

PLDGS(6)/A11/8

IN THE PRIVY COUNCIL

No 16 of 1984

ON APPEAL FROM THE  
SUPREME COURT OF WESTERN  
AUSTRALIA

BETWEEN:

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

Appellants

AND

NATIONAL WESTMINSTER FINANCE AUSTRALIA  
LIMITED

First Respondent

AND

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

Second Respondents

AND

AUSTRALIAN INSURANCE BROKERS LIMITED

Third Respondents

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CASE FOR THE THIRD RESPONDENT

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A. HISTORY

RECORD

1. This is an appeal from a judgment of the Supreme Court of Western Australia (Wallace J) dated 15th July 1983, whereby (i) the Appellants were ordered to pay \$433,500.19 to the First

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Respondent and \$731,704.81 to the Second Respondents and (ii) the First and Second Respondents' claims against the Third Respondent were dismissed.

2. The Third Respondent at all material times acted as insurance broker for the Second Respondents, and had so acted for many years previously.

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10 3. In January 1980 the Third Respondent arranged insurance, on behalf of the Second Respondents, for a race horse named Asian Beau in the sum of \$650,000. The horse was leased by the Second Respondents from the First Respondent on terms which required the Second Respondents to effect insurance. The Third Respondent arranged the insurance with Butcher and Hall  
20 (Australia) Pty Limited ("Butcher and Hall").

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4. In March 1981 Asian Beau suffered a severe bout of colic, for which it was treated at Murdoch University. The horse appeared to make a complete recovery. This colic was caused by eating sand ("sand colic"). It is a

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RECORD

condition prevalent amongst horses in  
Western Australia.

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5. On or about the 30th June 1980 Mr.  
Francis Wright, the Second Respondents'  
racing manager, informed the Third  
Respondent that the value of Asian Beau  
had increased to \$1,000,000 and asked  
that the insurance cover be increased to  
10 that amount. Mr. Malcolm Brown of the  
Third Respondent telephoned Mr. Don  
Booker of Butcher and Hall to ask  
whether they would be prepared to  
increase the cover. Mr. Booker said  
that they would not. He added that  
Livestock Underwriters of Australia,  
with which he was also associated, might  
be prepared to provide additional cover  
of \$350,000, but (as it subsequently  
20 emerged) they were not willing to do so.

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6. The Third Respondent then  
approached the Australian Bloodstock  
Insurance Pool ("ABIP"), a syndicate of  
insurers whose affairs were managed by  
Hudig Langeveldt Pty Limited ("Hudig").  
The Third Respondent had an agreement

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with ABIP, whereby ABIP were entitled,  
at Hudig's discretion, to insure  
horses for up to \$150,000 and arrange  
co-insurance in excess of that figure. VOL 3 P81  
By a Telex dated 16th July 1981 to VOL 3 P29  
Hudig the Third Respondent sought  
insurance for Asian Beau in the sum  
of \$1,000,000 and added "Existing  
10 Underwriter won't increase  
from \$650,000". On the 27th July 1981  
Mr. Clarke of Hudig sent a Telex to VOL 3 P33  
Chandler Hargreaves, Whittall and Co  
Limited ("CHW"), insurance brokers in  
London, asking them to place insurance  
for Asian Beau in the sum of \$1,000,000.  
Mr Clarke signed this Telex "Berte  
Clarke ABIP". CHW prepared a slip which  
showed ABIP as "Co-Assured" and stated:  
20 "All terms, clauses and conditions,  
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additional premiums and return VOL 3 P70  
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".

The various Appellants accepted the risk shown on this slip in the proportions pleaded in the Amended Statement of Claim. On the 28th July 1981 CHW informed Hudig by Telex that Asian Beau was insured for the period 1st August 1981 to 1st November 1982.

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On the same day Hudig passed this information on to the Third Respondent by Telex. The Third Respondent replied by Telex on the 30th July 1981:

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"Please hold covered stallion  
"Asian Beau"".

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7. In the meantime the Third Respondent had sent a proposal form to Mr. Wright for signature on the 23rd July 1981. This had been partially completed by the Third Respondent, but two questions (nos. 3 and 6) had been incorrectly answered. On the 30th July Mr. Wright signed the declaration at the foot of the proposal form. Mr. Wright states that he read the description of the insured and of the horse at the top of the first page. He did not read the rest of the proposal form, but he

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believes that he glanced over it to see that it had been answered.

