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[2007–09 Gib LR 82]

PHILLIPS AND COMPANY and PHILLIPS v. WHATLEY

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Hope of Craighead, Lord Mance, Lord Rodger of Earlsferry, Lord Scott of Foscote and Lord Walker of Gestingthorpe): May 2nd, 2007

Legal Profession—professional negligence—delay in prosecution of action—damages for failure to bring proceedings within limitation period calculated on percentage prospects of establishing liability of defendant and percentage prospects of making recovery from defendant or insurer

Insurance—liability insurance—third party liability—by Bankruptcy Ordinance 1934, s.47A, right of insured company to claim under third party insurance transferred directly to third party on liquidation of company—not limited to motor insurance third party risks

The respondent brought an action in the Supreme Court claiming damages for injuries and consequential loss caused by the appellants' negligence.

The respondent sustained a head injury in August 1994 at a building site owned by his company ("W&F"). The injury was caused when a scaffolding support (acrow), stored in a garage, fell and hit the back of his head when one of its employees stood on its base-plate.

He instructed his solicitors, the appellants, to bring an action against

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W&F to recover damages for the injury and medical expenses, which he valued at around £2m. W&F's third party liability insurance was with Assicurazioni Generali S.p.A. ("Generali") which used Masbro Insurance Brokers Ltd. as its agents in Gibraltar, and Marrache & Co. Ltd. for legal advice and representation.

In breach of the term of the insurance policy requiring W&F to give notice of a claim "immediately," no notice was given for nine months from the date of the accident. Generali reserved its rights as to the breach and denied liability to cover W&F.

The appellants issued proceedings against W&F in September 1997 following the expiry of the limitation period on August 1st, 1997. They admitted negligence in failing to issue proceedings promptly but the respondent sought to recover damages for the value of his claim lost as a result of this negligence.

In November 1999, W&F was wound up on a creditors' petition. The respondent was believed to have no preferential rights to recovery against W&F or Generali as compared with W&F's other creditors due to the absence, in Gibraltar, of any statutory third party rights against a company or its insurers, on its bankruptcy.

The Supreme Court (Dudley, A.J.) calculated the damages due to the respondent by measuring the prospects he would have had of succeeding in establishing the liability of W&F if the proceedings had been brought in time and what chance he would have had of securing recovery from W&F or its insurer. The court concluded that the overall percentage chance of success was 7%. This was calculated on the basis of a 25% chance of establishing the liability of W&F and a 25% chance of recovering funds from W&F or Generali.

On appeal, the Court of Appeal (Staughton, P., Aldous and Stuart-Smith, JJ.A.) found the respondent's chances of succeeding in establishing liability were considerably higher at 100% and his chances of recovery from W&F or Generali were 80%.

On further appeal, the appellants submitted that the respondent had minimal prospects of success in establishing the liability of W&F because (a) there was no negligence on the part of the employee, as when acrows were stored unsafely, they were bound to be stepped on; and (b) there was reduced liability on the part of W&F as there was contributory negligence in the respondent's failure to wear a hard hat. In reply, the respondent submitted that (a) there was negligence on the part of the employee for stepping on the base plate of the acrow as it was bound to move and cause injury if stepped on; and (b) there was a duty on W&F to ensure his safety at work which was not fulfilled because of the unsafe storage of the acrows in the garage, for which it was liable.

As to the respondent's prospects of recovery from W&F or Generali, the appellants submitted that he would not have been compensated because (a) W&F was not in a financial position to meet such a claim, even if the proceedings had been promptly served, due to its imminent liquidation; (b) Generali would not have paid out, relying on the late

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notification of the claim (even if proceedings had been brought before the expiry of the limitation period) to deny liability; (c) Generali had also reserved its rights as to the breach and was therefore under no obligation to finance the claim; and (d) s.47A of the Bankruptcy Ordinance 1934, imported from s.14 of the Motor Vehicle (Third Party Risks) Ordinance 1986, gave the respondent recovery rights against Generali equivalent to those of the insured but these rights were limited to motor vehicle insurance because of the original context of the legislation. The respondent submitted in reply that had the appellants not been negligent, he would have been fully compensated because (a) had proceedings been served by August 1st, 1998, the trial would have taken place before W&F's liquidation; (b) Generali had not expressly reserved its rights, therefore could not escape its duty to cover W&F under the employers' liability insurance policy; and (c) the provisions imported into the Bankruptcy Ordinance 1934, although originally dealing with motor vehicle insurance, were now applicable to liability in general and he therefore had applicable third party rights giving him priority in seeking compensation.

Held, estimating that the respondent had a 28% chance of success:

(1) The Board would strike a balance between the strict approach of the Supreme Court and the more generous approach of the Court of Appeal and assess the respondent as, overall, having a 28% chance of success. It based this overall assessment on his having a 70% chance of successfully establishing the liability of W&F whilst having a 40% chance of being compensated by W&F or Generali (para. 44).

(2) The Supreme Court decision was flawed in two fundamental respects—first, the relevance of the safety of storage of the acrows and, secondly, the relevance of the negligence and contributory negligence of the employee and the respondent respectively. The Board considered the safe storage of the acrows central to the appeal and an issue which was, at all times, relevant to the courts' assessment of the respondent's prospects against W&F. The Court of Appeal, although correct to find more favourably for him, had over-estimated his chances of successfully establishing W&F's liability at 100%. Although it was negligent of the employee to step on the base-plate of an acrow, it would have been negligent whether the acrows were safely or unsafely stored. This was despite the possibility of there being contributory negligence (in that the respondent was not wearing a hard hat) which was not a specifically limiting factor but correctly incorporated into the overall assessment of his chances of recovery (paras. 11–17).

(3) W&F could not have afforded to defend an action at trial unless its insurer, Generali, had supported it. It was unlikely that Generali would have done so as it had effectively and clearly reserved its rights as to the breach. Therefore, the likelihood of payment was minimal unless there was a judgment which forced it to pay. Its reservation of rights and denial of responsibility in clear terms meant that it was under no duty to provide

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cover to W&F. Generali used late notification as a valid defence to the claim and could still have relied on late notification as a ground on which to reject the claim even if proceedings had been issued within the limitation period (paras. 20–38).

