Privy Council Appeal No. 16 of 1993

(1) Siu Yin Kwan (Administratrix of the estate of Chan Ying Lung deceased) and
(2) Wang Chang Seu Ying (Administratrix of the estate of Sae Heng Hai, (alias Wang Poa Tsing deceased) *Appellants*

v.

Eastern Insurance Company Limited *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD MUSTILL
LORD WOOLF
LORD LLOYD OF BERWICK
SIR THOMAS EICHELBAUM

*[Delivered by **Lord Lloyd of Berwick**]*

On 8th September 1983 the "Barquentine Osprey" was moored in Repulse Bay, Hong Kong, when she was hit by the typhoon "Ellen". As a result, she became detached from her moorings, and capsized the following day. Several members of the crew lost their lives, including Chan Ying Lung, the cook, and Sae Heng Hai, an able seaman. They were employed by Axelson Company Limited, the owners of the "Osprey". In September 1984 their personal representatives brought proceedings in the District Court of Hong Kong claiming compensation under the Employees Compensation Ordinance. They were awarded $242,000. On 27th May 1986 they brought further proceedings against Axelson claiming damages for negligence. On 20th November 1986 they were awarded $589,081 and $443,000 respectively. Meanwhile Axelson had been wound up by order of the Supreme Court of Hong Kong. The judgments in favour of the plaintiffs were never satisfied.

Accordingly on 19th January 1988 the plaintiffs commenced the current proceedings against the respondents, Eastern Insurance Company Limited, claiming payment under the Third Parties (Rights Against Insurers) Ordinance. Section 2(1) provides:-

> "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then ... in the case of the insured being a company, in the event of a winding-up order being made, ... if ... any such liability ... is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall ... be transferred to and vest in the third party to whom the liability was so incurred."

By their defence, the respondents say that the persons named as insured were Messrs. Richstone Industries Limited, and not Axelson. There was nothing in the proposal to indicate that Richstone were acting as agents for Axelson. Even if Axelson had been entitled to claim under the policy as undisclosed principals, the policy was unlawful by virtue of the Life Assurance Act 1774. Section 2 of the Act provides:-

> "And ... it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose accounts such policy is so made or underwrote."

The case came before Keith J. on 17th February 1992. He made a number of findings of fact which are favourable to the plaintiffs, and in particular that Richstone had actual authority to effect the insurance on behalf of Axelson. Nevertheless he held that Axelson had no right to claim under the policy. Accordingly the plaintiffs could derive no rights under the Third Parties (Rights Against Insurers) Ordinance. Had he been in favour of the plaintiffs on that point, he would not have regarded the Life Assurance Act 1774 as standing in their way. In his view, the Act is not applicable to indemnity insurance.

The plaintiffs appealed to the Court of Appeal. On 21st October 1992 the appeal was dismissed. The majority judgment was given by Kempster J.A. He agreed with Keith J. that the terms of the proposal were inconsistent with Axelson having the right to sue. He would also have decided against the plaintiffs on the Life Assurance Act point. In his view the Act applies to indemnity insurance as well as life insurance and, since Axelson was nowhere named in the policy, the insurance was unlawful and void. Sir Derek Cons V.-P. agreed with Kempster J.A. Litton J.A. dissented on both points.

The plaintiffs now appeal to Her Majesty in Council by leave of the Court of Appeal. It is regrettable that a case

which is comparatively simple, both factually and legally, should have taken over ten years to be resolved.

Richstone Industries Limited was formed in Hong Kong in the early part of 1980 to carry on business as shipping agents. The managing director was Pak Chung King ("Mr. Pak"). The managing director of the respondents was Tung Kie Wei ("Mr. Tung"). Mr. Tung and Mr. Pak had known each other for many years. In November 1980 Axelson appointed Richstone as their agent to look after the "Osprey" in Hong Kong. Towards the end of 1981 Axelson instructed Richstone to obtain hull insurance on the "Osprey". Mr. Pak consulted the respondents. The respondents were unable to issue a policy for reasons which do not matter. But as a result of the approach the respondents knew that Richstone were acting as agents for the owners. By an agreement dated 23rd March 1982 Axelson appointed Richstone to act as their general agents worldwide. By clause 2(d) of the agreement Richstone were authorised:-

> "To insure the said vessels their apparel fittings freight earnings and disbursements against the usual risks either with Lloyd's or with insurance associations and to enter the said vessels in protection or indemnity or kindred associations and to make such claims as become necessary thereunder."

