Case No: A3/2005/2690

Neutral Citation Number: [2006] EWCA Civ 889
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
Mr. Justice Cooke
2004 Folio 911

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 29th June 2006

Before :

LORD JUSTICE WALLER
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE RICHARDS

- -

Between :

TALBOT UNDERWRITING LTD	**Respondent/** Claimant
- and -	
NAUSCH, HOGAN & MURRAY INC.	**Appellants/** Defendants

- -

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
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Official Shorthand Writers to the Court)

- -

Mr. Julian Flaux Q.C. and Mr. Peter MacDonald Eggers (instructed by **Eversheds**) for the **appellants**
Mr. Gavin Kealey Q.C. and Mr. Charles Kimmins (instructed by **Russell Ridley & Co**) for the **respondent**

- -

Judgment

Lord Justice Moore-Bick:

Background

1. This is an appeal against the judgment of Cooke J. determining a number of preliminary issues in this action. The dispute between the parties arises out of arrangements for the insurance of the vessel *Jascon 5* while she was undergoing completion, outfitting, commissioning and testing at Sembawang Shipyard Pte Ltd ("Sembawang") in Singapore in 2003. I shall refer to this as 'the completion work' and the contract between the vessel's owners, Consolidated Projects Ltd ("CPL"), and Sembawang under which it was carried out as 'the Completion Contract'.

2. The defendants, Nausch, Hogan & Murray Inc. ("NHM"), are insurance brokers. They were instructed by CPL to obtain a shipbuilders' all risks policy of insurance on the vessel's hull and machinery in respect of the period of the completion work on behalf of various interested parties and specifically to include Sembawang as co-assured pursuant to the terms of the Completion Contract. NHM placed the risk in three markets: London, Norway and Russia. They instructed the firm of Newman, Martin & Buchan ("NMB") to carry out the placing in the London market, but apparently failed to instruct them that Sembawang was to be named in the policy as a co-assured. Forty per cent of the risk was eventually placed in the London market with the claimants as insurers. It is common ground that Sembawang was not named as a co-assured in the London policy.

3. Much of the fitting out of the vessel was done in drydock. On 14th October 2003 while the vessel was being refloated she sustained serious flooding of several compartments. The damage was repaired by Sembawang which made a claim under the insurance. However, that claim was rejected by the London market insurers on the grounds that Sembawang was not one of the assured and as a result disputes arose between Sembawang, CPL and NHM. The loss attributable to the London market's share of the risk was eventually assessed at US$1,253,332 and Sembawang sought to recover that amount from CPL by way of damages for failing to procure insurance on its behalf in accordance with the terms of the Completion Contract. It also sought to hold NHM liable in negligence. CPL looked to the brokers for an indemnity against any liability it might have to Sembawang on the grounds that it had been brought about by their breach of duty.

4. The dispute between Sembawang and CPL was eventually compromised on the terms of a Settlement Agreement dated 28th April 2004 under which CPL agreed to pay Sembawang US$850,000. By an Assignment Agreement dated 26th July 2004 CPL and Sembawang assigned any rights they might have against NHM or their agents to the first claimant, Talbot Underwriting Ltd ("Talbot"), acting on behalf of all the London market insurers in consideration of the payment by Talbot to CPL of US$501,252.80. Talbot agreed to pursue claims against the brokers with the assistance of CPL and Sembawang and to distribute any amounts recovered from them to the parties to the agreement in accordance with a prescribed formula.

On 16th May 2005 the insurers began the present proceedings against NHM claiming damages for breach of duty and negligence by the brokers in placing the insurance on the vessel. They seek to recover US$403,132 as assignees of the rights of Sembawang and US$536,717 as assignees of the rights of CPL. In their defence NHM allege, among other things, that Sembawang was a co-assured under the policy, either because it was an assured or an "additional assured" within the meaning of the policy or because it was entitled to enforce the policy as an undisclosed principal of CPL, and that in any event neither CPL nor Sembawang has suffered any loss as a result of their failure to include Sembawang as a named co-assured.

At the request of the parties Cooke J. gave directions at the case management conference for the determination of a number of preliminary issues on the basis of the admissions made in the statements of case, certain documents which were identified in the order and certain facts which, by agreement between the parties, were to be assumed to have been established for the purposes of the trial. Those facts were set out in a schedule to the order.

At the trial itself a question arose whether the parties could rely on any facts other than those set out in the schedule insofar as they were not for practical purposes in dispute, albeit they were not the subject of any admissions in the statements of case. The judge ruled that they could not and there is no appeal against his decision. Accordingly, apart from any admissions in the statements of case and any facts which can fairly be said to be implicit in the documents referred to in the order, the schedule contains the entire factual basis on which the issues fall to be determined. In those circumstances I think it is appropriate to set it out in full in this judgment.

The facts

5. The following facts are to be taken as having been established for the purposes of the determination of the preliminary issues:

   1. The vessel *Jascon 5* ("the vessel") was an offshore pipelay construction barge, which was owned by CPL. CPL was part of the Sea Trucks group of companies.

   2. The vessel was built in China.

   3. In March 2003, the vessel was towed from China to Sembawang's Shipyard in Singapore, where the completion, outfitting, commissioning and testing of the vessel was to take place. The said work was commenced in March 2003 and was to be carried out pursuant to the Completion Contract entered into between CPL and Sembawang on 5th October 2002 (Appendix 1). The only legal relationship between Sembawang and CPL and/or Sea Trucks was constituted by the Completion Contract and the fact that Sembawang was

undertaking works in respect of the vessel at its shipyard.

4. In May 2003, NHM was instructed by Mr Roomans of CPL, Sea Trucks and Roomans Eneli Flynn Brokers Ltd to place a builders' all risks policy in respect of the vessel, which policy was to include Sembawang as a co-assured.

5. Mr Roomans, CPL and Sea Trucks were authorised by Sembawang and intended to place builders' all risks insurance on behalf of Sembawang and to include Sembawang as a co-assured.

6. The vessel was insured with a final contract value of US$70,800,000. The risk was placed in London (to the extent of an order of 40%), in Norway (35%) and Russia (25%).

7. The London insurers (for their 40% order) subscribed to the Builders' Risks Policy (Appendix 2) in respect of the vessel on various dates between 21st and 27th May 2003 respectively. The risk in London was placed by Newman Martin & Buchan ("NMB") on the instructions of NHM.

8. At all material times, Sea Trucks and CPL intended to include Sembawang as a co-assured under the Builders' Risks Policy as required by the Completion Contract.

9. The Claimants contend that, unless the contrary can be said by reason of the terms of the Builders' Risks Policy, NMB did not entertain an intention that Sembawang would be covered as a co-assured under the Builders' Risks Policy.

10. NHM contends that NMB intended that Sembawang would be covered as a co-assured under the Builders' Risks Policy.

11. Unless the contrary can be said by reason of the terms of the Builders' Risks Policy, the London insurers were not notified that Sembawang was intended to be a co-assured under the Builders' Risks Policy until after 14th October 2003.

The Claimants contend that, unless the contrary can be said by reason of the terms of the Builders' Risks Policy, the London insurers (at the time of or after their agreement to the Builders' Risks Policy) did not entertain an intention that, or specifically agree that, Sembawang would be covered as a co-assured.

NHM contends that, by reason of the terms of the Builders' Risks Policy, the London insurers intended or agreed that Sembawang would be covered as a co-assured.

On 14th October 2003, during the period covered by the Builders' Risks Policy, the vessel sustained flooding in various compartments, including the generator room, whilst the vessel was being refloated after drydocking at Sembawang's Shipyard.

Sembawang incurred expense by way of the cost of repair of the vessel.