(4) The likelihood of W&F being able to meet such a claim or finance the proceedings was limited due to its weak financial position, especially at the time of the proceedings (following its winding up). This would have been the same even if service had been before August 1st, 1999 as it was unlikely that any funds would have been received from W&F before its liquidation. However, the respondent himself could have brought the action to trial as he was able to bring the proceedings before the Board (paras. 18–19).

(5) It was said that, although s.47A of the Bankruptcy Ordinance 1934 was not relied upon by either counsel, it was necessary to consider the case had payment been considered, or made, at the time of W&F's liquidation. The lower courts misunderstood W&F's financial position on winding up—the respondent acquired third party rights against Generali, as W&F's insurer, by virtue of s.47A of the Bankruptcy Ordinance. He would therefore have had priority over W&F's other creditors, had the claim not been time-barred, because the transfer from s.14 of the Motor Vehicles Insurance (Third Party Risks) Ordinance to s.47A of the Bankruptcy Ordinance 1934 was effective. The terms of this provision gave him a right of action which was not limited to claims under motor insurance but applied to all third party claims on the bankruptcy of a company (paras. 39–43).

Cases cited:
(1) *Allen* v. *Robles*, [1969] 1 W.L.R. 1193; [1969] 3 All E.R. 154, applied.
(2) *Armory* v. *Delamirie* (1721), 1 Stra. 505; 93 E.R. 664, applied.
(3) *Browning* v. *Brachers*, [2005] P.N.L.R. 44; [2005] EWCA Civ 753, referred to.
(4) *Dixon* v. *Clement Jones Solicitors*, [2005] P.N.L.R. 6; [2004] EWCA Civ 1005, referred to.
(5) *Fraser* v. *B.N. Furman (Productions) Ltd.*, [1967] 1 W.L.R. 898; [1967] 3 All E.R. 57; [1967] 2 Lloyd's Rep. 1, considered.
(6) *Gregg* v. *Scott*, [2005] 2 A.C. 176; [2005] 2 W.L.R. 268; [2005] 4 All E.R. 812; [2005] UKHL 2, considered.
(7) *Hanif* v. *Middleweeks*, [2001] Lloyd's Rep. P.N. 920, referred to.
(8) *Kitchen* v. *Royal Air Force Assn.*, [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241, referred to.
(9) *Wells Fargo Ltd.* v. *Norfolk Multina (Owners)*, *The Norfolk Multina,* 1812–1977 Gib LR 386, referred to.

Legislation construed:
Bankruptcy Ordinance 1934, s.47A:

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"(1) Where under any contract of insurance, a person . . . is insured against liabilities to third parties which he may incur, then—

. . .

(b) in the case of the insured being a company, in the event of a winding-up order being made . . .

if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall notwithstanding anything in any law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

Motor Vehicles Insurance (Third Party Risks) Ordinance 1951, s.14: The relevant terms of this section are set out at para. 41.

Motor Vehicles Insurance (Third Party Risks) Ordinance 1986, s.18(1): The relevant terms of this sub-section are set out at para. 42.

Revised Edition of the Laws Ordinance 1981, s.7(1): The relevant terms of this sub-section are set out at para. 40.
s.8: The relevant terms of this section are set out at para. 40.
s.11: The relevant terms of this section are set out at para. 40.

J. Leighton Williams, Q.C. and *D. Feetham* for the first and second appellants;
H. McGregor, Q.C. for the respondent.

1 **LORD MANCE,** delivering the opinion of the Board: This appeal arises from an accident suffered by the respondent, Mr. Stephen Whatley, as long ago as August 2nd, 1994. Mr. Whatley and Sharon Fosdike (who later became Mrs. Whatley) were each directors and 50% owners of Whatley & Fosdike Building Contractors Ltd. ("W&F"). The accident occurred on a small site on which they were working. Mr. Whatley maintains that the accident resulted in serious injury to his health, giving him a large potential claim against W&F, which he puts (the Board was told) at around £2m. But it is common ground that he lost any such claim due to the negligence of the first appellants, a firm of barristers and solicitors, of which the second appellant, a barrister, is owner. The negligence in question (the only negligence that could on the face of it have been alleged, since the present claim was issued on July 21st, 2003) is a failure to issue a writ against W&F between July 21st, 1997 and August 2nd, 1997.

2 The conventional approach to a claim such as the present is not to seek to try the original claim, but to measure its prospects of success and assess damages on a broad percentage basis: see *Kitchen* v. *Royal Air Force Assn.* (8); *Hanif* v. *Middleweeks* (7); *Dixon* v. *Clement Jones Solicitors* (4); and *Browning* v. *Brachers* (3). Before the Board, Mr. Williams, Q.C., representing the appellants, sought leave to submit, for the first time, that this

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was no longer a correct approach, and that the Board should assess damages on an "all or nothing" approach by applying a balance of probabilities test, having regard to the House of Lords' decision on January 27th, 2005 in *Gregg* v. *Scott* (6). Such a submission could have been raised below, before Dudley, A.J., who heard the matter in mid-March 2005 and gave judgment on April 27th, 2005 and before the Court of Appeal for Gibraltar which gave judgment on December 22nd, 2005. There are also obvious differences between the medical context of *Gregg* v. *Scott* and the present. In these circumstances, the Board ruled that it was not appropriate to take the exceptional course of permitting a new point of this nature to be raised for the first time on appeal to the Board. The appeal therefore falls for determination on the basis on which it was approached below.

3 The assessment which Dudley, A.J. had to undertake was complicated. He had to assess not merely the prospects in law of a successful claim against W&F, but also the prospects of W&F satisfying any such claim. W&F itself plainly never could do so. Its financial statements for periods to 30th June, 1998 show very limited assets, and it was, in November 1999, wound up on a creditor's petition with an evidently substantial deficit. The only hope lay in its employers' liability policy with Assicurazioni Generali S.p.A. ("Generali"). But, in clear breach of a condition precedent to liability under that policy, no notice of any claim was given by W&F to Generali until May 23rd, 1995, and this is not a breach which can be laid at the appellants' door. Generali, through local barristers and solicitors, Marrache & Co., reserved all its rights in respect of the breach and, without prejudice thereto, sought further information which was never supplied. An added difficulty, even if W&F had recovered moneys from Generali, appeared in the courts below to be that there was in Gibraltar, no third party (rights against insurers) or employers' liability legislation to give Mr. Whatley a direct or preferential right to such recoveries. It was thought (incorrectly as now appears—see paras. 39–43 below) that they would have gone into the general liquidation pot.

