



The Doctrine of Attribution and its Application in the Context of Insurance

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[1] Introduction

The law relating to the imputation of knowledge or intention to a principal from an agent may be important in the insurance context at all stages of the timeline of insurance. It is of relevance at the pre-contractual stage of disclosure;² in respect of

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² Is the knowledge of the agent of a matter which ought to be disclosed the knowledge of the principal? On the other hand, is a disclosure to a broker disclosure to an insured?



liability³; and in respect of claims⁴.Particular issues arise in the context of corporations. In order to determine the knowledge, intention, acts or omissions of an individual, one needs (subject to considerations of agency) only to look in one place. But a company must always act through one of its constituting organs, or through agents. The search for knowledge, intention, responsibility for actions and omissions in respect of companies inevitably involves a more complicated inquiry.

Yet there are important ramifications for corporate insured's, and insurers. Are the actions of a third party to be taken as actions of the company, such that a corporate policy responds? Did the company make full and proper disclosure, where one of its director's was aware of a non-disclosed risk? Was a claim made fraudulently where some, but not other employees or directors, were aware of the falsity of the claim?

A company thinks, forms intentions, makes decisions and acts though more than one means. It may for example act by the board, by the shareholders in general meeting, and by its agents. Such acts may be intended to further the interests of the company, they may bind the company in a legal sense and they may expose the company to liability.

Resolution of these sometimes complex issues draws upon a number of juristic threads, some of them not well settled themselves and often uneasy in their relationships with each other. It might fairly be said that the law relating to the knowledge, intention, acts and omissions of companies is disordered.

The purpose of this paper is to identify principles salient to insurance law concerning imputation of knowledge with special reference to the acts, knowledge and intention of companies.

³ Are the actions of the third persons actions of the insured, such that the policy responds, and the operation of exclusion clauses

⁴ For example, is a claim made fraudulently



[2] Defining the Law of Attribution: matters of terminology and context

The term “rules of attribution” was coined by the Privy Council in *Meridian Global Funds Management Asia Limited v Securities Commission*⁵ in these terms:

“Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called “the rules of attribution.” ”

By the “rules of attribution”, the company can be said to have acted or to have had an intention.⁶

It is important immediately to distinguish “the rules of attribution” from the concept of vicarious liability. Vicarious liability occurs where one party is held liable for the acts of another done for the benefit and advantage of the first party. However, as the High Court said in *Sweeney v Boylan Nominees Pty Ltd*⁷, that circumstance alone is not enough. The Court continued:

“Three recent decisions of this Court have examined questions of vicarious liability: *Scott v Davis* (9), *Hollis v Vabu Pty Ltd* (10) and *New South Wales v Lepore* (11). It is unnecessary to rehearse all that is established by those decisions. It is important, however, to begin examination of the issues in this appeal from a frank recognition of some considerations that are reflected in those decisions. First, “[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law” (12). Secondly, “the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in

⁵ [1995] 2 AC 500

⁶ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 491; cited in Grantham, R *Attributing Responsibility to Corporate Entities: A Doctrinal Approach*, (2001) 19 CSLJ 168 at 169

⁷ [2006] 206 CLR 161



analytical jurisprudence but as a matter of policy” (13). That may suggest that the policy to which effect was given by “the modern doctrine” is clearly identified, but, as is implicit in the first proposition, the policy which is said to lie behind the development of the modern doctrine is not and has not been fully articulated. Thirdly, although important aspects of the law relating to vicarious liability are often traced to the judgment of Parke B in *Quarman v Burnett* (14), neither in that decision, nor in other early decisions to which the development of the doctrine of vicarious liability may be traced, does there emerge any clear or stable principle which may be understood as underpinning the development of this area of the law. Indeed, as is demonstrated in *Scott* (15), the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions.”

Thus, while vicarious liability concerns the liability of one for the acts of another, the rules of attribution concern circumstances where the acts, intention and knowledge of one or more persons related to the company will be considered the acts, intention and knowledge of the company itself.

In *Meridian's* case, the Court described “primary rules of attribution”, “general rules of attribution” and “specific rules of attribution”. The primary rules of attribution concerned the circumstances where the actions of a constituting organ, or a person or persons of such importance in the company, were deemed actions of the company not because of the law of agency, but because the actions were the actions of the company itself. General rules of attribution involved the identification of circumstances where, by the law of agency, the actions, intention or knowledge of an individual should be attributed by the law of agency to the company. The specific rules of attribution concern circumstances where no other rule of attribution applies, but “where it is nevertheless clear that companies were intended to be subject to the substantive rule in question”⁸. This will ordinarily be a matter of statute.