Sembawang has not acknowledged liability, nor has been held liable, to incur the said expense.

Sembawang made a claim upon the London insurers under the Builders' Risks Policy, in respect of the London market's order of 40%, but the claim was refused by the London insurers on the ground that Sembawang was not an assured under the Builders' Risks Policy.

The London insurers did not avoid the Builders' Risks Policy.

The issues

6. Cooke J. gave directions for the determination of ten preliminary issues, but the notice of appeal only sought to challenge his decision in relation to five of them and by the end of the hearing those five had been reduced to the following four (for convenience I have retained their original numbering):

Issue 1: Was Sembawang a co-assured under the Builders' Risks Policy on the grounds set out in sub-paragraph 7(7) of the Amended Defence and Counterclaim [i.e. because it was an assured or an additional assured or was insured as an undisclosed principal]?

Issue 3: Assuming the relevant facts which may be relied on by the Claimants in support of their allegation of non-disclosure of the circumstances alleged in paragraph 6(d) and/or paragraph 7 of the Amended Reply and Defence to Counterclaim [i.e. CPL's intention to contract on behalf of Sembawang and its authority to do so],

(1) Was CPL and/or Sea Trucks obliged, as a matter of law, to disclose the said

circumstances?

(2) Did the London insurers, by reason of the terms of the Builders' Risks Policy, waive disclosure of the said circumstances?

Issue 8: Did Sembawang suffer no loss as a result of any alleged breach of duty on the part of NHM on any of the grounds set out in paragraph 9(1) of the Amended Defence and Counterclaim [i.e. because it was not liable to make good the damage to the vessel]?

Issue 9: Did CPL suffer no loss (by way of a liability to Sembawang for breach of clause 15.12 of the Completion Contract) as a result of any alleged breach of duty on the part of NHM on the grounds set out in paragraph 16C of the Amended Defence and Counterclaim [i.e. because CPL was itself entitled to recover the full amount of the loss under the policy]?

[I have added the words in brackets to assist in understanding the nature of the issues.]

The policy

7. It is convenient at this point to refer to the salient terms of the London market policy. As is commonly the case, the contract is to be found in a market slip to which each of the claimants subscribed. The slip describes the type of cover as 'Marine Hull' and the form of policy as 'MAR 91 / Slip Policy'. It does not appear to have been envisaged, therefore, that a formal policy wording would be produced and none was.

8. The following clauses are of particular importance:

"ASSURED: SEA TRUCKS (NIGERIA) LIMITED and/or DIESEL POWER (NIGERIA) LIMITED and/or DOLPHIN OFFSHORE (NIGERIA) LIMITED and/or WALVIS (NIGERIA) LIMITED and/or WEST AFRICAN DRYDOCK LIMITED and/or Subsidiary, Affiliates, Associated and Interrelated Companies and/or Joint Ventures as may be required as their respective rights and interest may appear.

PROJECT/

PERIOD: Attachment hereon with effect from 21st May 2003 whilst at Sembawang Shipyard, Singapore, undergoing completion, outfitting, commissioning and testing during period of approx. 6½ months, expected final delivery date after sea trials, mid January 2004.

INTEREST: HULL AND MATERIALS etc., MACHINERY OUTFIT etc., and everything connected therewith nothing excluded. Sum Insured:-

Hull Value & Equipment: US$ 21,000,000

Final Contract Value: US$ 70,800,000

CONDITIONS: Institute Clauses for Builders' Risks 1st June 1988 (C1.351).
Institute War Clauses Builders' Risks 1st June 1988 (C1.349).
Institute Strikes Clauses Builders' Risks 1st June 1988 (C1.350).
Institute Extended Radioactive Contamination Exclusion Clause 1st November 2002 (Cl.356A).
Institute Chemical, Biological, Bio-Chemical, Electromagnetic weapons and cyber attack exclusion clause (Cl.365).
Including Assured, interest of Mortgagees (and Notices of Assignment in respect thereof), Loss Payees, Additional Assureds and Waivers of Subrogation as may be required.
Any amendments and/or agreements and/or alterations and/or increases (not exceeding written line) or decreases in value to be agreed slip leading underwriter only and to be binding on all others hereon subject to adjustment of premium at expiry.
Brokers Cancellation Clause as attached.
Several Liability Notice LSW 1001 (Insurance) as attached.
Premium Payment Clause LSW 3000 (45-days)."

9. In the light of the policy terms I turn to consider the issues that arise on the appeal.

Issue 1: *Was Sembawang a co-assured under the Builders' Risks Policy on the grounds set out in sub-paragraph 7(7) of the Amended Defence and Counterclaim?*

10. Two quite separate questions arise under this issue: (a) on the true construction of the slip was Sembawang one of the assured; and (b) if not, was Sembawang entitled to enforce the contract as an undisclosed principal?

(a) Was Sembawang an assured?

11. Before the judge NHM argued on a number of different grounds that Sembawang was an assured under the terms of the policy. Before us, however, they relied on only one ground, namely, that Sembawang was an "additional assured" within the meaning of the clause in the slip which provides

> "Including Assured, interest of Mortgagees (and Notices of Assignment in respect thereof), Loss Payees, Additional Assureds and Waivers of Subrogation as may be required."

For convenience I shall refer to this as the "general extension" clause. In summary, the argument was that these words operate so as extend cover to any person who has an insurable interest in the vessel's hull and machinery insofar as it may be necessary for the named assured that such persons should be covered.

12. The construction which NHM sought to place on the general extension clause raises a number of difficult questions, both in relation to the language used and its commercial effect. These difficulties are compounded by the fact that, unlike the immediately following lines, the words themselves do not form a natural sentence. If the clause is to be read as containing a single coherent substantive provision, therefore, it is necessary to read some words into it in order to express its meaning fully. However, the very fact that it is necessary to do so causes one to question whether they can have been intended to bear the meaning suggested.

The parties have suggested a number of different meanings for this clause at different stages in the course of the proceedings. The task of constructing a sensible unified provision has proved difficult, however, partly because of the presence of the word “Assured”, partly because of the references to loss payees and waivers of subrogation and partly because of the inclusion of the expression “as may be required”, which also appears in the section at the head of the slip identifying the assured. Before the judge NHM submitted that the general extension clause should be read as providing for additional assureds (among others) to be included in the cover as might be required by the assured identified earlier in the slip, but that construction runs into a number of difficulties. Since the insurers were never notified that Sembawang was to be covered, it was necessary for NHM to argue that the words “as may be required” meant no more than “as may be needed”, rather than “as may be demanded of underwriters”, but it is inherently unlikely that any insurer would undertake to treat as an insured under a policy of this kind a person of whose existence and interest he had not been notified. Even under a facultative/obligatory contract some declaration or notification to the insurer prior to the occurrence of the loss is normally required in order to render the insurer liable: see *Glencore International AG v Alpina Insurance Company Limited* [2004] 1 Lloyd's Rep. 111 at paragraphs 267-271. Although the insurer under such a contract is bound to accept the risk, he does at least have the opportunity of obtaining reinsurance, if he thinks it appropriate to do so.

Two further constructions of the clause were discussed: (a) that “Assured” refers to the named assured in the section earlier in the slip identifying the assured and “Additional Assureds” to those identified by description rather than name; and (b) that “Assured” refers to all the assureds identified in that earlier section and “Additional Assureds” to entities that did not fall within the description of the assured at the time the slip was signed, but who might subsequently come within it. In either case, however, the suggestion was that the clause was intended to contain a substantive provision identifying the persons who are to be included in the cover. The judge preferred the latter construction, but, as he said, on neither view is Sembawang an assured under the policy.