4 Dudley, A.J. concluded that (i) Mr. Whatley's chances of success in establishing liability against W&F were more than negligible, and would be assessed at 25%; while (ii) the percentage prospect of "recovering from Generali" would also be assessed at 25%. In arriving at the latter percentage, he bore in mind the policy issues, the difficulty that Mr. Whatley would have had in funding any claim by W&F against Generali and the fact that any recovery by W&F would, on its face, have had to be distributed amongst all W&F's creditors. However, it appears that he may not have been taken in any detail to the figures in W&F's financial or liquidation statements. In the upshot, Dudley, A.J. assessed Mr. Whatley's overall chance of success at 7% (a rounding up of 25% x 25%, which would give 6.25%).

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5 On December 22nd, 2005, the Court of Appeal for Gibraltar (Staughton, P., Stuart-Smith and Aldous, JJ.A.) allowed the respondent's appeal and dismissed the appellants' cross-appeal. The court held that Mr. Whatley's chances of success against W&F were excellent and assessed them at 100%. The majority assessed the percentage chance of recovering from Generali at 80% (Staughton, P. put it at only 50%); and the overall chance of success was accordingly assessed by a majority at 80%. Against that decision this appeal is now brought.

Mr. Whatley's prospects of success against W&F

6 The accident on August 2nd, 1994, occurred inside a small area (about 5m. long, 3.5m. wide and 3.5m. high) which W&F was converting from a cistern into a garage. Twelve acrows, each nearly 3m. long, were stored at an angle (to the floor) of about 60° against the wall in the back right corner, awaiting removal. At the site were Mr. Kenyon (site foreman) and Mr. Clinton (labourer), both employees who had only been working for W&F for just over two months. It was common ground on the pleadings in the present proceedings that Mr. Whatley "attended [the] site to . . . assist in the removal from the said site of various pieces of equipment." He was asked by Mr. Kenyon to help to lift out a beam lying on the floor. It was also common ground that, as Mr. Whatley crouched down at the entrance end of the site to do this, Mr. Kenyon stood on the bottom plate of one of the acrows which came forward and hit Mr. Whatley on the back of the head.

7 Dudley, A.J. regarded the claim which Mr. Whatley originally advanced against W&F as alleging an unsafe system of work. The letter dated May 23rd, 1995 sent to Masbro Insurance Brokers Ltd., local agents for Generali, enclosed an employers' liability report form. This was completed (with one exception) by Mr. Whatley and described the accident as happening when an "acrow fell from its resting place." The one exception was the answer in the second appellant's writing, to a question about steps taken to avoid future occurrences as being "new instructions on methods of storage to the supervisor." (Mr. Whatley disputed that he had told the second appellant any such thing.) In a further letter dated July 19th, 1995, the first appellants described the accident as occurring when an acrow fell "as the result of being stacked in this negligent manner."

8 From mid-September 1995, no claim was progressed against either W&F or Generali. However, on September 16th, 1997, following the expiry of the limitation period, proceedings were issued in Mr. Whatley's name against W&F, and served on Marrache & Co. Marrache & Co. acknowledged service, and were able to defend, and in effect terminate, the proceedings on the ground that they were time-barred. The statement of claim in such proceedings was also on its face, as Dudley, A.J. noted,

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"premised upon the basis of an unsafe system of work," involving unsafe storage of the acrows. It made no reference to Mr. Kenyon having trodden on the acrow. Only in the present proceedings did an allegation appear of vicarious responsibility for failure "to take reasonable care for the claimant's safety when working near the acrow, such that it was dislodged and fell onto the claimant." Despite this sequence of events, Dudley, A.J. held on balance, in light of other evidence, that the original instructions to the first appellants "must have been such that the action could have been formulated upon the dual basis" of unsafe storage and/or careless dislodgement.

9 Dudley, A.J. found, however, that "the vicarious liability argument suffered from significant inherent difficulties." An "essential prerequisite" would, he thought, have been "that the acrows were stored safely." He considered the evidence of Mr. Labrador. At pre-trial hearings, when permission was being sought to admit Mr. Labrador's evidence, counsel for the appellants said that he would not object, provided that the evidence was given without elaboration, and that he would not be calling any evidence of his own, and Mr. Labrador was described by the judge as "clearly an expert witness at the eleventh hour without leave." In this event, the judge was not wholly convinced by his evidence. Despite it, he saw "force in the proposition that in a building site, acrows should not fall merely because they are stepped upon," and said that "stepping on the base of an acrow may not necessarily be easy to categorise as a negligent act."

10 The apparent focus on the safety or otherwise of the system of storage led to an issue before Dudley, A.J. about who was responsible for health and safety within W&F. Mr. and Mrs. Whatley said that it was Mrs. Whatley, but Dudley, A.J. was sceptical. It was not, he correctly said—

> "[for him to] 'decide' [but] . . . it seems to me that at the very least there is sufficient material upon which the court [*i.e.* the court hearing a claim by Mr. Whatley against W&F] could have properly concluded that Mrs. Whatley was not responsible for health and safety and therefore conclude that it was rather Mr. Whatley who undertook those duties."

In so concluding, he regarded it as proper to disregard the second appellant's testimony that Mr. Whatley had suggested to him that Mrs. Whatley be represented as health and safety officer on the ground that the evidence would not have been before the court trying Mr. Whatley's claim against W&F. Before the Board, Mr. McGregor sought to introduce fresh evidence in the form of an affidavit by a Mr. Quinn sworn on June 14th, 2005. The Court of Appeal (in view of its general attitude to the issue of unsafe storage, to which the Board will come), refused to admit this evidence, but Mr. McGregor submitted that it should, if necessary, be

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admitted before the Board as bearing on the judge's conclusion on the prospects of Mrs. Whatley being regarded as health and safety officer at the relevant time. The Board read it *de bene esse*. While it appears to support Mrs. Whatley's evidence that a health and safety document referring to Mr. Whatley dates to a time two or three years after the accident, it does nothing to assist her further explanation that the reference to Mr. Whatley was because responsibility for health and safety had, at some point after the accident been transferred by her to her husband. The Board considers the suggested additional evidence to be of, at best, limited relevance and declines to admit it.