⁸ Grantham, R *Attributing Responsibility to Corporate Entities: A Doctrinal Approach*, (2001) 19 CSLJ 168 at 174



[3] Corporate Attribution and Imputation Principles

[3.1] Primary rules of attribution

The primary rules of attribution are generally found in the constituting documents for the company. The articles may say “*for the purpose of appointing members of the board, a majority vote of the shareholders shall be the decision of the company*”, or “*the decisions of the board in managing the company’s business shall be the decisions of the company.*”.

There are also primary rules of attribution, not expressly stated in the articles, but implied by company law. For example: “*the unanimous decision of all the shareholders in a solvent company about anything which the company, under its memorandum of association has power to do, shall be the decision of the company.*”: *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Limited.*⁹

The “primary rules of attribution” are not concerned with agency: the primary rules of attribution involve an inquiry as to whether the particular acts should be taken to be the actions of the company itself. In *Meridian’s* case, Lord Hoffman defined the general rules of attribution by reference to the principles of agency, not the primary rules, which were actions of the company itself.

It was this aspect of the conduct of a company to which Lord Reid referred in *Tesco Supermarkets Ltd v Natrass*:¹⁰

“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his act is the

⁹ [1983] Ch 258

¹⁰ [1972] AC 153



mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one would say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.”¹¹

Thus, the conduct and knowledge of the board of directors, acting collectively, will be automatically imputed to the company.¹² Other than the board acting as a whole, the persons who will be treated in law as being the company are those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the *exercise of the powers* of the company.¹³ The search for those who constitute the company has been expressed alternatively to be a quest to find the person or persons who are in *actual control* of the operations of the company, which may vary from company to company depending on its organisation.¹⁴

Again in *Tesco Supermarkets Ltd v Natrass*¹⁵ Viscount Dilhorne said:

“In my view, a person who is in actual control of the operations of the company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as ‘another person’.”¹⁶

¹¹ Ibid at 170.

¹² *Houghton (JC) and Company v Nothard, Lowe and Wills Ltd* [1928] AC 1 at 18-19.

¹³ Ibid per Lord Diplock at 199-200.

¹⁴ Ibid per Viscount Dilhorne at 187.

¹⁵ [1972] AC 153

¹⁶ Ibid at 187



By ‘another person’ Viscount Dilhorne meant someone other than the company. The *Tesco* principle has been approved by the High Court in *Hamilton v Whitehead*¹⁷ and was first applied in the insurance context in Australia in *Stateliner Pty Ltd v Legal & General Assurance Society Ltd*.¹⁸

The clearest case is that of a private company where a majority shareholder is also a director and that person treats the company as his own.¹⁹ In such a case the state of mind of that individual will be treated as that of the company. In a traditional type of small family company there may have been no formal appointment of managing director but a director will assume responsibility for carrying out the functions of managing director. These functions include dealing with every day matters and supervision of the daily running of the company. If a person or persons assume these powers with the approval of the company they will be seen to be the active mind and will of the company: *Entwells v National and General Insurance Co Ltd*.²⁰

The *Tesco* principles which require identification of those who *are* the company, in that they constitute its’ “directing mind and will” are the principles applied in determining whether a company is criminally liable.²¹ If the issue is whether the company is responsible for a civil wrong, then the wider principles of attribution are applied. These principles derive from the law of agency. In some cases the legislature will provide its own requirements in this respect. This will involve interpreting the particular statutory provision to determine whose act or knowledge was to be regarded as the act or knowledge of the company, for the purpose of that particular statute. This category of attribution has been termed the “special rules of attribution”: *Meridian Global Funds Management Asia Ltd v Securities Commission*.²²

¹⁷ (1988) 166 CLR 121

¹⁸ (1981) 29 SASR 16.

¹⁹ *Bernard Elsey Pty Ltd v FCT* (1969) 121 CLR 119

²⁰ (1991) 5 ACSR 424.

²¹ *Beach Petroleum v Johnson* (1993) 11 ACSR 103 at 114; *Darvall v North Sydney Brick & Tile Company* (1989) 16 NSWLR 260 at 293 cited in *Dempster v NCSC* (1993) 10 ACSR 297 at 343.

²² [1995] 2 AC 500; see also *AAPT Ltd v Cable & Wireless Optus Ltd* (1999) 32 ACSR 63.