The construction preferred by the judge has the merit of enabling an entity which comes within the ambit of the original group during the course of the cover, whether as the result of an acquisition, a change in corporate structure, the conclusion of a joint venture agreement or however, to obtain the benefit of the group's insurance on notification to the insurers. To that extent it may be said to be consistent with

commercial needs, but nonetheless I find it difficult to ascribe a meaning to the general extension clause as a whole which accommodates it. In effect one is being asked to construe the clause as if it read

> "Including [within the scope of cover] Assured, interest of Mortgagees (and Notices of Assignment in respect thereof), Loss Payees, Additional Assureds and Waivers of Subrogation as may be required.",

but what is one then to make of the words "Loss Payees" (who do not necessarily have an interest in the subject matter of the policy of any kind and would not have one merely by virtue of being loss payees) and "Waivers of Subrogation" and why is it necessary, for that matter, to mention notices of assignment in respect of mortgagees' interests? The fact is that it is very difficult to construct a single coherent provision which both extends cover to additional assureds in general and accommodates all the expressions used in this clause, even if one adds a great deal of additional language. If these lines were intended to have the meaning for which NHM contended, or even that which the judge preferred, it ought to be possible to express that meaning in language of a kind that might be found in a fully expressed policy wording while retaining the essential elements of the language used in the slip. In my view it is significant that Mr. Flaux Q.C. did not attempt to formulate any such wording and in my view it is not possible to do so satisfactorily in relation to any of the constructions that were put forward in the court below.

13. In his submissions to us Mr. Kealey Q.C. put forward yet another meaning for this clause which at one stage he indicated was his primary case. He submitted that its purpose was to identify the persons to whom the proceeds of the policy would be paid, as appropriate. That, of course, would account for the presence of mortgagees and loss payees, but it still does not account satisfactorily for the references to notices of assignment and waivers of subrogation. I find the suggestion that those words were intended to apply to a situation in which the insurers would otherwise have had a subrogated claim against a mortgagee or loss payee unconvincing in the absence of some indication that the parties actually had such a situation in mind. Moreover, as with the case of the judge's constructions, I find it difficult to accept that the parties would have chosen these words if they had intended to achieve the result which it is said they had in mind. I am well aware that market documents of this kind are often expressed in abbreviated terms which are well understood by those who deal with them on a daily basis but may appear almost unintelligible to those who do not. However, if the parties had really been intending to provide for the addition of new assureds or the disposal of policy proceeds, I should have expected them to use much clearer language. That is particularly so when it comes to including Sembawang as an assured. The parties were well aware that Sembawang was going to carry out the work to the vessel. If it had been intended that the yard itself should be an assured, I find it impossible to believe that it would have not have been included by name or reference in the section identifying the assured.

In my view much of the difficulty that has been encountered in construing this element of the

“Conditions” section of the slip has resulted from the assumption that the clause in question was intended to embody a self-contained provision providing for the extension of the policy to persons other than referred to in the section dealing with the assured. In my view, however, the context suggests quite strongly that that is not the case. The section of the slip in which they are to be found is entitled “Conditions” and begins by identifying certain standard form market conditions published by the Institute of London Underwriters which are to be incorporated into the policy. The tenor of the words which follow is generally to a similar effect and some of the expressions used in the two lines under consideration, such as 'interest of Mortgagees', 'Notices of Assignment', 'Loss Payees' and 'Waivers of Subrogation' are apt to refer to well-recognised types of clauses often found in policies of this kind. At first sight it is more difficult to see how the expressions 'Assured' and 'Additional Assureds' can have a similar meaning, but in fact it is not unknown for policies to include clauses with descriptions of that kind. An example is provided by the policy in *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582 in which the policy distinguished between “principal assureds”, which included Davy and its subsidiaries, and “other assureds”, which included contractors, sub-contractors and other parties. The section of the present slip describing the assured could, for example, be structured along similar lines in a formal policy wording.

There are other factors which point to the same conclusion. The clause which follows is worded quite differently and clearly contains a substantive provision authorising the leading underwriter to agree amendments to the contract on behalf of the following market. It gives rise to no comparable difficulty of construction and the contrast in language is striking. However, against this construction of the general extension clause is the fact that, unlike other elements of this section of the slip which refer to conditions that are to be incorporated in the policy, there is nothing in it to identify with any precision the clauses to which they refer. There is undoubtedly some force in this point, which serves to emphasise the difficulty of ascribing any wholly satisfactory meaning to this part of the slip. On the whole, however, I think that to read this clause as referring to additional clauses which are to be included in the policy if required by the assured most naturally reflects the language the parties have chosen to use as well as the structure of the slip as a whole.

On this view of the matter the parties presumably had some 'Additional Assureds' clause in mind, but, although they have had ample opportunity to do so, NHM have not attempted either in their statement of case or in argument to identify any specific form of wording that might fall within that description, much less one that would automatically entitle Sembawang to claim as an assured under the policy without any prior notification to the insurers. In those circumstances I am satisfied that on the true construction of the contract Sembawang was not one of the assured.

(b) Was Sembawang entitled to enforce the contract as an undisclosed principal?

14. Under clause 15.12 of the Completion Contract, to which it will be necessary to refer in greater detail at a later stage, CPL was obliged to arrange builders' all risks insurance

which was to include Sembawang as a co-assured. CPL therefore had a duty to conclude a contract of insurance on Sembawang's behalf as well as authority to do so and it is to be assumed that at all material times Sea Trucks and CPL intended to include Sembawang as a co-assured under the policy. In those circumstances NHM argued that all the conditions were satisfied to enable Sembawang to enforce the contract in its own name as an undisclosed principal.

A summary of the legal principles by which a person may sue and be sued on a contract as an undisclosed principal is to be found in a passage in the judgment of Diplock L.J. in *Teheran-Europe Co. Ltd v S.T. Belton (Tractors) Ltd* [1968] 2 Q.B. 545, 555 and in the opinion of the Privy Council in *Siu Yin Kwan v Eastern Insurance Co. Ltd* [1994] 2 A.C. 199. In the former case Diplock L.J. explained the position as follows:

> "In determining who is entitled to sue or liable to be sued on a contract, a useful starting point, where the contract is in writing, is to look at the contract. In doing so a number of elementary principles should be borne in mind. The first is that a person may enter into a contract through an agent whom he has actually authorised to enter into the contract on his behalf or whom he has led the other party to believe he has so authorised. But we are concerned here only with actual authority. Where an agent has such actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing."

16. In *Siu Yin Kwan v Eastern Insurance Co. Ltd* these principles were held to apply to a contract of marine insurance. Lord Lloyd, delivering the opinion of the Board, said at page 207:

> "For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The

> contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

17. In the present case Sea Trucks and CPL were authorised to obtain builders' all risks insurance on the vessel on behalf of Sembawang and at all material times they both intended to include Sembawang as a co-assured under the policy. The placing brokers, NMB, were not aware that Sembawang was to be included as a co-assured and did not intend that it should be a party to the contract, but, since NMB was merely acting as an agent to place the insurance, that is not sufficient to prevent Sembawang from enforcing the contract as an undisclosed principal. What matters for that purpose is the authority and intention of the person in whose name the contract is made: see *Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 Q.B. 42. In these circumstances the argument was mainly directed to whether the terms of the contract or the circumstances surrounding it were such as to make it clear that the insurers were willing to contract only with the person or persons identified as the assureds in the slip.

The mere identification, whether by name or description, of certain persons as assureds cannot be sufficient of itself to demonstrate an unwillingness on the part of the insurer to contract with any other person. If it were otherwise, the principles under discussion would have no application at all to contracts of insurance. Each case must therefore be decided by reference to the terms of the contract under consideration and the circumstances in which it came to be made, though no doubt due regard should be had to the warning of Lord Lloyd in *Siu Yin Kwan v Eastern Insurance Co. Ltd* that if the courts are too ready to construe written contracts as contradicting the right of an undisclosed principal to intervene it would go far to destroy the beneficial assumption in commercial cases to which Diplock L.J. referred in *Teheran-Europe Co. Ltd v S. T. Belton (Tractors) Ltd*.