This proposal form was sent or given to the Third Respondent who forwarded it (together with a Veterinary Certificate) to ABIP on the 31st July.

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8. Hudig sent a debit note dated 31st July 1981 (but stamped received on 25th August 1981) in respect of this

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10 insurance to the Third Respondent, showing the insurer as "Lloyds-Chandler Hargreaves Whittall and Company". On the 13th August the Third Respondent sent to the Second Respondents a memorandum of insurance and a confirmation of cover, both showing that insurance had been effected with ABIP.

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Copies of those documents were sent to the First Respondent as lessor of the horse. On the 25th August CHW sent a

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20 "cover/debit note" to ABIP, which corresponded with the slip (see paragraph 6 above) and showed the Appellants as insurers.

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9. In October 1981 policies were issued on behalf of the Appellants.

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These policies (with the possible exception of one) were sent by CHW to Hudig. Hudig kept them in its file until after Asian Beau's death.

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10. On the 4th March 1982 Asian Beau was destroyed following the discovery of peritonitis caused by a large tear at the base of the caecum. A claim was made against the Appellants as insurers.

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10 The Appellants denied liability, initially on the grounds of non-disclosure of material facts. The present proceedings then followed.

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B. THE ISSUES BETWEEN THE PARTIES

11. The principal basis on which the First and Second Respondents put their case was the interim contract of insurance arising from the Telexes between the Third Respondent and Hudig in July 1981 and/or the cover/debit note issued by CHW on 25th August 1981: see paragraphs 7A - 7C of the Amended Statement of Claim. In the alternative the First and Second Respondents claimed upon the policies: see paragraph 8 of

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the Amended Statement of Claim. The Appellants denied the alleged interim contract of insurance, but admitted the contracts of insurance which were embodied in the policies: see

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paragraphs 4 and 12-15 of the Amended Defence of the First Defendants. The Appellants contended that the contract or contracts of insurance (whatever form they took) had been avoided, or should be rescinded, by reason of misrepresentation and/or non-disclosure of material facts.

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12. As against the Third Respondent, the First and Second Respondents claimed damages for breach of contract and/or negligence in the event that their action against the Appellants failed:

see paragraphs 17 to 41 of the Amended Statement of Claim. The Third

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Respondent admitted (at trial) that its employee who completed the proposal form was negligent and that it was thereby in breach of its implied contractual duty to the Second Respondents to exercise reasonable care and skill.

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The other allegations of breach of contract and the allegations of negligence were denied. The Third Respondent contended that no breaches of contract or negligence on its part had caused the First or Second Respondents loss. This contention was put on three separate grounds.

10 (i) The First and Second Respondents did not enter into any valid contract of insurance with the Appellants. Accordingly even if the Third Respondent had not committed the alleged breaches of contract or negligence, the First and Second Respondents would not have been entitled to recover against the Appellants: see paragraphs 3(a)-(c) and 14(b) of  
20 the Amended Defence of the Second Defendant.

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(ii) Alternatively, the Appellants were not entitled to deny liability on the grounds of misrepresentation or non-disclosure: see paragraphs

3(d),12(e)-(g), 14(c)-(f) of the  
Amended Defence of the Second  
Defendant.

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(iii) In the further alternative,  
the First and Second Respondents'  
loss was caused or contributed to  
by their own negligence in signing  
the proposal form without  
correcting the errors therein: see  
10 paragraphs 15 and 18 of the Amended  
Defence of the Second Defendant.

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C. THE JUDGMENT OF WALLACE J.

13. Wallace J held that at the time of  
Asian Beau's death an interim contract  
of insurance existed; that this interim  
contract had not been induced by any  
misrepresentation to the Appellants  
concerning the role of ABIP; that the  
refusal of the previous insurers to  
20 increase cover beyond \$650,000 had been  
disclosed (in that it had been notified  
to ABIP as agents for the Appellants);  
that the attack of colic in March 1981  
was not a material fact of which  
disclosure was required. Wallace J also

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held (in the alternative) that the Appellants had waived the right to repudiate on the grounds of innocent misrepresentation. Accordingly the First and Second Respondents' claim against the Appellants succeeded.

14. The First and Second Respondents' claim against the Third Respondent was dismissed on the second of the three grounds set out in paragraph 12 above. However, Wallace J made the following specific findings against the Third Respondent in his Reasons for Judgment and Reasons for Judgment on Costs:

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- (i) The Third Respondent "contracted to provide the Plaintiffs with the required insurance cover."
  - 20 (ii) The Third Respondent was negligent and in breach of contract.
  - (iii) There was no contributory negligence on the part of the First or Second Respondents.