So there can be no doubt that Richstone had actual authority on behalf of Axelson to obtain insurance against claims by members of the crew, since this is one of the standard heads of cover under P. and I. insurance.

On 1st January 1984 Part IV of the Employees Compensation (Amendment) Ordinance 1982 came into force, under which employers were obliged to insure themselves against claims from their employees. Axelson instructed Mr. Pak to obtain the appropriate cover. Mr. Pak approached the respondents. They sent him their standard form of Proposal For Workmen's Compensation Insurance. Since the first main issue turns on the language of the Proposal Form, and the answers given by Richstone, it is necessary to set out the relevant terms in full.

WORKMEN'S COMPENSATION INSURANCE

PROPOSAL FORM

Proposer's Name in Full	*Richstone Industries Co. Ltd.*
Proposer's Business Address	*Room 1503 Wing on Central Building, 26 des Voeux Road "C", Hong Kong*
Proposer's Trade or Occupation	*Shipping*
Particulars of Work and Place of Employment	*S/V Barquentine Osprey*

Policy to Date from *26th June 1983* Until *25th June 1984*
(Both dates inclusive)

1. Does Schedule A within include

   (a) All persons within the scope of the Workmen's Compensation Ordinance? (a) ✓

2. Do your premises come within the meaning of any Law or Regulation governing the conduct and maintenance of such premises *Nil*

3(a). Have you any circular saws or other machinery driven by steam, gas, water, electricity or other mechanical power? If so, give full particulars. *One 320 BHP Diesel Engine Two 40 BHP Diesel Generator*

(b).

4. What Boilers have you? *Nil*

5. State what acids, gases, chemicals or explosive will be used and to what extent. *Diesel Fuel for Engine*

6. Are you at present insured or have you ever proposed for an insurance in respect of your liability to your employees? If so, please give the name of the Company or Companies.

7. (a) Has any proposal for an insurance in respect of your liability to your employees, or renewal thereof, ever been declined or withdrawn or cancelled?

   (b) Has any increase in premium been required? If so, in what years and how much?

8. State the total wages paid to and particulars of accidents to your employees incidental to their occupation during the last three years.

Year	Total Wages	Claims	
		Settled	Outstanding
1st 12 months ended 31st December 1980	*$150,000*	*Nil*	*Nil*
2nd 12 months ended 31st December 1981	*$180,000*	*Nil*	*Nil*
3rd 12 months ended 31st December 1982	*$200,000*	*Nil*	*Nil*

Schedule A ALL EMPLOYEES within the scope of the Workmen's Compensation Ordinance must be included.

DESCRIPTION OF EMPLOYEES	Estimated number of employees	Estimated annual wages etc.
Ship's crew	*10*	*$200,000*

Do you wish to insure your liability under the Workmen's Compensation Ordinance to the employees of sub-contractors?

I/We the undersigned, this *21st* day of *June* 1983 desire to effect an Insurance in terms of the Policy to be issued by Eastern Insurance Co. Ltd., against my/our Statutory and Common Law Liability and under Schedule "B" and "C" of this proposal as within. I/We agree to keep a proper record of wages salaries and other earnings and to render, at the end of each period of Insurance, a statement in the form required by Eastern Insurance Co. Ltd., of all wages salaries or other earnings actually paid and to pay premium on any wages salaries or other earning paid in excess of the amounts estimated herein. I/We hereby declare that all statements and particulars herein, where I/we have read over and checked are true, and that I/we have not suppressed, misrepresented or mis-stated any material fact, that I/we have fairly estimated my/our total wages salaries or other earnings and that I/we agree that this declaration shall be the basis of the contract between me/us and Eastern Insurance Co. Ltd.

The Proposal was signed by Richstone Industries Company Limited. The signature is not qualified by the words "as agents" or by any other similar qualification.

On 27th June 1983 the respondents issued a policy in their standard form. The name of the insured is given as "Messrs. Richstone Industries Co. Limited" and their business as "Shipping". The schedule to the policy gives the estimated number of employers as ten, their annual earnings as $200,000, and their occupation as "Ship's crew (whilst on board S/V 'Barquentine Osprey')". The policy was signed by Mr. Tung himself on behalf of the respondents.