11 Dudley, A.J. went on to conclude that—

> "if Mr. Whatley was responsible for health and safety and the accident occurred consequent upon an unsafe system for which he was responsible, responsibility for the accident would very arguably lie squarely upon his shoulders,"

and he noted that the same consideration could also undermine the suggestion that Mr. Whatley undertook the lifting at the request of Mr. Kenyon and had no supervisory role in respect of the removal of the materials from the site, especially when Mr. Kenyon and Mr. Clinton had only been with W&F for just over two months. Dudley, A.J. noted that the question of responsibility for the storage bore on the issues of both negligence and of contributory negligence.

12 Dudley, A.J. also took into account, in the context of arguable contributory negligence, the undisputed fact that Mr. Whatley had not been wearing a hard hat. He noted Mr. Labrador's evidence that wearing a hard hat was not a strict requirement of good practice although it would be best practice. He further noted W&F's own health and safety document, dated by Mrs. Whatley (as stated above) as after the accident, which called for the wearing of such a hat at all times. He noted Mr. Labrador's hearsay evidence that, although the hard hat that Mr. Labrador would himself have worn and which he tried on Mr. Whatley, would have covered the spot where the acrow had hit Mr. Whatley, the type of hard hat which Mr. Whatley told him he wore would not have done. The Board observes that no evidence to this effect was in the event given at trial by Mr. Whatley. Ultimately, the judge considered that, because the point also bore on the issue of an unsafe system of work, he should not ascribe a specific deduction for contributory negligence, but should factor it into his overall assessment of the chance. Doing this, he concluded that the action was fraught with difficulties and "mindful [he said] of the principle in *Armory* v. *Delamirie*," assessed the chances of success at 25%.

13 The Court of Appeal disagreed fundamentally. Full judgments on this aspect were given by Aldous and Stuart-Smith, JJ.A., with which Staughton, P. agreed. Aldous, J.A. took issue with the judge's statement

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that an "essential pre-requisite [to any vicarious liability] . . . would have been that the acrows were stored safely." The Board agrees with Aldous, J.A. about this. It is perfectly possible for a scenario to exist in which the acrows were unsafely stored *and* it was negligent to tread on the foot-plate of one of them. Indeed, in some circumstances it could be negligent not to note that the acrows were unsafely stored. However, the Court of Appeal went further and regarded unsafe storage, and unsafe system as entirely misguided suggestions, which had no bearing on the accident and should never have been raised (*per* Aldous and Stuart-Smith, JJ.A.) and which "led to a wholly unnecessary and irrelevant consideration of who was the safety officer" (*per* Stuart-Smith, J.A.). Stuart-Smith, J.A. said that there were two ways in which acrows could be safely stored: one (which he viewed as the "preferable method") flat on the ground, the other at an angle in a corner. Both Stuart-Smith and Aldous, JJ.A. noted in the latter connection the "unchallenged" evidence of Mr. Labrador. But the judge heard and assessed Mr. Labrador's evidence, and, doubtless using his own common sense and experience (and the Board understands that this was a field in which he was familiar), formed a less sanguine view about Mr. Labrador's late-produced evidence and about the safety of storing 12 long and heavy acrows inside a confined space in which work was still being undertaken. The Court of Appeal's general attitude that unsafe storage should never have entered the arena ignores the reality that it was at all times placed in the centre of the arena by Mr. Whatley's own case, as pleaded first against W&F and latterly against the appellants (and as summarized at the outset in the employer's liability report form). The judge was, in the Board's view, justified in treating it as raising a real point, to which Mr. Whatley himself had attached significance and which would have played a part in any trial as between him and W&F.

14 Aldous, J.A. took the view that if there was improper storage then—

> "that was the fault of Mr. Kenyon who was the foreman on the site [and] . . . in any case the storage of the props could not excuse Mr. Kenyon from taking reasonable care not to knock one over onto Mr. Whatley's head."

The unequivocal statement that any unsafe storage would have been the fault (alone) of Mr. Kenyon was not, in the Board's view, one which was open to him. The trial judge's task was not to make findings but to assess prospects. The evidence before the judge left room for the view that Mr. Whatley may have had a relevant supervisory responsibility. Aldous, J.A.'s latter statement (that unsafe storage would not excuse Mr. Kenyon) reverses the judge's error, by assuming that negligence by Mr. Kenyon would exclude any responsibility for unsafe storage.

15 The Court of Appeal was, however, justified in the Board's view, in reaching an assessment considerably more favourable to Mr. Whatley on

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the question of whether Mr. Kenyon would have been found to have been in some degree negligent in stepping on the base plate of an acrow. While it may be that acrows should not be stored unsecured in a confined space where they may be trodden on, the judge seems to the Board to have gone too far towards suggesting that it was safe, or at least not negligent, to step on the base plate of an acrow. The base plate is necessarily at 90° to the shaft, and an acrow leaning against a wall is bound to move if one steps heavily on its base plate.

16 Turning to the issue of arguable contributory negligence in failing to wear a hard hat, both Aldous and Stuart-Smith, JJ.A. suspected that, since the judge had not expressly referred to the onus of proof, he failed to appreciate where it lay. The Board doubts the correctness of this suspicion, and doubts that the onus of proof could anyway have been significant in the judge's assessment of prospects on contributory negligence. The Court of Appeal again relied on Mr. Labrador's evidence, but, for reasons already indicated, the Board does not consider that that represented the end of any point on contributory negligence consisting of a failure to wear a hard hat.

17 In the result, the Board considers that the Court of Appeal was correct in identifying two principal errors or weaknesses in the judge's approach to this issue, which led him to as low a percentage as 25%. But, the Court of Appeal went itself too far in other respects. Mr. Whatley's prospects of success against W&F were, in the Board's view, in no way 100%. The Board must, in these circumstances substitute its own assessment, and has concluded that the prospects should be assessed at 70%.

Mr. Whatley's prospects of obtaining money from W&F or Generali

18 The Board starts with W&F's own financial position. On November 12th, 1999 it was wound up on a creditor's petition dated September 24th, 1999. Its list of admitted creditors totalled £486,046, including a £199,782 preferential debt owed to the Government of Gibraltar, a £37,800 secured debt owed to two companies and £248,466 owed to some 48 other unsecured creditors (which in turn included £90,067 owed to Mr. and Mrs. Whatley). Proofs of debt for further sums exceeding £200,000 were also received. W&F's most recent financial statements to June 30th in each of the years up to 1998, show that W&F was a fairly typical small building contractor. It had few fixed assets, little cash and current assets of moderately substantial size (though nothing approaching in value its total indebtedness to creditors according to the list prepared after its liquidation). Such current assets consisted also of debtors and works in progress—assets of a kind which are prone to evaporate or to be submerged by cross-claims for defects or non-performance, if and when building contractors cease to trade.

