Law, paragraphs 690/692 and 783/793 and in Allen v Robles [1969] 1 W.L. R. 1193, C.A. There must be 20.

(a) full knowledge on the part of insurers of the facts entitling them to avoid, and

- (b) express or implied affirmation of the contract.

As to (b)

- 10. "Delay or inactivity on [insurers'] part is not of itself indicative of an intention to waive the insured's breach of duty, but it will affect the insurers' position if the assured is prejudiced by it or led to believe in the circumstances of the particular case, that the delay is explicable only on the basis of affirming the contract. The mere failure to return the premium is not of itself a waiver of the right to avoid the policy for non-disclosure" MacGillvray para 691

The authority for the last sentence in March Caberet Club and Casino Club Ltd v The London Assurance 1975 1 Lloyd's Rep 169.

- 20. (iv) Taking in turn the allegations said to founder a waiver in this case:

- (a) Knowledge Chandlers were not agents to receive or possess any the knowledge on/Appellants' behalf: cf paragraph 7(i) and 8(i) and(ii)

above. It was not alleged that Chandlers passed on the telex of 7th May 1982 or its information to the Appellants. Chandlers' knowledge as agents was the only knowledge pleaded against the Appellants on this issue and accordingly the plea of waiver should fail at the first stage.

(b) Retention of Premium The 10.

Appellants were claiming to avoid the contracts at all times after 24th April, 1982, and both in their original (August 1982) Defence and in their Amended Defence of 8th March 1983.

Retention of premium could not in these circumstances constitute any waiver.

Moreover it was not established that 20.
all or any of the Appellants retained or indeed received premium in respect of "ASIAN BEAU" Some or all of them may have received premium in account with Chandlers following receipt of a closing advice similar to that in

Volume 3

P.72

Volume 2

P.459

Volume 3 at page 72: cf Evidence of Mr. K P Regan. If they did, it was not shown (nor suggested to Mr. Regan in cross-examination) that they retained it after they avoided in April 1982.

10. (c) Affirmation The Judge concluded Volume 1
that the Appellants by their Amended P.46
Defence dated 8th March 1983 affirmed lines 3 - 7
the contracts but both the original
(August 1982) Defence and the Amended
Defence dated 8th March 1983 claimed to
avoid the contracts for non-disclosure
at common law: cf paragraphs
9 and 10. A claim for misrepresentation
justifies on the same principles
precisely the same course of avoidance
at common law: "For this purpose there
is no difference between allegations of
non-disclosure and misrepresentation":
20. Container Transport International
Inc v Oceanus Mutual Underwriting
Association (Bermuda) Ltd [1984] 1
Lloyd's Rep. 476 C.A., per Kerr L.J. at
at Page 490.

Moreover, the Appellants were and are
entitled to rely upon the misrepresent-

ation as to A.B.I.P's retention as an additional reason justifying their original avoidance on other grounds before they learnt of that misrepresentation : Chitty on Contracts (25th Ed) Vol. 1. General Principles paragraph 1599. Paragraphs 1599

- (d) Lapse of Time It is correct that the Appellants did not raise the misrepresentation regarding A.B.I.P's participation until 2nd June 1983. 10.

It was not pleaded or suggested, however, that any delay or inactivity on the Appellants' part had prejudiced the First and Second Respondents in any material way or led them to believe that the Appellants were affirming the contracts. On the contrary, as stated, the Appellants throughout were maintaining their claim to avoid. 20.

- (v) The learned Judge's finding of waiver was in these circumstances wrong in law and fact. In any event, it constitutes no answer to the Appellants' contentions that there was non-fulfilment of a condition of any insurance and that

the risk never attached.

19. The Appellants therefore humbly submit that this Appeal should be allowed with costs and the judgment of the Supreme Court of Western Australia reversed, alternatively that it should be set aside and a new trial ordered for the following, among other,

REASONS

10. (1) BECAUSE the learned Judge erred in law in concluding that Chandlers and A.B.I.P. became agents of the Appellants in consequence of the latters' acceptance of the slip wording or by virtue of the slip or policy wording.

(2) BECAUSE the learned Judge erred in law in finding that ^{the} Cover Note issued by CHW was issued on behalf of or with any authority of the Appellants.

20. (3) BECAUSE the learned Judge erred in law and/or misdirected himself in holding that the companies Combined/Collective Policies did not contain the relevant contracts and did not replace any earlier contracts.

(4) BECAUSE it was misrepresented to the Appellants at the time of placing of the slip that the risk was a co-insurance with A.B.I.P. participating there-

in as local co-insurers on terms, clauses and conditions of a policy issued by A.B.I.P. and because this was a misrepresentation material to the Appellants as prudent insurers.

(5) BECAUSE the learned Judge erred in law and/or his findings of fact were unsupported by or against the weight of the evidence in relation to his conclusion that the Appellants had waived any right to avoid for the misrepresentation as to co-insurance with A.B.I.P.

10.

(6) BECAUSE A.B.I.P.'s participation as co-insurers on terms, clauses and conditions of policy issued by A.B.I.P. was a condition of and pre-requisite to any contract of insurance by the Appellants (whether in the slip or policy wording or elsewhere); and/or because in the absence of any participation by A.B.I.P. the risk never attached.

(7) BECAUSE in the alternative to (6), the Appellants were entitled to rely upon the non-fulfilment of the condition regarding A.B.I.P.'s participation as co-insurers as a justification for their avoidance from 29th April 1982 and thereafter.

20.

(8) BECAUSE the learned Judge erred in law or misdirected himself in holding that the test for considering whether there had been material

non-disclosure to the Appellants was that of the prudent underwriter in the Australian bloodstock insurance market rather than that of the prudent underwriter in the London and/or Belgian bloodstock insurance market.

10. (9) BECAUSE the learned Judge was wrong to exclude evidence as to what a prudent underwriter in the English and/or Belgian insurance market would have regarded as material to be disclosed upon placing the risk.

(10) BECAUSE in relation to the existing insurance and the refusal thereunder to increase cover from A\$650,000 to A\$1,000,000 in June 1981, the learned Judge was wrong to attribute to the Appellants knowledge of A.B.I.P.

20. (11) BECAUSE if any enforceable contracts of insurance by the Appellants existed or attached, they are to be treated as having incorporated the terms, clauses and conditions of a standard A.B.I.P. policy and of the proposal form dated 31st July 1981 actually signed by the Second Respondents and submitted to A.B.I.P. and accordingly the Appellants were entitled to treat any such contracts as void on account of the mis-statements in that proposal.

(12) BECAUSE the learned Judge was wrong in law

and/or on the evidence before him in his rejection of the Appellants' contentions as set out herein and in his conclusion that the Appellants were not entitled to avoid and/or deny liability under any contracts with the First and Second Respondents.

JONATHAN MANCE

JULIAN FLAUX