Cooke J. considered that the present case was one in which it could properly be said that the terms of the policy prevented Sembawang from taking the benefit of it as an undisclosed principal. He put the matter in this way in paragraph 64 of his judgment:

> "The insurance was drafted to cover the interest of the Sea Trucks Group, together with any joint ventures into which the members of that Group might enter, as the terms of the Assured clause show. That was the express limitation given to the Assured and I have found that the wording in the Conditions of the Slip Policy do not have the effect of extending the definition of the Assured, save insofar as the insurers agreed to take into account derivative interests and further Assureds who fell into the same categories as those in the Assured clause. The failure to include Sembawang, whether by name, or by including a category of "builders/outfitters" in a policy which was designed to cover the ship during the period of outfitting is, as I have already found, highly significant. If there was no intention to cover Sembawang directly in the policy, it appears

> to me that the intention cannot be circumvented by an application of the doctrine of the undisclosed principal. The very terms of the Slip Policy militate against this and prevent the operation of such a contrivance."

18. As I have already pointed out, the underwriters in this case were well aware that the completion work was to be carried out by Sembawang and they must have been aware of the possibility that the vessel would suffer damage as a result of acts or omissions on the part of the yard or its sub-contractors. There is no reason, however, to think that they were shown the Completion Contract or that they were informed that it might affect their ability to pursue subrogated claims against them.

19. Mr. Flaux submitted that it was necessary to draw a clear distinction between circumstances that would entitle Sembawang to sue on the policy as an undisclosed principal, which he submitted were no more than the existence of authority on the part of CPL to contract on its behalf and an intention to do so, and other matters, such as the effect on the insurers' rights of subrogation, which might be relevant to the question of non-disclosure, to which I shall come later. However, in my view it is not possible to view these different aspects of the matter in isolation from each other since they all inevitably have a bearing on the final shape of the contract.

20. In support of his submissions Mr. Flaux drew our attention to three cases which he said supported the conclusion that a person may sue on a contract as an undisclosed principal even though the policy identifies a broad class of co-assured. The first was *National Oilwell (UK) Ltd v Davy Offshore Ltd* to which I referred earlier. In that case Davy ("DOL") as main contractor for the construction of a floating oil production system in the North Sea entered into a contract with National Oilwell ("NOW") for the supply of a wellhead completion system to form part of the installation. DOL obtained insurance on the works in which the assureds were identified as Davy Corporation plc (DOL's parent company) and its "parent and/or subsidiary and/or affiliated and/or associated and/or interrelated companies", all of whom were described as "Principal Assureds". The policy was also expressed to include as assureds other companies and firms "with whom the Assured(s) . . . . . have entered into agreement(s) and/or contract(s) in connection with the subject matter of this Insurance and/or any works activities, preparations etc. connected therewith", who were described as "Other Assureds". It was common ground between the parties that NOW was an assured, but a question arose as to the extent of its cover and that in turn raised the question of the means by which a person who is not named as a co-assured but who falls within a class of unnamed persons, all of whom are described as assureds for their respective interests, can become bound to the insurers on any terms of the contract. Having considered a number of authorities Colman J. summarised the principles which he drew from them, the first of which was that

> "where at the time when the contract of insurance was made the principal assured or other contracting party had express or implied actual authority to enter into that contract so as to bind some other party as co-assured and intended so to bind that

> party, the latter may sue on the policy as the undisclosed principal and co-assured regardless of whether the policy described a class of co-assured of which he was or became a member."

21. The question with which Colman J. had to grapple arose out of the fact that NOW was an unidentified member of a class of persons described in the policy as "Other Assureds". He was not concerned with the question whether the terms of the policy demonstrated an unwillingness on the part of the insurers to contract with any particular person as an undisclosed principal and I do not therefore think that much assistance is to be gained from that case.

22. The second case was *North Atlantic Insurance Co. Ltd v Nationwide General Insurance Co. Ltd* [2003] EWHC 449 (Comm) (unreported) in which Cooke J. referred to *National Oilwell (UK) Ltd v Davy Offshore Ltd* as authority for the proposition that, where it is necessary to ascertain the identity of a principal with whom the other party knows it is contracting but who remains unidentified on the face of the contract, it is necessary to resort to the intention of the agent at the time of making the contract. Again, that is a different question from the one that arises here and I do not think that a great deal of assistance is to be derived from that case either.

23. Finally we were referred to the decision of Mr. Richard Siberry Q.C. sitting as a Deputy Judge of the Commercial Court in *O'Kane v Jones* (*The 'Martin P')* [2003] EWHC 2158 (Comm), [2004] 1 Lloyd's Rep. 389. The owners of the *Martin P*, Nanice Schiffahrts A.G., employed another company, ABC Maritime A.G., to act as manager of the vessel. Its duties included arranging insurances. Insurance on the vessel's hull and machinery was placed in London under a slip policy which described the assured as "ABC Maritime as managers and/or affiliated and/or associated companies for their respective rights and interests". Following a casualty Nanice sought to claim under the policy as undisclosed principals, but the underwriters maintained that the description of the assured in the slip precluded it from doing so. Their argument was that the only persons who could be assureds were ABC itself and companies to which it had some corporate relationship; they did not include Nanice with which its relationship was purely contractual. The Deputy Judge rejected that argument both on the grounds that the description of the assured in that case was not such as to exclude the right of a third party to enforce the contract as an undisclosed principal and also on the grounds that Nanice and ABC could be regarded as affiliated or associated companies within the meaning of the slip. In my view the case turns largely on its own facts, which are significantly different from those of the present case, and on the terms of the slip. Insofar as the case decides that the identification of the assured by reference to a class of persons who are to be covered for their respective interests will not necessarily preclude the intervention of an undisclosed principal, I would agree with it, but I do not think that it can be treated as authority for any wider proposition. In each case the question whether the insurers have demonstrated an unwillingness to contract with anyone other than the persons identified in the policy has to be answered by reference to the terms of the contract and the circumstances surrounding it.

24. Having regard to the circumstances of the present case I think the judge was right to attach particular significance to the omission of Sembawang from the categories of assureds set out in the slip. When a vessel enters a shipyard for completion and fitting out the persons most immediately interested in her safety are the owner and the shipyard. Other parties with commercial interests in her may also be adversely affected if she suffers loss or damage and it is not surprising, therefore, to find that the assureds in the present policy include other companies within the same group as the owner and even joint venturers. In this context the absence of any reference to the shipyard and its sub-contractors is striking, particularly when it is borne in mind that their inclusion as co-assureds would have a significant effect on the insurers' rights of subrogation and therefore on the risk.

Bearing in mind the context in which this policy was issued, I have come to the conclusion that the omission of any reference to the yard or its sub-contractors is not neutral but must be regarded as a positive indication that the insurers were not willing to contract with them. I am satisfied that this is a case, therefore, in which the terms of the contract by implication exclude any right on the part of Sembawang to sue on it as an undisclosed principal.

Issue 3: *Non-disclosure and waiver of disclosure*

25. Since Sembawang is not entitled to take advantage of the policy as an undisclosed principal, the question of non-disclosure does not arise. However, since it was fully argued before us I propose to express my views on it briefly.