D. SUMMARY OF THE THIRD RESPONDENT'S  
CONTENTIONS IN THIS APPEAL.

15. The Third Respondent contends  
that:

10 (i) The Judgment of Wallace J  
in favour of the First and Second  
Respondents and against the  
Appellants was correct and ought to  
be affirmed (see paragraphs 16-18  
below)

20 (ii) Wallace J erred in holding  
that the Third Respondent  
contracted to provide the First and  
Second Respondents with the  
required insurance. He ought to  
have held that the Third  
Respondents' contractual duty  
(which was owed to the Second  
Respondents only) was to exercise  
reasonable care and skill in  
attempting to obtain the insurance  
which was requested. (See  
paragraphs 19-23 below).

(iii) Wallace J erred in holding  
that there was no contributory  
negligence on the part of the First

or Second Respondents. He ought to have held that Mr. Wright was negligent in signing the proposal form without correcting the errors therein, and that such negligence should be imputed to the First and Second Respondents, alternatively to the Second Respondents alone. He ought further to have held that this negligence caused or contributed to the First and Second Respondents' alleged losses. (See paragraphs 24-29 below).

(iv) (If contention (i) fails) the First and Second Respondents did not enter into any valid contracts of insurance with the Appellants, for reasons unconnected with the Third Respondent's negligence or breach of contract. Thus no loss has been suffered by the First or Second Respondents by reason of such negligence or breach of contract. (See paragraphs 30-34 below).

E. CONTENTION (i): THAT THE JUDGMENT IN  
FAVOUR OF THE FIRST AND SECOND  
RESPONDENTS AND AGAINST THE APPELLANTS  
OUGHT TO BE AFFIRMED

16. It is anticipated that this point will be more fully developed in the case of the First and Second Respondents. In brief, however, the Third Respondent supports each of the reasons given by  
10 Wallace J and, in addition, will contend that the judgment against the Appellants ought to be affirmed for two further reasons set out in paragraphs 17 and 18 herein.

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17. Firstly, the refusal of the previous insurers to increase cover beyond \$650,000 was not a material fact. The circumstances in which such refusal occurred were described by Mr. Brown  
20 and, more briefly, by Mr. Willis. There is no evidence to suggest that the previous insurers were unwilling to renew the existing cover, nor is there any evidence to suggest that the refusal to increase cover was connected with the attack of colic in March 1981 or with any other specific fact affecting the risk. It is contended that the

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previous insurers' refusal to increase cover was not a matter which would have influenced the judgment of a prudent insurer in July 1981 in deciding whether, and on what terms, to take the risk.

10 18. Secondly, the Third Respondent was authorised by ABIP to issue both interim insurance and policies of insurance on ABIP's behalf, where ABIP was to be the insurer or co-insurer. In this case ABIP impliedly represented to the Third Respondent that it was co-insurer and the Third Respondent acted in the belief that this was so. CHW and the Appellants must have known that ABIP would make this representation. Thus the Third Respondent's knowledge is to be imputed to the Appellants: Stockton .v. Mason [1978] 2 Lloyd's Rep 430.

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F. CONTENTION (ii) THAT THE THIRD RESPONDENT'S ONLY RELEVANT CONTRACTUAL DUTY WAS TO EXERCISE REASONABLE CARE AND SKILL IN ATTEMPTING TO OBTAIN THE INSURANCE WHICH WAS REQUESTED

19. It is common ground that the contract of engagement between Second



and Third Respondents was made in or  
about 1977: See paragraph 37 of the  
Amended Statement of Claim and paragraph  
16 of the Amended Defence of the Second  
Defendant. No separate or specific  
contract was ever made between these two  
parties in relation to the insurance of  
Asian Beau.

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10 20. In the ordinary way an insurance  
broker's duty is to exercise reasonable  
care and skill in attempting to obtain  
the insurance which his client requests:  
See MacGillivray and Parkington on  
Insurance Law (7th edition) paragraph  
368. The insurance broker provides  
"professional" services and a  
professional man does not normally  
impliedly warrant that he will achieve  
the result which his client desires: see  
20 Greaves and Co (Contractors) Limited v.  
Baynham Meikle and Partners [1975] 1  
W.L.R. 1095 at 1100.