As already mentioned, the judge found as a fact that Richstone had actual authority to effect the insurance on Axelson's behalf. He also made certain other findings as to the respondents' state of knowledge, and in particular that they knew (i) that Richstone were shipping agents, not ship owners, (ii) that Richstone were not the owners of "Osprey", and (iii) that Richstone had acted as agents

of the owners of the "Osprey" in relation to the hull policy in 1981.

In the light of these findings, it could well have been argued that this was not a case of undisclosed principal at all, but rather a case in which Richstone was acting, and was known to be acting, on behalf of a disclosed but unnamed principal. For there was no finding that the respondents knew the name of the owners.

However the judge made a further important finding in this connection. He said that he was not satisfied that the respondents knew that Richstone were not the employers of the crew. In the normal way, of course, it is the owners who employ the crew, not their agents. It is common place for the agents to engage the crew on behalf of the owners. Thus in the present case the master was engaged by Richstone and the crew were engaged by the master. But it is very rare for the agents to employ the crew. In declining to infer knowledge on the part of the respondents that the owners of the "Osprey" were the employers of the crew, the judge may have been over-generous to the respondents, especially as the respondents called no evidence. But in the light of that negative finding, their Lordships are obliged to approach the case on the same basis as the courts below, namely, that the appellants can only succeed if they can show that Axelson were entitled to enforce the policy as undisclosed (as distinct from unnamed) principals.

The main features of the law relating to an undisclosed principal have been settled since at least at the end of the 18th century. A hundred years later, in 1872, Blackburn J. said that it had often been doubted whether it was originally right to hold that an undisclosed principal was liable to be sued on the contract made by an agent on his behalf, but added that "doubts of this kind come now too late".

For present purposes the law can be summarised shortly as follows:-

(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.

The origin of, and theoretical justification for, the doctrine of the undisclosed principal has been the subject of much discussion by academic writers. Their Lordships would especially mention the influential article by Goodhart and Hamson in (1932) 4 CLJ 320, commenting on the then recent case of *Collins v. Associated Greyhound Racecourses Ltd.* [1930] 1 Ch. 1. It seems to be generally accepted that, while the development of this branch of the law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience.

The present case is concerned with the fifth of the features noted above. The law in that connection was stated by Diplock L.J. in *Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.* [1968] 2 Q.B. 545, at page 555, as follows:-

> "Where an agent has ... 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."

Since the contract in the present case is an ordinary commercial contract, Axelson were entitled to sue as undisclosed principal unless Richstone should have realised that the respondents were unwilling to contract with anyone other than themselves.

In the courts below Keith J., at first instance, and the majority of the Court of Appeal held that the language of the proposal form and of the policy was inconsistent with the insured being anyone other than Richstone. Keith J. held that the proposal form "assumed" that the proposer was the employer, since the form is addressed to the proposer, and questions 6, 7 and 8, for example, refer to "your employees". In completing the proposal form Mr. Pak did nothing to correct this assumption. Accordingly the proposal form must be read as if it named Richstone as the employer, and therefore as the only party entitled to sue on the policy.

The majority of the Court of Appeal adopted the trial judge's reasoning. Litton J.A. dissented. He held that the language of the proposal form was not such as to exclude the right of Axelson to sue as undisclosed principal. He drew attention to question 3(a), in which the respondents asked:-

> "Have you any circular saws or other machinery driven by steam, gas, water, electricity or other mechanical power?"

The answer was:-

> "One 320 BHP Diesel Engine
> Two 40 BHP Diesel Generator"

This answer could only refer to the "Osprey". It could not possibly refer to Richstone, since Richstone were not ship owners. It follows that "you" in question 3(a) could not refer to Richstone personally. It must refer to the owners of the "Osprey". The same applies to questions 3(b) and 4. If that be so, then "your employees" in questions 6, 7 and 8 could equally well refer to the owners of the "Osprey", as the employers of the crew, whoever the owners might be.

On this point their Lordships find themselves in full agreement with the dissenting judgment of Litton J.A. True, the proposal form is directed to Richstone as proposer. But nowhere does it state, or imply, that Richstone might not propose insurance on behalf of others. Nowhere in the proposal form is the question asked "Who is the employer?". Nor, having regard to Richstone's answers, were the respondents entitled to assume, as Keith J. held, that Richstone were the employers.