26. The insurers say that if Sembawang is in principle entitled to enforce the policy as a co-assured, they are entitled to avoid it on the grounds that there was a failure to disclose the fact that Sea Trucks and CPL were contracting on its behalf. Mr. Flaux accepted that the doctrine of utmost good faith applies in relation to an undisclosed principal seeking to take the benefit of a contract of insurance as it does in relation to any other insured. He accepted, therefore, that any circumstances relating to the undisclosed principal that are material to the risk must be disclosed to the insurers. He submitted, however, that the authority and intention of Sea Trucks and CPL to insure on behalf of Sembawang (which he sought to equate with the identity of Sembawang as an intended assured) were not matters of that kind.

27. The main foundation of Mr. Flaux's argument was the following dictum of Scrutton J. in *Glasgow Assurance Corporation Ltd v William Symondson and Co.* (1911) 16 Com. Cas. 109, 119-120:

> “The material facts are as to the subject matter, the ship, and the perils to which the ship is exposed; knowing these facts the underwriter must form his own judgment of the premium, and other people's judgment is quite immaterial . . . . . Again, if true disclosure is made as to the ship and the perils affecting her, no

> one has ever suggested that it is necessary to disclose the name of the person interested in her who is desiring to insure or reinsure his interest. . . . . ."

28. As in the case of all such observations, this passage must be read in the context of the issues that arose in that case. If that is done it will be seen that Scrutton J. was not seeking to expound any general principles of law but was addressing himself to a particular issue before the court, namely, whether in accordance with the ordinary practices of the marine insurance market the defendant brokers were bound to disclose to the plaintiff insurers the fact that the risks they were seeking to reinsure had been written by their partners at a higher premium than that being proposed to the plaintiffs. In that context one can understand why neither the judgment of another underwriter as to the premium to be charged nor the identity of the proposed reinsured were material matters. In my view the judge's remarks have limited application to a case such as the present, save for his insistence that there had to be true disclosure of the ship and the perils affecting her.

29. Whether any particular circumstance is or is not material is a question of fact which the court is usually invited to determine after hearing evidence from those who have practical experience as underwriters. It is not a question which can be determined on the basis of the agreed facts. I can understand that in many cases the identity of the undisclosed principal will be a matter of indifference to the insurer, but I should be surprised if that were so in the case of Sembawang since its right to be treated as a co-assured would be likely to affect the insurers' ability to pursue a claim against it in the name of CPL. It is no answer, as Mr. Kealey pointed out, to say that any claim by the insurers under the Completion Contract would in any event have been met by a counter-claim for breach of clause 15.12. At the time of the placing the insurers were not aware of that clause and were therefore entitled to assess the risk on the basis that they would be entitled to pursue a claim against the yard if the circumstances otherwise justified it.

Mr. Flaux submitted that the insurers had in any event waived disclosure of Sembawang's position as an undisclosed principal by including it as a co-assured under the terms of the so-called 'Additional Assureds' clause, by the very fact that the law permits an undisclosed principal to sue on the contract and by including in the 'Additional Assureds' clause an undertaking to waive their rights of subrogation against anyone in respect of whom Sea Trucks or CPL asked them to.

I am unable to accept any of those submissions. For the reasons given earlier I am unable to accept that the clause in question bears the meaning suggested by Mr. Flaux and therefore I do not accept that it rendered Sembawang a co-assured. The fact that the law generally recognises the right of an undisclosed principal to sue and be sued on a contract does not relieve the nominal insured from the duty to make full disclosure of all material circumstances in each case, including any which may relate to his undisclosed principal. That is essential to ensure a fair presentation of the risk to the insurer. Although no attempt has been made to identify the terms of the 'Waiver of Subrogation' clause to which the slip refers, I see no reason to think that the insurers

bound themselves to waive their rights to pursue subrogated claims against third parties other than co-assureds at the request of Sea Trucks or CPL.

Issue 8: *Did Sembawang suffer no loss as a result of any alleged breach of duty on the part of NHM?*

Issue 9*: Did CPL suffer no loss (by way of a liability to Sembawang for breach of clause 15.12 of the Completion Contract) as a result of any alleged breach of duty on the part of NHM?*

30. Since these issues both require some detailed consideration of the Completion Contract it is convenient to consider them together.

31. The Terms and Conditions which formed part of the Completion Contract made detailed provision for the respective rights and liabilities of the parties in relation to the carrying out of the work. The following provisions are of particular relevance to the present case:

> "It is hereby agreed as follows:
>
> . . . .
>
> 4. In consideration of the payments to be made by the COMPANY to the CONTRACTOR as provided in the CONTRACT, the CONTRACTOR hereby covenants with the COMPANY to execute the WORK in conformity in all respects with the provisions of the CONTRACT. . . . . .
>
> 5. The COMPANY agrees that subject to the satisfactory performance by the CONTRACTOR of all its obligations contained or referred to in the CONTRACT the COMPANY shall pay to the CONTRACTOR the CONTRACT PRICE for the WORK at the times and in the manners specified in the CONTRACT.
>
> . . . .
>
> **8.0 CONTRACTOR'S PARTICULAR OBLIGATIONS**
>
> 8.1 General
>
> Throughout the duration of the CONTRACT the CONTRACTOR shall:
>
> 8.1.1: Commence and carry out the WORK strictly in accordance with the PROJECT SCHEDULE and complete the WORK

by the COMPLETION DATE. . . . . .

8.1.2 Carry out the WORK in a professional and workmanlike manner with due diligence in every respect . . . . . .

. . . .

13.0 TITLE AND RISK

13.1 Title to equipment, materials, goods and drawings supplied or prepared by the CONTRACTOR for the purposes of the CONTRACT shall be vested in the COMPANY as soon as it becomes identifiable as such or as soon as payment has passed for the same, whichever occurs first

Notwithstanding the foregoing provisions all such equipment, materials, goods and drawings shall remain at the sole risk of the CONTRACTOR until unconditional acceptance by the COMPANY.

13.2 During all stages of the execution of the CONTRACT and the WORK title to any value added or supplied work or materials added by the CONTRACTOR or SUBCONTRACTOR(s) to materials furnished by the COMPANY shall pass to the COMPANY upon acceptance by the COMPANY's REPRESENTATIVE, provided that the CONTRACTOR and SUBCONTRACTOR(s) shall remain responsible for all defects, losses or damage to such value added work, materials and equipment for the warranty and guarantee periods in accordance with Article 30.

15.0 LIABILITIES AND INSURANCES

. . . .

15.4 The CONTRACTOR shall assume full responsibility and be liable for loss of or damage to

a. the BARGE; and /or

b. any materials or equipment in the care, custody or control of the CONTRACTOR GROUP;

resulting from or arising out of or in connection with the negligence of the CONTRACTOR GROUP in the performance of its obligations under this contract.

15.6 The CONTRACTOR shall ensure that all its insurance coverage, where possible, are extended to cover the COMPANY's interests and that insurers designate the COMPANY as an additional co-insured and such insurers waive all rights of subrogation against the COMPANY GROUP. . . . . .

15.7 The CONTRACTOR agrees to procure at its sole expense during the duration of the CONTRACT and the WORK the following insurance:

. . . .

15.7.5 Ship Repairer's Insurance for an amount of not less than US$5,000,000 per incident, occurrence or event, covering all operations of the CONTRACTOR including without prejudice to the generality of the foregoing, the contractual liabilities assumed herein.

. . . .

15.12 Policies of insurance procured by the COMPANY

The COMPANY shall arrange Builders All Risks Insurance which shall include the CONTRACTOR as an additional co-assured and shall be endorsed to require the underwriters to waive any rights of recourse including, in particular, subrogation rights against all assured thereunder.

Liability for deductibles thereunder shall be for the account of the CONTRACTOR.