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19 A suggestion was pleaded that if the appellants had served proceedings on W&F, the trial would have occurred no later than August 1st, 1999, something that the appellants admitted in their defence "may" have occurred. But when judgment would have been given and above all, whether any payment would then have been received from W&F before W&F went into liquidation are different matters. It was unrealistic to think that W&F could or would have paid any judgment itself—unrealistic because of the timing (just before W&F's actual winding up), and because of W&F's extremely limited cash position. Dudley, A.J. found accordingly that, had Mr. Whatley succeeded in his action against W&F, the company would not have had the means to pay any substantial award. The Board observes that the hypothetical position may be rather more complex than this scenario contemplates. Any assumption that Mr. Whatley and W&F could or would have fought an action to trial appears unrealistic, unless one also assumes that Generali would have stood behind W&F. It is unlikely that Generali could have stood behind W&F and at the same time have reserved its policy position, without at least reaching a special agreement with W&F to that effect. If, on the other hand, Generali had not stood behind W&F, Mr. Whatley could and probably would have obtained judgment relatively speedily against W&F (as indeed he did by default in January 1998). In that event, the focus would have shifted to W&F's ability to pursue Generali. It is at this stage that delay might have been envisaged, which might have meant that by the time any payment could have been hoped for from Generali, W&F would have been in liquidation. This is so, in particular, if Dudley, A.J.'s conclusion that "it would have been highly unlikely that Generali would have paid up unless judgment was obtained against it" stands. The Board will return to this finding below.

20 The fundamental issue, as the judge recognized, concerned the prospects of Mr. Whatley's claim being met from payments under the employers' liability insurance policy which W&F had taken out with Generali. Generali had no physical presence in Gibraltar but had agents there, Masbro Insurance Brokers Ltd. ("Masbro"). But, no notice of any accident or claim was given to Generali until the letter sent by the first appellants to Masbro on May 23rd, 1995. There is, as the Board has already observed, no claim against the appellants in this respect. (An application to raise such a claim made by counsel during reply in the Court of Appeal was refused, and the appellants deny as a matter of fact that they were instructed before May 1995.) The Board has recited (see para. 7 above) what the letter and its enclosure said about the accident. The letter and a follow-up dated June 8th, 1995 also acknowledged that there were uncertainties about the attribution of symptoms which Mr. Whatley said he was experiencing in May 1995 to the accident of August 2nd, 1994, and sought insurers' agreement to reimburse medical expenses to investigate this aspect.

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21 The policy contained a usual provision:

> "4. In the event of any occurrence giving rise to loss, damage or to a claim for which the Company may be liable under this policy—
>
> 4.1 the Insured shall, as a condition precedent to any liability on the part of the Company;
>
> 4.1.1 immediately upon receiving notice of any accident or claim give notice in writing thereof to the Company, at his own expense and as soon as practicable, supply full particulars in the form required by the Company."

Masbro on behalf of Generali instructed Marrache & Co., who, on June 15th, 1995, reserved "all [Generali's] rights as to late notification of your clients' claim," but went on to ask, without prejudice, for further particulars such as to how the accident occurred, why Mr. Whatley was not wearing a hat, whether the second appellants were prepared to give an outline of the evidence of the two other employees present and what evidence there was of any causal link. They refused to meet "medical expenses for which [insurers] may not be liable [and said that] . . . in the absence of any evidence to the contrary, we must therefore deny liability on our client's part."

22 In a further letter dated July 19th, 1995, the first appellants described the accident as occurring when an acrow which had, prior to being removed from the site, been placed against the wall by Mr. Kenyon or Mr. Clinton (it was "not possible to say" which) fell and struck Mr. Whatley "as the result of being stacked in this negligent manner." No reference was made to anyone treading on the acrow. The insurers' point about wearing a hard hat was not addressed, nor was anything said in answer to the insurers' request to have an outline of what Mr. Kenyon and Mr. Clinton would say. It is common ground that, shortly after the accident, both had left Gibraltar and neither was traceable by solicitors acting in the present proceedings. The letter further asserted, without documentary support, that Mr. Whatley's symptoms had now been attributed by consultants at the National Neurological Centre in London to the accident of August 2nd, 1994, and again sought reimbursement of the medical expenses which Mr. Whatley had incurred and confirmation that insurers would negotiate on quantum. On August 7th, 1995, Marrache & Co. replied that insurers could not reimburse any medical expenses until fully satisfied on liability; that they would, at the very least, require copies of written medical reports, and that "for the record, our clients deny any liability whatsoever, and continue to reserve all their rights." On September 14th, 1995 the first appellants informed Marrache & Co. that "[A]t this stage we would not propose to give sight of the preliminary report." They advised Mr. Whatley by separate letter on the same day that they did "not think that the medical reports we already have are suitable for disclosure." This

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advice appears understandable in the light of their contents (now available), which lend very limited support to a link between the symptoms complained of and the accident. But the failure to disclose any medical reports was, not surprisingly, followed by silence from insurers' side.

23 Insurers were not thereafter involved until January 12th, 1998 when the first appellant wrote to Marrache & Co. a letter headed in the matter of Mr. Whatley versus W&F. They referred to the last correspondence between them dated August 7th and September 14th, 1995, said that they were "now instructed to serve the writ" on W&F and asked whether Marrache & Co. were instructed to accept service. On January 15th, 1998 Marrache & Co. confirmed that they were so instructed. There is no direct evidence from them as to how or by whom. In addition to the terms already set out, cl. 4 of the policy went on to say:

> "4. In the event of any occurrence giving rise to loss or damage or to a claim for which the Company may be liable under this policy:
>
> 4.2 The Company shall be entitled—
>
> 4.2.1 to undertake in the name of and on behalf of the insured the absolute conduct and control of any proceedings and the settlement of same . . ."