But their Lordships go further. Even if Richstone had been named as employer, expressly or by implication, it would not necessarily have prevented Axelson intervening to show that they were the true principals. This was the point decided in *Fred Drughorn v. Rederiaktiebolaget Transatlantic* [1919] A.C. 203. In that case a charterparty was signed on behalf of an individual who was named as the charterer. It was held by the House of Lords that this was not inconsistent with the named charterer having entered into the charterparty as agent for his employer. Accordingly the employer was entitled to intervene as undisclosed principal, and enforce the charterparty against the owners. The same reasoning would have applied in the present case if Richstone had been named as employer. If 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 J. referred in *Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.* It is unnecessary for their Lordships to decide to what extent, if at all, *Humble v. Hunter* (1848) 12 Q.B 310 and *Formby Brothers v. Formby* (1910) 102 L.T. 116 should still be regarded as good law.

Finally, under this head, the respondents relied on the concluding paragraph in the proposal form, whereby Richstone declared that all statements in the proposal form were true, and further agreed that such declaration should form the basis of the contract. But if, on its true construction, "you" and "your" in the proposal form should be read as meaning, or at any rate including, the owners of the "Osprey", then the declaration adds nothing.

Their Lordships would therefore hold that there is nothing in the terms of the proposal form, or the policy, which expressly or by implication excludes Axelson's right to sue as undisclosed principal.

But Mr. Neville Thomas, on behalf of the respondents, has a further argument. He submits that a contract of insurance is a contract of a special kind. It is a personal contract, which of its nature is inconsistent with intervention by an undisclosed principal. This argument is described as a subsidiary argument in the respondents' case. It was not mentioned in any of the judgments below. But it was given prominence by Mr. Thomas in his submissions before the Board. If it is correct, it would have very far reaching consequences.

The starting point of the argument is the article by Goodhart and Hamson, where it is suggested at page 323 that the doctrine of undisclosed principal bears some resemblance to the assignment of contractual rights. This analogy has been developed by subsequent writers: see *Bowstead on Agency* 15th Edition 321, *Chitty on Contracts* 26th Edition Vol. 2 paragraph 2552, and *Powell on the Law of Agency* 2nd Edition at page 165. Mr. Thomas contends that, if the contract is one that cannot be assigned, because it is "personal" by nature, neither should it be capable of being enforced by an undisclosed principal. Contracts of insurance are of this kind. Thus according to *MacGillivray and Parkington on Insurance Law* 8th Edn. para. 1616 "A contract of insurance is a personal contract and does not run with the property which is the subject matter of the insurance".

Mr. Thomas relied on *Peters v. General Accident and Life Assurance Corporation Limited* [1937] 4 All E.R. 628. That was a case of motor insurance. Goddard J. held that the policy was a contract of personal indemnity, and could not be assigned to a purchaser. His decision was upheld by the Court of Appeal: [1938] 2 All E.R. 267. By the same token, so it was argued, an employer's liability policy is a contract of personal indemnity. It cannot be assigned. It follows that it cannot be made on behalf of an undisclosed principal. The insurer is always entitled to know of the existence and identity of the assured. Richstone should have realised, in the words of Diplock L.J., that the respondents would not have been willing to treat anyone other than Richstone as a party to the contract. Mr. Thomas accepted that in marine

insurance the rule is different. But this was not, he said, a case of marine insurance.

The short answer to Mr. Thomas' argument lies in a finding by the judge that the actual identity of the employer was a matter of indifference. It was not material to the risk. "Eastern would have been content" he said "to insure the employer of the crew of the 'Osprey', whoever it was, provided that it was satisfied with the answers given in boxes 6 and 7 of the proposal form". In the light of that finding it is impossible for the respondents to contend that this was a "personal" contract of the kind that excludes the rights of an undisclosed principal. In passing it may be noticed that the respondents seem to have been content to insure the employers, even though they received no answer to questions 6 and 7.

Although this short answer is sufficient to dispose of Mr. Thomas' argument, it would not be right to leave the matter there. Their Lordships accept that there is a class of personal contract where the burden cannot be performed vicariously. The example often given is a contract to paint a portrait. Such a contract cannot be enforced by an undisclosed principal since, as Goodhart and Hamson point out, his intervention in such a case would be a breach of the very contract in which he seeks to intervene. But their Lordships are unwilling to accept that a contract of indemnity insurance is a personal contract in that sense. No case was cited to their Lordships which decides, or even suggests, that a contract of insurance is an exception to the general rule that an undisclosed principal may sue on a contract made by an agent within his actual authority. Nor is there any suggestion that marine insurance is an exception to the supposed exception, which depends upon the words of the preamble to the form of policy now scheduled to the Marine Insurance Act 1906. On the contrary, in *Browning v. Provincial Insurance Company of Canada* (1873) 5 L.R.P.C. 263 it was held that an undisclosed principal could sue, even though those words were absent from the certificate of insurance issued by the agent of the insurers in that case. There was no sufficient ground to distinguish between contracts of marine insurance and mercantile contracts generally.