15.13 For the purposes of this Article 15 the expression the “COMPANY GROUP” shall mean the COMPANY, its parent, affiliates and subsidiary companies and its and their officers, employees, personnel and agents and the expression the “CONTRACTOR GROUP” shall mean the CONTRACTOR and sub-contractors of

> any tier, its and their parent, affiliates and subsidiary companies and its and their officers, employees, personnel and agents."

(a) The position of Sembawang

32. Against this contractual background Mr. Flaux submitted that Sembawang's insurable interest in the vessel was limited to the loss it would suffer by reason of any liability to make good loss of or damage to the vessel. In the present case it was not liable for making good the damage caused by the flooding and so could not have retained any part of the proceeds of the policy. Accordingly, it suffered no loss as a result of not being a co-assured.

33. The foundation for this submission is to be found in clause 15 of the contract terms. Mr. Flaux submitted that, taken together, the provisions covering liability and insurance demonstrate an intention that neither Sembawang nor any of its sub-contractors was to be liable for loss of or damage to the vessel insofar as it was capable of being covered by insurance of the kind referred to in that clause. In support of that submission he drew our attention to two authorities, *Mark Rowlands Ltd v Berni Inns Ltd* [1986] Q.B. 211 and *Scottish and Newcastle Plc v GD Construction (St Albans) Ltd* [2003] EWCA Civ 16, [2003] Lloyd's Rep. I.R. 809.

34. In *Mark Rowlands Ltd v Berni Inns Ltd* the defendant was the tenant of part of a building under a lease which provided that the plaintiff should insure the whole building against fire, that the defendant should contribute to the costs of insurance and that in the event of damage to the building by fire the defendant should be relieved of his repairing obligation and the plaintiff would lay out the insurance moneys to repair or rebuild the defendant's premises. The building was destroyed by a fire started by the negligence of the defendant and the plaintiff's insurers, having paid the claim, brought proceedings against the defendant in the name of the plaintiff in the exercise of their rights of subrogation. The first question to be considered was whether the parties had intended that the insurance should enure for the benefit of the defendant. The court held that they had and that there was nothing in law to prevent that from occurring. Kerr L.J., with whom Croom-Johnson and Glidewell L.JJ. agreed, explained the position as follows in a passage in his judgment at page 226B which is also relevant to one of the other arguments addressed to us on this appeal:

> "I therefore turn to the question whether there is anything in law which precludes the conclusion that the insurance effected by the plaintiff in this case was also intended to enure for the benefit of the defendant. In my view the answer is no. Provided that a person with a limited interest has an insurable interest in the subject matter of the insurance - an issue to which I turn in a moment in relation to the circumstances of the present case - there is no principle of law which precludes him from asserting that an insurance effected by another person was intended to enure for his benefit to the extent of his interest in the subject

> matter, whether the insurable interest of the person effecting the insurance be upon the whole of the subject matter or also only to the extent of a limited interest in it. Illustrations of relationships which may give rise to this consequence are those of bailee and bailor and mortgagee and mortgagor. I do not see why the relationship between landlord and tenant should not be capable of giving rise to the same consequence, and the decision of Harman L.J. (sitting as an additional judge of the Chancery Division) in *Mumford Hotels Ltd. v. Wheeler* [1964] Ch. 117 directly supports this conclusion."

35. However, it was the second issue which was decisive of the case, namely, whether, having regard to the terms of the lease, the landlord had any claim against the tenant in respect of damage caused by fire. The court held that it did not, because (in the words of Kerr L.J.)

> "An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiff agreed to provide in consideration of, inter alia, the insurance rent paid by the defendant. The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident or negligence, the landlord's loss was to be recouped from the insurance moneys and that in that event they were to have no further claim against the tenant for damages in negligence."

36. The dispute in *Scottish and Newcastle Plc v GD Construction (St Albans) Ltd* arose out of a fire which caused serious damage to a public house owned by the claimant while it was being refurbished by the defendant. The contract rendered the defendant liable for damage caused by its own negligence or that of its sub-contractors, but was subject to other provisions which required the claimant to insure the existing building and the work being carried out on it against fire in the joint names of itself, the defendant and the defendant's sub-contractors. The court held that these provisions made it clear that the parties did not intend that the defendant should be liable for loss by fire, whether or not caused by negligence.

37. Similar questions have arisen in other cases and it is now well recognised that, particularly in the case of construction contracts, provisions relating to insurance may, when viewed in conjunction with other terms of the contract, demonstrate an intention to relieve the contractor and sub-contractors from liabilities to which they would otherwise be subject. In each case it is necessary to examine the terms of the contract in question in order to determine what the parties intended. Cooke J. held, having regard to the terms of clause 13 and 15 in particular, that in the present case Sembawang was responsible for damage to the vessel caused by its negligence, that it had to put matters right because of the obligations it had undertaken and that the provisions of the contract dealing with insurance were subordinate to those dealing with liability.

38. Before considering the terms of the Completion Contract two points must be mentioned. First, whatever the nature of the casualty may suggest, there is, as Mr. Flaux was at pains to point out, nothing in the statement of facts to enable one to conclude that the damage was caused by negligence on the part of Sembawang or those for whom it was responsible. It is necessary therefore to approach the question on the assumption that it was the result of a cause beyond the reasonable control of the yard. Second, it must be borne in mind that the flooding caused damage both to the vessel itself (i.e. the original hull which was the subject of the completion work) and to the equipment that had been installed under the contract.

In some respects I do not find the Completion Contract altogether easy to construe, but I think it reasonably clear from clause 13 that the work itself, including all the equipment installed pursuant to the contract, was to remain at the risk of the yard until what is described as "unconditional acceptance" by CPL. Unconditional acceptance is not defined in the contract, but it cannot have been earlier than practical completion, which occurred when the vessel had successfully completed its sea trials and was reasonably capable of being used for its intended purpose, and may be the same as final acceptance which occurred only after the completion of any outstanding items list. However, there is no comparable provision relating to the barge itself (i.e. the hull).

The broad scheme of clause 15 is that Sembawang and CPL each assumed responsibility for personal injury, loss and damage resulting from its own negligence, including loss of or damage to the barge itself and any materials or equipment in the care or control of the yard. In clause 15.7 Sembawang agreed to procure at its own expense certain insurances of the sort that could be expected to provide cover against the kinds of losses and liabilities contemplated in clauses 15.1 to 15.3 and in clause 15.6 it undertook to add CPL to those policies as a co-insured and to obtain a waiver of subrogation rights in its favour. In clause 15.12 CPL undertook to arrange a builder's all risks insurance for the benefit of both parties with a waiver of subrogation rights against all assured. If these provisions had been fully performed both parties would have had the benefit of any relevant insurance cover, as far as possible, and in the event of an insured loss the insurer would not have been entitled to claim against one party in the name of the other.

In the light of these provisions I think that there is some force in Mr. Flaux's submission that the parties intended that in the event of loss of or damage to the vessel or the completion work they should have recourse to insurance and should not be entitled to make claims against each other. Some support for the view that this will generally be the case where the parties have entered into a contract containing provisions of this kind can be found in paragraph 65 of the speech of Lord Hope in *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17, [2002] 1 W.L.R. 1419. However, for present purposes it is unnecessary to reach any final conclusion on this question since clause 15.4 only makes Sembawang responsible for damage caused by its negligence and, as I have pointed out, it cannot be assumed that that was the cause of the flooding in this case.