It may be that this was all that Marrache & Co., or their principals, thought was necessary. As will appear, the Board thinks it unlikely that Marrache & Co. decided by themselves and without any instructions from their principals, to take the actions they did at this stage. Stuart-Smith, J.A. described the effect of taking over the defence under cl. 4.2.1 as an affirmation of the policy. The question is, strictly, whether taking over the defence involved or gave rise to a waiver of Generali's rights to rely on any breach of the separate condition precedent under cl. 4.1.1, in respect of which its rights had previously been reserved. In circumstances where the writ was sent by Mr. Whatley's solicitors to Marrache & Co., where no one else was interested in defending W&F's interests and where Generali's defence of the action was a pure benefit and in no way prejudicial to W&F, there could conceivably have been room for argument about this. But the point was not discussed before the Board, and the issue on which the Board has to focus is whether what happened in early 1998 is a guide to what would have happened if the writ had been issued before the expiry of the limitation period.

24 After asking for an extension of time for a defence, Marrache & Co. allowed judgment in default of defence to be obtained and had to apply to have that set aside. The affirmation of April 9th, 1998 made by David Whitmore in support of that application observes that—

> "the plaintiff's claim may well be time barred . . . [I]n this case the primary limitation period would have expired on August 1st, 1997

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> and it is contended that the defendant has an arguable limitation defence."

The next paragraph reads:

> "The plaintiff's generally endorsed writ merely avers that 'the injury forming the subject of this claim became known to the plaintiff in or about April 1995.' Since the plaintiff obviously knew he was hit on the head on the day he suffered the injury alleged, this is an averment which will obviously need to be the subject of a detailed enquiry."

25 Staughton, P. read this as "an indication that the delay in notification [*i.e.* of the insurance claim] was still definitely a live issue." The Board doubts if it should so be read. In context, it is more likely to have been a reference to the possibility that Mr. Whatley might be trying to extend the limitation period (under ss. 5(2) and 10(3) of the Gibraltar Limitation Act 1960, equivalent to what are now ss. 11 and 14 of the United Kingdom's Limitation Act 1980) for any claim against W&F by arguing that he did not have knowledge of the relevant facts (*viz.* that he had suffered significant injury, attributable to the act or omission alleged to constitute negligence or a breach of duty) before September 16th, 1994 (a contention consistent with the original claim letter of May 23rd, 1995).

26 On April 20th, 1998 the judgment obtained by Mr. Whatley against W&F was set aside by consent. Effectively, that was the end of Mr. Whatley's claim against W&F.

27 With regard to Generali's attitude if the appellants had issued proceedings against W&F within the three-year limitation period, Dudley, A.J. heard evidence from Mr. Belilo, the general manager of Masbro. Mr. Belilo's evidence was that Generali would have refused to pay out, primarily because of the late notification, unless W&F had obtained a judgment against it. He could not recall any case in 32 years of claims experience where a claim had been honoured which was nine months late in notification. He thought that Generali probably had been prejudiced by the late notification. Addressing Marrache & Co.'s actions in early 1998 in defending Mr. Whatley's claim against W&F, the judge said:

> "By that time the action was time barred. An inference cannot properly be drawn . . . that the late notification point would not have been taken had the writ been issued within the limitation period. I can see merit in the view that given the unassailable defence of limitation, no purpose was served by arguing late notification. Indeed, according to Mr. Belilo the advice of Marrache & Co. was to defend the claim on the basis that the action was time barred given that the defence was a 'virtual certainty.'"

(The transcript indicates that Mr. Belilo's actual words were a "certainty really.") Dudley, A.J. further concluded, as the Board has said, that on the

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evidence he had heard it would have been highly unlikely that Generali would have paid up unless judgment was obtained against it.

28 Turning to the prospects of W&F financing an action against Generali, the judge thought it unlikely that it could have done, but mentioned as a possibility a conditional fee agreement or some other financial arrangement. The Board interposes that one may indeed surmise that Mr. Whatley himself might have funded such a claim, since he has been able to pursue the present proceedings. The judge went on to identify two legal arguments raised by Mr. McGregor, one that cl. 4.2 might not be construed as a condition precedent, the other that "good faith" might have precluded Generali from relying on cl. 4.2. Not surprisingly, neither of these implausible arguments featured before the Board. Finally, he noted a point on which the parties were, until after the oral hearing before the Board, in agreement, namely that there was in Gibraltar no relevant third party (rights against insurers) or equivalent employers' liability legislation. On that assumption, as he correctly said, any moneys paid out by Generali after W&F went into liquidation in 1999 "would have been distributed amongst all the creditors." He observed however, that the sum claimed (assuming that the injuries upon which it were based related to this accident) would be "significantly in excess of any sums due by W&F in its winding up." That would not, however, avoid the need to distribute any recovery from Generali (along with any other assets, if any, of W&F) *pari passu* among all creditors, including Mr. Whatley. The Board will have to return to this aspect of the judge's judgment later in this opinion.

29 Ultimately, taking a global view, and again reminding himself of the principle in *Armory* v. *Delamirie* (2), the judge assessed the prospects of Mr. Whatley recovering from Generali at 25%.

30 The members of the Court of Appeal took different views from the judge and to some extent from each other. As to whether Generali could have relied on the condition precedent, an argument of estoppel was raised before the Court of Appeal and repeated before the Board, based on the fact that Generali did not unequivocally repudiate any policy liability between 1995 and 1998 and on the incurring by Mr. Whatley (and perhaps by the appellants on his behalf) of medical expenses during this period. Staughton, P. and Aldous, J.A. saw no basis for any suggestion that Generali had so estopped itself. Stuart-Smith, J.A. on the other hand regarded this as a not "particularly easy point," in relation to which a court might not look favourably on Generali. In the Board's view, however, the majority of the Court of Appeal was correct. Generali's policy position had been reserved and there had been a refusal to accept responsibility for any medical fees in the clearest terms by Marrache & Co.'s letters of June 15th and August 7th, 1995—indeed the latter letter had gone further and had specifically denied liability. There is no conceivable risk that Generali could have been held to have become estopped from relying on late

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notification as a ground for denying policy liability. The suggestion by Stuart-Smith, J.A. that "if insurers are going to repudiate, they should do so promptly and clearly," with the consequence that they will be estopped if they do not do so, is also incorrect in law (see *Allen* v. *Robles* (1)).