The argument based on assignment illustrates the dangers of proceeding by analogy. There are indeed certain similarities between these two branches of the law. But there are also many differences. These are listed in *Powell* at pages 165-166. In particular a contract, which provides that it shall not be assignable, cannot be assigned. But such a provision does not preclude intervention by an undisclosed principal: see *Browning v. Provincial Insurance Company of Canada (supra)* at page 273.

Peters v. General Accident and Life Assurance Corporation Limited is *nihil ad rem*. Obviously a contract of insurance which is based on one driver's record cannot

bind the insurers when he sells his car to another driver. For the other driver might have a much worse record. But there is nothing in *Peters'* case which decides that a vendor cannot take out insurance on behalf of a purchaser, should he so wish, provided always, of course, that the information given to the insurers relates to the purchaser, and not the vendor. For the above reasons, their Lordships would reject Mr. Thomas' alternative argument.

They now turn to consider the second main defence, based on section 2 of the Life Assurance Act 1774. It can be dealt with quite shortly. Mr. Thomas submits, and the majority of the Court of Appeal have held, that the policy is payable on the happening of an event, within the meaning of section 2 of the Act, that event being the insured's liability to pay compensation in respect of injury to his employees. Since the name of the person interested, that is to say Axelson, was not inserted in the policy, the insurance is unlawful and void.

The meaning of section 2 of the Act was considered recently by the Court of Appeal in *Mark Rowlands Limited v. Berni Inns Limited* [1986] 1 Q.B. 211, a case of fire insurance. The plaintiff was the freeholder of premises. The defendant was tenant of the basement. The question was whether the policy taken out by the plaintiff enured for the benefit of the defendant, although his name did not appear in the policy. It was held that the policy did not infringe section 2 of the Act, since the Act was not intended to apply to indemnity insurance.

On the other hand in *Re King, Robinson v. Gray* [1963] Ch. 459 Lord Denning said at page 485:-

> "You must remember that when you take out a policy of fire insurance of a building (as distinct from goods), you must insert in the policy the names of all the persons interested therein, or for whose use or benefit it is made. No person can recover thereon unless he is named therein, and then only to the extent of his interest. That is clear from the Life Assurance Act, 1774, ss. 2, 3 and 4, which by its very terms applies to 'any other event' as well as life. If the tenant insures, therefore, in his own name alone, it is only good to the extent of his interest."

Faced with this conflict of authority their Lordships prefer the decision of the Court of Appeal in the former case. In *Re King* the point was not argued. The observation of Lord Denning was obiter and is not reflected in the judgments of the other two members of the Court. Some doubt as to the correctness of *Mark Rowlands Limited v. Berni Inns Limited* is expressed in *MacGillivray and Parkington (supra)* at para. 154. But their Lordships do not share these doubts.

There are two reasons why their Lordships prefer the decision in *Mark Rowlands Limited v. Berni Inns Limited*. In the first place the words "event or events" in section 2, while apt to describe the loss of the vessel, are hardly apt to describe Axelson's liability arising under the Employees Compensation Ordinance, or at common law, as a consequence of the loss of the vessel. Secondly, section 2 must take colour from the short title and preamble to section 1. By no stretch of the imagination could indemnity insurance be described as "a mischievous kind of gaming". Their Lordships are entitled to give section 2 a meaning which corresponds with the obvious legislative intent.

Various other defences were pleaded in the amended points of defence. But these have all been dismissed, or fallen by the wayside. Their Lordships are glad to have reached the conclusion that the plaintiffs are entitled to succeed, because the defence of the respondents, knowing what they did, was wholly without merit.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be allowed and the judgments of the Court of Appeal and of the trial judge set aside; that the appellants are entitled to an order in their favour pursuant to the Third Parties (Rights Against Insurers) Ordinance; that the case ought to be remitted to the trial judge for assessment of the amount due; and that the respondents ought to pay the appellants' costs of these proceedings in the courts below. The respondents must also pay the appellants' costs before their Lordships' Board.