Nonetheless, it does not follow that Sembawang, which as a co-assured would have been entitled to make a claim under the builder's all risks insurance, would not have been entitled to retain the proceeds of the policy in order to recover the cost of making good the damage. Its entitlement to receive payment of the contract price, ninety per cent of which was payable on practical completion, depended upon the satisfactory performance of all its obligations and on its ability to hand the vessel over to CPL in the condition required by the contract. All the equipment that had been installed under the contract remained at its risk until that time and it had no choice but to replace, repair or clean it as necessary in order to meet those requirements. (It almost certainly necessitated the repair or cleaning of the affected parts of the hull as well, but that does not affect the matter either way.) That was all work which it had to do at its own expense. Clause 13 gave Sembawang an insurable interest in the vessel as a whole (including the hull) and it would have been entitled to recover the cost of making good the damage in order to obtain payment under the contract.

In these circumstances it is unnecessary to consider Mr. Flaux's alternative argument that any liability of Sembawang to CPL in respect of the flooding damage would have been extinguished by its own claim against CPL for breach of contract in failing to make it a co-assured under the policy as required by clause 15.12.

For these reasons I am unable to accept the submission that Sembawang suffered no loss as a result of NHM's failure to include it as a named assured in the London market policy.

(b) The position of CPL

39. NHM contends that even if CPL's failure to ensure that the London market policy named Sembawang as a co-assured involved a breach of clause 15.12, CPL did not become liable in damages to Sembawang in respect of that breach of contract, or, if it did, that CPL did not suffer any loss as a result. The argument has two limbs. First, it is said that even as a co-assured Sembawang would have had no claim under the policy in this case because it was not liable to make good the damage to the vessel. Secondly, it is said that as owner of the vessel CPL itself sustained a loss at the very moment the flooding occurred and was therefore entitled to recover a full indemnity in its own right. Accordingly, it was entitled to recover from the insurers an amount equal to that which it would have had to pay Sembawang as damages for breach of contract.

40. The first argument fails for the reasons given earlier. At the time of the flooding the work was at the risk of Sembawang which had to make good the damage in order to complete the contract and obtain payment. It follows that Sembawang was entitled to recover damages from CPL for its breach of clause 15.12 in an amount equal to that which it would otherwise have received under the policy. That leaves the question whether CPL itself could have recovered under the policy and, if so, whether it has suffered any loss in this case.

41. Mr. Flaux submitted that as owner of the vessel CPL sustained loss at the very moment the flooding occurred and was therefore entitled to recover a full indemnity in its own right. In my view that is correct as far as it goes. A contract of insurance is one of indemnity and the insurers therefore became liable as soon as the damage occurred: see *Firma C-Trade S.A. v Newcastle Protection and Indemnity Association (The Fanti) and Socony Mobil Oil Co. Inc. v West of England Ship Owners Mutual Insurance Association (The Padre Island) (No.2)* [1990] 2 Lloyd's Rep. 191, 202, col.1 per Lord Goff. However, in accordance with the ordinary principles of subrogation the insurers are entitled to the benefit of any rights held or benefits received by the insured which diminish the ultimate loss: see *Castellain v Preston* (1883) 11 Q.B.D. 380 per Brett L.J. at pages 388-389 and Cotton L.J. at pages 393-394.

42. Mr. Flaux submitted that the fact that the damage was subsequently made good by Sembawang at its own expense was not something of which the insurers could take advantage in this case and so did not prevent CPL from incurring a loss. He relied on a number of authorities beginning with the following passage in the judgment of Bowen L.J. in *Castellain v Preston* at page 404:

> "Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist him. The effect on the position of the underwriters will depend on the real character of the transaction. Did the brother mean to give the money for the benefit of the insurers as well as for the benefit of the assured? If he did, the insurers, it seems to me, are entitled to the benefit, but if he did not, but only gave it for the benefit of the assured, and not for the benefit of the underwriters, then the gift was not given to reduce the loss, and it falls within *Burnand v. Rodocanachi."*

43. *Burnand v Rodocanachi* (1882) 7 App. Cas. 333 concerned a claim by underwriters to recover from the owners of a vessel destroyed by a Confederate cruiser on which they had paid a total loss under a valued policy a sum received from the United States by way of compensation for the difference between their actual loss and the amount received under the policy. The House of Lords rejected the claim on the grounds that the payment in question was not made with a view to reducing the loss against which the underwriters had agreed to indemnify the insured. In *Castellain v Preston* Bowen L.J. himself provided an explanation for that decision when he said

> "I think the root of the decision in *Burnand v. Rodocanachi* was that the payment which had been made did not reduce the loss, not having been intended to do so. The truth was that the English Government and the American Government agreed that the sums which were to be paid were to be paid not in respect of the loss, but in respect of something else, and therefore the payment could not be a reduction of the loss."

44. In *Merrett v Capitol Indemnity Corporation* [1991] 1 Lloyd's Rep. 169 brokers who had placed reinsurance for the plaintiff with the defendant paid a sum of money in respect of a loss incurred by the plaintiff for commercial reasons, although they were under no legal liability to do so. In response to a claim under the reinsurance the defendant argued that the plaintiff had been partly indemnified by the brokers' payment and that his loss had been reduced accordingly. Steyn J. held on appeal from arbitrators that the critical question was whether the brokers intended that the payment should be solely for the benefit of the reinsured. Since the arbitrators had found that the brokers had made the payment in order to retain Merrett's good will and expected to be reimbursed by the defendant, he concluded that it had been their intention to benefit the plaintiff to the exclusion of the defendant and that it therefore did not reduce the loss. The defendant was therefore liable in full.

45. In *Colonia Versicherung A.G. v Amoco Oil Co.* [1997] 1 Lloyd's Rep. 261 a cargo of oil was insured in transit from Texas to Teesport. On arrival it was found to have been contaminated at the port of loading. The seller, Amoco, settled a claim by the buyer, ICI, on terms that included an assignment of its rights under the policy. Amoco then made a claim under the policy, but the insurers declined to pay on the grounds that the payment to ICI had to be taken into account in calculating the loss. Again, the court held that the critical question was whether on the true construction of the settlement agreement Amoco intended to benefit ICI to the exclusion of the insurers. It concluded that it did not and that the payment had been made to make good the loss. Accordingly, the insurers were entitled to the benefit of it and the claim failed.

46. In both *Burnand v Rodocanachi* and *Merrett v Capitol Indemnity*, as also in the example of the brother's gift given by Bowen L.J. in *Castellain v Preston*, it is possible to see that the payment was not intended to make good the loss against which the underwriters were obliged to indemnify the insured. The settlement payment in *Colonia Versicherung A.G. v Amoco Oil Co.* can be seen to fall on the other side of the line. In the present case there is nothing to suggest that Sembawang carried out the repairs to the vessel with any intention other than to complete the work under the contract and obtain payment of the price. In those circumstances it is impossible in my view to say that Sembawang did not intend to make good the loss in respect of which CPL was entitled to claim on the insurers. The judge may have expressed his conclusion on this point more economically than Mr. Flaux would consider appropriate, but I agree with him that by the time a claim was made CPL had not incurred a loss that could be recovered from the insurers.

47. Mr. Flaux's next submission was that as owner of the vessel CPL was entitled to recover the full amount of the loss under the policy, although it would have been bound to account to Sembawang for the cost of making good the damage. By doing so, however, it would have satisfied any claim Sembawang might have had against it for failing to insure. In view of the conclusion I have reached on the previous issue, this question does not arise, but since it was fully argued I think it right to express my views on it.