31 The Board turns therefore to the question of whether Generali would have rejected any claim pursued within the limitation period for late notification. All three members of the Court of Appeal referred in this connection to *Fraser* v. *B.N. Furman (Productions) Ltd*. (5). That case shows that the question is one of fact—what are the prospects that a reputable insurer such as Generali would, in such circumstances as the present, have relied on the breach of policy? When considering such a question, the nature and effect of the breach of policy are relevant. In *Fraser*, the court was concerned with a quite different type of policy clause—a clause in an employer's liability policy purporting to place on the employer a duty to take reasonable precautions to prevent accidents. The argument that reputable liability insurers would lightly have raised such a defence in answer to a policy claim to indemnity was, not surprisingly, viewed as remote—all the more so once the court indicated that such a clause should (in the context of a policy designed to cover liability for negligence) be construed as excluding only situations of wilful or reckless disregard of proper precautions. Here, the clause is a clear and unequivocal condition precedent regarding early notification, a matter of obvious importance to liability insurers' ability to investigate and assess any claim. Staughton, P. was correct to draw attention to this important distinction from the position in *Fraser*, which Aldous and Stuart-Smith, JJ.A. did not identify when relying on that case in their judgments.

32 Staughton, P. was also correct to draw attention to the background against which Generali would have taken any decision as to whether or not to rely on or waive the condition precedent—the long delay of nearly 10 months before any notification, the loss of the opportunity to investigate contemporaneously (or, it appears, at all) with witnesses, and (so far as it might have become apparent) the inconsistent presentation of the factual position (moving from the original suggestion of unsafe storage to the later case of negligence by Mr. Kenyon in stepping on the foot-plate). The Board adds that the failure to address the points raised by Marrache & Co. in 1995 for another two years would itself hardly have conduced insurers to view any claim favourably either (see para. 22 above). On the other hand, even where there has been the clearest breach of a policy provision prejudicing insurers, they, even though not prepared to waive the breach entirely, may at least prefer to pay without prejudice, using the breach as a lever to control their exposure. Any assessment of prospects must also cover this fact of life.

33 An important difference between the approaches taken by Staughton, P. and the majority in the Court of Appeal relates to the significance of

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Marrache & Co.'s actions on behalf of Generali in early 1998. Staughton, P. regarded what was done in 1998 as no indication of what would have been done before the limitation period expired. He pointed to the evidence given by Mr. Belilo of Masbro, whose authority to take decisions was limited to £5,000, but who said of the late notification point, "I would advise Generali of the situation, which I did, and they would have recommended that we should [take the point and not accept policy liability] as they did as well." Staughton, P. also quoted the concluding passage from Mr. Belilo's re-examination:

> "*Q*. What advice did you receive at this stage from Marrache & Co. in relation to defending this claim?
>
> *A*. As they said, there was not much point in defending when we have the limitation and are statute-barred, so we just defended it on those grounds which were a certainty really."

The question was leading, though no objection was taken and no request made to permit further cross-examination on the answer. Mr. Belilo, had just before (on the previous page of the transcript) indicated awareness of the issue of the claim in 1998 and of its non-pursuit since then. As stated above, Dudley, A.J. accepted the answer in his judgment.

34 In contrast, Aldous and Stuart-Smith, JJ.A. attached significance to what actually happened in early 1998 suggesting that Generali would not have relied on late notification to repudiate a claim had one been made within the limitation period. Aldous, J.A. quoted a paragraph in Mr. Belilo's witness statement stating baldly that—

> "Masbro . . . ceased to become involved in this claim when the claim became statute-barred . . . [I]t is therefore not surprising that he did not know that solicitors for Generali had accepted the service of proceedings on behalf of W&F and had taken the steps in that action to which I have referred."

Stuart-Smith, J.A. took a similar approach, referring to Masbro's limited authority and saying that it was "clear" that Mr. Belilo had nothing to do with the case after 1995, and "importantly it was not he who instructed Marrache & Co. to defend the claim."

35 Neither Aldous, J.A. nor Stuart-Smith, J.A. made any reference to the passages quoted from Mr. Belilo's oral evidence (see para. 33 above), or to the judge's acceptance of them. It is furthermore inherently implausible that Masbro would simply have left the scene for all purposes, as if by reference to some diary entry, on August 2nd, 1997, three years after the accident. Masbro were Generali's only agent in Gibraltar, even though their decision-making authority without a reference backing was limited to £5,000. Moreover, they had instructed Marrache & Co. Although there was, and is, no direct evidence about why and on whose instructions, if

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any, Marrache & Co. acted in defending Mr. Whatley's claim against W&F, it is inherently unlikely that this could, or would, have occurred without Marrache & Co. informing Masbro (and indeed without Masbro taking instructions from Generali), and Mr. Belilo's evidence that Masbro was involved at this point was accepted by the judge.

36 Before the Board, Mr. McGregor drew attention to the terms of the affirmation by which Marrache & Co. applied to have the judgment in default set aside (see para. 24 above). He submitted that these showed that Marrache & Co. could not have thought that the limitation position was clear or therefore have advised Masbro and Generali to proceed on that basis in the manner suggested by Mr. Belilo and accepted by the judge (see paras. 27 and 33 above). This submission has, on its face, some attraction, but faces the difficulty that Mr. Belilo was never cross-examined upon it or upon his contrary answer which the judge accepted. Like Staughton, P., the Board does not consider that a sufficient basis has been made out for disturbing the clear finding on this aspect of the judge who heard and saw the witness.

37 Finally, all three members of the Court of Appeal discounted W&F's financial weakness. Staughton, P. did so on the basis that it was not an independent ground, and that, if (as he considered) there was a 50% prospect of Generali paying, "it would be unlikely that the cost of litigation would be an obstacle." Aldous and Stuart-Smith, JJ.A. both took the view that all that would have had to be done, if Generali had taken the late notification point, was to put in a defence for W&F and then to issue third party proceedings in W&F's name against Generali. The Board considers that all three members of the Court of Appeal were over-sanguine in their estimation of the ease with which W&F might have pursued Generali.

38 None of the three members of the court mentioned the consideration that, in the event of W&F's liquidation before any recovery from Generali (a likely scenario if Generali had defended a claim by W&F), any such recovery would have fallen to be distributed *pro rata* among all of W&F's not insubstantial creditors. On the basis on which the matter was argued at all stages until after the hearing before the Board (see para. 28 above), the judge was right to take this into account, albeit as a general unquantified factor in arriving at his ultimate assessment. Written submissions to the Board, since the hearing have, however, shown that the matter is considerably more complex than previously assumed, and that a re-evaluation is necessary.