[3.2] General rules of attribution

Of course, not all decisions can be made by the shareholders voting as a whole, or by decisions of the board. The company may, by the law of agency, appoint persons to act on its behalf which are not the shareholders acting as a whole, or the board.

At this point, the matter becomes, in a juristic sense, a little disordered. The company may be liable for the actions of its agents, absent the principle of vicarious liability, and solely on the basis of the agency, where the agent is acting for the specific purpose for which he has been appointed: *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*.²³ However, in *Hollis v Vabu Pty Ltd*²⁴, only McHugh J utilized the law of agency to justify the liability of the principal. Vicarious liability, as there discussed, does not depend upon the law of agency, but upon the imposition of liability by policy, and the considerations referred to above.

Whether the law of attribution concerns circumstances of vicarious liability is a matter of terminology. This paper is not concerned with “liability”, but circumstances where the acts, knowledge and intention of persons acting on the company’s behalf will be attributed to the company itself.

When a person is not the directing mind and will of the company, there is still scope for attributing their knowledge and conduct to the company, if the general principles of attribution are met.

These principles are agency principles. Under the law of principal and agent, a company will be attributed with the knowledge of individual directors, employees and other agents who have authority to receive and communicate relevant information to the company. There is an exception, in some cases, where the knowledge would

²³ (1931) 46 CLR 41

²⁴ (2001) 207 CLR 21



disclose a fraud committed by the person of which the company is the victim. In such a case the knowledge will not be imputed, unless relevant legislation, on its proper construction, shows an intention that a fraudulent agent's knowledge should be attributed: *Meridian Global Funds Management Asia Ltd v Securities Commission*.²⁵

Bowstead in his work on *Agency* expresses the relevant principles as follows:²⁶

“When any act or circumstance, material to any transaction, business or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken.”

The rule is stated by Bowstead to be subject to two exceptions:

1. Where an agent is privy to the commission of a fraud upon or misfeasance against her or his principal, her or his knowledge of such fraud or misfeasance is not to be imputed to the principal;²⁷ and
2. Where the person seeking to charge the principal with notice is aware that that the agent intended to conceal her or his knowledge from her or his principal, such knowledge is not to be imputed to the principal.²⁸

If a number of different people within a corporation each know something different which, if their knowledge were to be combined, would constitute a material matter, then the issue arises as to whether their combined knowledge will be attributed to the

²⁵ [1995] 2 AC 500.

²⁶ 14th ed, 1976 at 334 cited in *Ford Excavations Pty Ltd v Do Carmo* [1981] 2 NSWLR 253 at 266-267 and compare 16th ed 1996 at 529.

²⁷ See, for example, *PCW Syndicates v PCW Reinsurers* [1996] 1 AllER 774

²⁸ See, for example, *Blackley v National Mutual Life Association of Australasia Ltd* [1970] NZLR 919



company. Again, if the relevant people are part of the company's directing mind and will then their combined knowledge will be attributed to the company: *Krakowski v Eurolynx Properties Ltd*²⁹. If the people are not part of the "directing mind and will" then the imputation of their combined knowledge will not necessarily occur: *Re Chisum Services Pty Ltd*.³⁰ Situations where it might, include, where one agent with part of the knowledge had a duty to the company to make enquiries which would have revealed the rest of the knowledge,³¹ or where the agent with part of the knowledge had a duty and opportunity to communicate to the other agent who knew the rest of the knowledge³².

If the relevant combined knowledge is knowledge of fraud, it will not be possible to argue that the independent and different knowledge of several agents within the corporation should be combined to impose knowledge of a dishonest intent on the part of the company, where each agent individually was unaware of the fraud, or of the facts which ought to have disclosed the fraud: *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*.³³

[3.3] Special rules of attribution

A company's primary rules of attribution, and the general rules of attribution, will normally be sufficient to determine the relationship between the knowledge, intention and actions of the organ or individual, and the company. However, that will not always be so. In some circumstances, most often found in the context of criminal or quasi-criminal conduct, statutes impose liability on companies and it is necessary to determine whether, in that statutory context, the acts complained of are attributable to the company, or remote from it. There are also examples in statutory civil liability provisions. The circumstances in which the company bears responsibility in these

²⁹ (1995) 130 ALR 1 at 16.

³⁰ (1982) 7 ACLR 641 at 650.

³¹ *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270

³² *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641 at 650.

³³ [1998] 3 VR 133 at 144.



circumstances are termed the “special rules of attribution”, and their content will depend upon the terms of the statute.