In principle I think Mr. Flaux's submission is correct. In *Lonsdale & Thompson Ltd v Black Arrow Group Plc* [1993] Ch. 361 Mr. Jonathan Sumption Q.C. sitting as a Deputy High Court Judge considered the position which arises when property is insured for its full value by a person whose interest in it is limited. In that case the defendant, who owned a warehouse in Liverpool, let the building to the plaintiff for 25 years. The landlord undertook to insure the building for the full reinstatement value and in the case of its destruction to lay out the proceeds of insurance in reinstating it. The deputy judge described the position in the following way at page 368-371:

> "Insurances on property are prima facie to be construed as contracts of indemnity. Subject to the express terms of the policy the measure of the indemnity is the diminution in the value of the thing insured as a result of the operation of the insured peril. . . . . .
>
> If the assured has only a limited interest in the property, being, for example, a tenant or reversioner, a trustee, a mortgagee or a bailee, the value of his own interest may have diminished by much less than the value of the property or the cost of its reinstatement. But it does not necessarily follow that if the assured recovers the whole diminution in the value of the property or the whole cost of reinstatement he will be getting more than an indemnity. That must depend on what his legal obligations are as to the use of the insurance proceeds when he has got them. If he is accountable for the proceeds to the owners of the other interests, then he will not be receiving more than an indemnity if the insurer pays the full amount for which the property was insured. This will be so, whether the assured is accountable to the owners of the other interests as a trustee of the proceeds of the insurance or simply on the basis that he owes them a contractual obligation to pay those proceeds over to them or to employ them in reinstatement. None of this means that a party with a limited interest who insures the entire interest in the property is insuring on behalf of the others as well as for himself. All that it means is that his obligations as to the use of the insurance moneys once they have been paid are relevant in determining whether he will recover more than an indemnity by getting the measure of loss provided for in that policy."

48. Then, after having referred to *Waters v Monarch Fire and Life Assurance Co.* (1856) 5 El. & Bs 870, *London and North Western Railway Company v Glyn* (1859) 1 El & El. 652 and the speech of Lord Reid in *A. Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451, 467-468 he continued:

> "It is true that a bailee has a rather special status in English law, having in many respects the rights of an owner as against third parties. But the decisions in the *Waters, Glyn* and *Tomlinson*

> cases do not turn on any principle peculiar to the law of bailment. Similar principles apply to insurance in quite different fields. I have already given trustees as one example. Another is the case of a trade union which insures the property of its members against burglary. It may recover the value of the stolen property, accounting for it to its members: *Prudential Staff Union v. Hall* [1947] K.B. 685. A third is the case of the shipowner who sells his ship but undertakes to keep the insurance on foot and assigns the benefit of it to the purchaser. The law might have been that if a loss subsequently occurs, the insurer is not liable because his assured has not suffered any and the assignee can have no better right than he had. But there is good authority that the insurer must pay: see *Powles v. Innes* (1843) 11 M. & W. 10, *per* Parke B., and *Arnould's Law of Marine Insurance and Average*, 16th ed. (1981), vol. 1, p. 173. It is implicit in *Rayner v. Preston* (1881) 18 Ch.D. 1 that the same would be true if real property were sold on those terms, even apart from section 47 of the Law of Property Act 1925: see, in particular, Brett L.J., 18 Ch.D. 1, 12.
>
> The authors of these judgments regarded them as turning on two critical factors. The first was that in each case the subject matter of the insurance was the whole interest in the property insured and not simply the assured's interest. That was treated as a question of construction: see, in particular, Lord Reid in *Tomlinson* [1966] A.C. 451, 469. It is usually enough that when construed on ordinary principles the policy covers the whole value of the subject matter and not only the value of some partial interest in it. The second factor was that so far as the assured was thereby enabled to recover in excess of the value of his own interest, it had to be shown that he would be accountable for that excess, either by virtue of his own distinct legal obligations to the holders of the other interests or by virtue of a trust which the courts were, at least in some cases, prepared to construct for the occasion.
>
> Both of these are features of the present case. . . . . . ”

49. Mr. Kealey submitted that the present case can be distinguished from *Lonsdale & Thompson v Black Arrow* inasmuch as the Completion Contract contains no provision requiring CPL to lay out the proceeds of insurance in making good any damage to the vessel, and that CPL would therefore have been under no obligation to account to Sembawang for any part of the policy proceeds. Accordingly, he submitted that if CPL had otherwise been entitled to recover under the policy it would have received more than an indemnity.

50. As Mr. Sumption Q.C. pointed out in *Lonsdale & Thompson v Black Arrow*, the two factors that are critical in establishing the insured's right to obtain the full amount of the loss

from the insurers are (i) that the whole interest in the property should have been insured and (ii) that the insured making the claim should be accountable for the value in excess of his own interest to the holders of other interests and will therefore obtain no more than an indemnity in respect of his own loss.

52. It has not been disputed that the London market policy insured the whole of the interest in the vessel's hull and machinery and in those circumstances there is a clear answer to Mr. Kealey' arguments. Clause 15.12 of the Completion Contract contemplated that the vessel's hull and machinery would be insured for the interests of both CPL and Sembawang under a policy which would ordinarily enable either of them as an assured to make a claim for the whole of the loss. In this respect the position is similar to that contemplated by Kerr L.J. in the passage from his judgment in *Mark Rowlands Ltd v Berni Inns Ltd* to which I referred earlier. It is implicit in the contract, therefore, that whichever of them received the proceeds of the policy would account to the other to the extent of its interest. Mr. Kealey suggested that an obligation to account to other parties interested in the subject matter of the insurance only arises in a limited class of cases of which this was not one, but in my view that is to state the position too narrowly. It is true that an obligation to account has been recognised as arising under some kinds of legal relationships, notably those of bailor and bailee and trustee and beneficiary, and it may be that the classes of relationships which will support such an obligation are limited, though it is unnecessary to decide that question in the present case. However, an obligation of a similar kind may also arise out of a relationship created between the parties by contract, as *Lonsdale & Thompson v Black Arrow* demonstrates. As I have said, I think it is implicit in clause 15 of the Completion Contract that if CPL recovered the full amount of the loss from the insurers it would account to Sembawang to the extent of its interest, which in this case would have involved accounting for the whole of the recovery. There was therefore no risk of double recovery on this ground, although for the reasons given earlier I am satisfied that CPL could not make a claim against the insurers in this case.

53. As Mr. Kealey pointed out, as a result of NHM's failure to include Sembawang as a co-assured under the London market policy and the consequent rejection of its claim (i) a dispute arose between Sembawang and CPL on the one hand and the insurers on the other over their right to recover under the policy, (ii) a dispute arose between Sembawang and CPL over CPL's failure to comply with its obligations under clause 15.12 of the Completion Contract and (iii) disputes arose between CPL and NHM and between Sembawang and NHM over NHM's failure to carry out their instructions properly. The dispute between Sembawang and CPL was compromised on the terms of the Settlement Agreement under which CPL paid Sembawang US$850,000 and the disputes between Sembawang, CPL and the insurers were compromised under the terms of the Assignment Agreement under which the insurers paid CPL US$501,252. The effect of those agreements, therefore, is that Sembawang and CPL have suffered net losses of US$403,132 and US$348,748 respectively, together with any associated costs and expenses.

NHM have alleged in their defence that it was unreasonable for Sembawang and CPL to have entered into agreements on those terms because Sembawang was entitled to recover

under the policy and therefore had no claim against CPL under the Completion Contract, and because CPL had a claim under the policy in any event for the full amount of the loss. For the reasons I have given I am unable to accept those arguments and accordingly I am satisfied that these losses were suffered as a result of breaches of NHM's breach of duty.

For all these reasons I am unable to accept Mr. Flaux's submission that neither Sembawang nor CPL has suffered any loss as the result of NHM's failure to include Sembawang as a co-assured under the policy.

I would therefore answer the questions which arise on this appeal as follows:

Issue 1: 'No';

Issue 3: (1) 'Yes';

(2) 'No;

Issue 8: 'No';

Issue 9: 'No'.

and would dismiss the appeal accordingly.

Lord Justice Richards:

54. I agree.

Lord Justice Waller:

55. I also agree.