39 Information very properly put before the Board by counsel for the appellants now shows that, contrary to both parties' previous assumptions at all stages in these proceedings, there has at all material times been legislation of apparently general import transferring to third parties rights

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against insurers on the bankruptcy or winding-up of a person or company insured against third party liabilities. Section 47A was purportedly inserted by transfer into the Bankruptcy Ordinance 1934 by the Attorney-General's order by L.N. No. 63 of 1986 in *Gazette* 2296 of June 19th, 1986. In the context of the 1934 Ordinance, s.47A reads as a general provision transferring to the third party claimant whatever rights the insured has against the insurer in respect of his liability to the third party, in the event of such bankruptcy or winding up. The appellants take issue with the validity of this purported transfer, and maintain that, if valid, the section anyway only refers to motor insurance liabilities.

40 The Attorney-General purported to make the transfer under a power conferred by s.7(1)(c) of the Revised Edition of the Laws Ordinance, 1981, to "transfer any provision contained in any Ordinance from that Ordinance to any other Ordinance to which, in his opinion, it more properly belongs." Under s.8, the power so conferred by s.7 should "not be taken to confer on him or to imply in him any power to make any alteration or amendment in the matter or substance of any law or any part of a law." Section 11 states that the Revised Edition of the Laws Ordinance 1981, once in operation, shall "be and be taken by all courts and for all purposes to be the authentic version of the statute laws of Gibraltar," but this is expressly subject to, *inter alia*, s.8. So, a purported transfer which is clearly in excess of the Attorney-General's power to transfer may, at least to that extent, be invalid (see *Wells Fargo Ltd.* v. *Norfolk Multina (Owners), The Norfolk Multina* (9)).

41 Before its purported transfer, s.47A was a section which the Attorney-General wrongly described in his order as s.14 of the Insurance (Motor Vehicles) (Third Party Risks) Ordinance in the 1986 *Gazette*. It is clear that he meant s.14 of the Motor Vehicles Insurance (Third Party Risks) Ordinance 1951 (No. 15 of 1951). *Falsa demonstratio non nocet*. Almost all of the provisions of the 1951 Ordinance related to motor insurance, including s.9 which introduced a duty on the part of insurers providing compulsory "rights of third parties against insurers on bankruptcy, etc." to satisfy judgments against their insureds, subject to due notice of the proceedings in which any such judgment was given. Section 9 (in contrast with s.14) was expressed to take effect notwithstanding any right to avoid or cancel. On the other hand, s.14 was, in entirely general terms, not in any way expressly limited to a motor insurance context. However, the appellants submit that s.14 was, in context and by implication, limited to motor insurance, and that it was so viewed by the legal profession. The latter submission may be correct, bearing in mind the common attitude of counsel in this case, although the inference is that the Attorney-General at least thought differently in 1986. The former submission is one the Board is unable to accept. In its view, s.14 was general in both terms and effect, and the Attorney-General was correct in thinking

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that it could be transferred out of its motor insurance surroundings into the general context of the Bankruptcy Ordinance 1934.

42 There was, in s.14 of the Motor Vehicles Insurance (Third Party Risks) Ordinance 1951, as there is in s.47A of the Bankruptcy Ordinance 1934, nothing to affect or remove any defence which insurers might otherwise have, such as Generali's potential defence of late notification arising under cl. 4 in the present case. In their written submissions addressing s.47A, the respondents have suggested that s.15 of the 1951 Ordinance, now s.18(1) of the successor Insurance (Motor Vehicles) (Third Party Risks) Ordinance 1986, is in this respect relevant. The Board cannot accept that. Section 15, now s.18(1), is in terms limited to "such liabilities as are required to be covered by a policy under section 5 [of the Act]." Section 5 was, and is, in terms dealing exclusively with compulsory motor insurance in respect of third party liabilities.

43 Although the existence of s.47A long escaped counsel on both sides in this litigation, the Board does not consider that it would be right to proceed on the basis that it would have escaped attention if a situation had arisen where Generali were contemplating making a payment in respect of Mr. Whatley's claim against W&F, after the commencement of W&F's winding up in November 1999 or, indeed, if attention had been focused on the point at any time after it became apparent that W&F might go into winding up. The appellants, as Mr. Whatley's lawyers, ought to have known of the existence of s.47A and deployed it for all it was worth. Not only would the appellants' present arguments regarding s.14 have been, in the Board's view, bad in law, they would, from the insurers' viewpoint, have had no ultimate financial attraction. They would have been expensive to argue and would have been very unattractive from a business and reputational angle. The Board cannot think that they would have played any significant role, especially if one considers the likelihood, to which the Board has already referred, of Generali seeking some settlement with Mr. Whatley, reflecting the applicable legal and commercial considerations.

44 In these circumstances, the Board must re-evaluate the prospects on the second issue on a basis not addressed before either court below. First, however, the Board would summarize the effect of its observations on other points by saying that it is unable to accept the approach taken on them by the majority of the Court of Appeal. The Board in general prefers the approach taken by the President, Staughton, P. Secondly, apart from the new point discussed (see paras. 39–43 above), the Board would have had difficulty in seeing any very substantial ground upon which to differ from the judge's assessment of prospects on the second issue. But the new point means that the judge proceeded under a misapprehension as to the legal position on winding up, which was clearly relevant, albeit only as part of the overall evaluation of prospects which led him to take 25% as

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representing the prospects of recovery on the second issue (see paras. 28–37 above).

45 Thirdly, it is appropriate to record that the Board considers that both the judge and all the members of the Court of Appeal were correct to identify the relevance of the principle in *Armory* v. *Delamirie* (2) to the second issue as to other aspects of the case. It is the appellants' negligence which has meant that the actual prospects of recovery from Generali cannot be known, even though the appellants were not responsible for the late notification to Generali.

46 In all the circumstances, the Board considers that the appropriate assessment of the respondent's prospects on the second issue is 40%.

Conclusion

47 In the result, the Board would, in lieu of the assessments made in the courts below, substitute as the value of the prospects of success lost through the appellants' negligence, 28% (70% x 40%). To that extent, the Board will humbly advise Her Majesty that the judgment of the Court of Appeal should be set aside and this appeal allowed. The Board invites the parties to make submissions as to costs within 28 days.

Order accordingly.

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