21. There was no express agreement in  
the present case that the desired  
insurance would be obtained in respect  
of the Second Respondents' horses

generally or Asian Beau in particular.  
There are no circumstances from which  
such a term can be implied.

22. There was no contract between the  
First and Third Respondents.

23. Accordingly, it is contended that  
Wallace J erred in holding that the  
Third Respondent contracted with the  
First and Second Respondents to provide  
10 them with the required insurance cover.

G. CONTENTION (iii): THAT THE NEGLIGENCE  
OF THE FIRST AND SECOND RESPONDENTS,  
ALTERNATIVELY THE SECOND RESPONDENTS  
ALONE, CAUSED OR CONTRIBUTED TO THE  
FIRST AND SECOND RESPONDENTS' ALLEGED  
LOSSES

24. On the 30th July 1981 Mr. Wright  
was well aware that Asian Beau had been  
treated for colic four months previously  
20 and also that Asian Beau was currently  
insured by insurers who were not willing  
to increase the cover to \$1,000,000.

He conceded in cross-examination, that  
if he had spent 30 seconds looking at  
the proposal form, it would have been  
apparent to him that the answer to  
question 3 was inadequate and that the

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answer to question 6 was untrue. It is submitted that on the evidence a finding that Mr. Wright was negligent to sign the declaration at the foot of the proposal form, without correcting the answers to questions 3 and 6, is inescapable. Furthermore, the fact that Mr Wright had, on a previous occasion, found and corrected errors in a proposal form completed by the Third Respondent shows that he did not rely totally upon the Third Respondent in this regard.

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25. Mr. Wright was employed by the Second Respondents and expressly signed "for J M Goldberg". Thus his negligence must be imputed to the Second Respondents. Furthermore, if it should be held that the First Respondent is affected by any non-disclosure or misrepresentation on the part of the Second Respondents, then Mr. Wright must be taken to have signed the proposal form on behalf of the First Respondent as well. In these circumstances Mr. Wright's negligence must be imputed to both the First and Second Respondents.

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26. If it is held that there was any misrepresentation to the Appellants concerning the health of Asian Beau or concerning the previous insurers Mr. Wright's negligence was the sole effective cause of such misrepresentation: O'Connor v. Kirby [1972] 1 Q.B. 90 (see the judgment of Davies L J at 99 and the judgment of Karminski L J at 100).

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27. If it is held that any material facts concerning the health of Asian Beau or its previous insurance were not disclosed to the Appellants, Mr. Wright's negligence was the sole effective cause of such non-disclosure.

28. In the alternative to paragraphs 26 and 27, it is contended that if there has been any misrepresentation or non-disclosure of material facts, this was contributed to by the negligence of Mr. Wright.

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29. Accordingly, if the Appellants' appeal succeeds and if the First and Second Respondents succeed to any extent in their claim against the Third

Respondent, then their damages should be reduced for contributory negligence.

H. CONTENTION (iv): THAT THE FIRST AND SECOND RESPONDENTS DID NOT ENTER ANY VALID CONTRACTS WITH THE APPELLANTS FOR REASONS UNCONNECTED WITH THE THIRD RESPONDENT'S NEGLIGENCE OR BREACH OF CONTRACT

10 30. This contention is inconsistent with, and alternative to, contention (i). It will only be pursued if the Appellants succeed in their appeal.

31. The underwriting agreement between the Third Respondent and ABIP clearly envisaged that where the insurance exceeded \$150,000 ABIP would provide the lead insurance and that other insurers would be co-insurers with ABIP. In this case it was agreed between ABIP and the Third Respondent that the co-insurers would be Lloyds. However, under the arrangements made by ABIP and CHW, ABIP were not the lead insurers and the co-insurers were not Lloyds.

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Thus no valid contract of interim insurance was made between the First and Second Respondents and the Appellants.

32. The Third Respondent will further contend (if necessary) that the policies issued by CHW on behalf of the Appellants did not constitute or embody any contract between the Appellants and the First and Second Respondents, for the reasons set out in paragraph 3(b) of the Amended Defence of the Second Defendant.

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10 33. The only negligence on the part of the Third Respondent was negligence by its employee in filling out the proposal form. Since no valid contract of insurance came into existence, no loss was caused to the First or Second Respondents by reason of the inaccuracies in the proposal form.

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RUPERT JACKSON