The category of attribution known as the “special rules of attribution” apply when legislation has imposed its own test for determining when a corporation will be found liable for the conduct and/or knowledge of its agents. The legislation will make the corporation primarily liable if its attribution requirements are met. The following are important legislative examples of attribution principles:

1. Section 84 of the *Trade Practices Act 1974* (Cth);
2. Section 769B of the *Corporations Act 2001* (Cth) in respect of offences under Chapter 7 which relates to the provision of financial services and products; and
3. Section 12.2 of the *Criminal Code Act 1995* (Cth) which applies to attribute responsibility to a corporation for any offence created by Commonwealth laws, except those under Chapter 7 of the *Corporations Act* which imposes its own regime.

An offence will usually comprise a physical element and/or a fault element which can be any of intention, knowledge, recklessness or negligence.

Section 12.2 of the *Criminal Code Act* attributes a physical element to a company if the the act is committed by an employee, agent or officer acting within that agent’s actual or apparent authority.

Section 12.3 deals with the attribution of fault to a corporation where that is an element of an offence.

Interestingly, this provision extends the principles of attribution beyond those applied at common law to deeming a corporation to have committed an offence where there is proof that a corporate culture existed within the body corporate that “directed, encouraged, tolerated or led to non-compliance with the relevant provision.”



[4] The Corporate Insured: Attribution in the context of Insurance

[4.1] Disclosure and the Corporate Insured

If a corporate insured enters into an insurance contract it is subject to a duty of disclosure and an obligation of the utmost good faith. An insured is required to disclose matters within its knowledge which are also matters which the insured knows or a reasonable insured in the circumstances would know were relevant to the insurer. If the insured is a corporation it is necessary to determine what the “knowledge” of the corporation is in both respects in order to be able to say whether the duty of disclosure has been breached. The knowledge of the insured and its conduct may also be relevant in determining whether a breach of the duty of utmost good faith has occurred.

Section 21 sets out the insured’s duty of disclosure to the insurer. It provides:

- “(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
- (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
 - (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.
- (2) The duty of disclosure does not require the disclosure of a matter:
- (a) that diminishes the risk;
 - (b) that is of common knowledge;
 - (c) that the insurer knows or in the ordinary



- course of the insurer's business as an insurer
ought to know; or
- (d) as to which compliance with the duty of disclosure is waived by the insurer.
- (3) Where a person:
- (a) failed to answer; or
- (b) gave an obviously incomplete or irrelevant answer to;
- a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.”

Pursuant to this section, the insured must disclose every matter which is known to him or her if:

- o he or she knows it to be relevant to the insurer's decision; or
- o a reasonable person, in the circumstances, could be expected to know that it was so relevant.

Section 28 provides the remedy for a non-disclosure or misrepresentation:

“General insurance

- (1) This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into:
- (a) failed to comply with the duty of disclosure; or
- (b) made a misrepresentation to the insurer before the contract was entered into;
- but does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions,



even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.

- (2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.
- (3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.”

Section 21 raises some important issues for corporate insureds in the context of disclosure. These issues include:

1. Whether the required knowledge must be actual, or whether it is sufficient that it can be inferred from other matters known to the insured;
2. The extent to which the knowledge of some person other than the insured is to be imputed to the insured, in particular, to what extent, if any, is the knowledge of the insured’s directors, officers, employees and other agents (including brokers) to be imputed to the company; and
3. How might a severability and/or non-imputation clause in an insurance contract affect the imputation of knowledge in the context of a corporate insured and is it possible to apply such a clause to a situation where the insurer would otherwise be entitled to avoid the contract for a fraudulent non-disclosure or misrepresentation.



1. Whether the required knowledge must be actual, or whether it is sufficient that it can be inferred from other matters known to the insured.

In relation to the first question, authority favours the position that only actual as opposed to inferred knowledge is relevant: *Midaz Pty Ltd v Peter McCarthy Insurance Brokers Pty Ltd* [1999] 1 Qd R 279. This was the position adopted recently by the Federal Court of Australia in *A & D Douglas Pty Ltd ACN 008 404 180 v Lawyers Private Mortgages Pty Ltd ACN 010 556 751* ([2006] FCA 520). In this case, the supervising partner of the insured, Mr Ryan, was found to have no knowledge of the fact that the statements in an investment summary had not been checked or that they were inaccurate in two material respects. He was certainly not aware of Mr Blackadder's fraud.³⁴ Accordingly, it was held, Mr Ryan did not possess any "personal knowledge" which he failed to communicate to QBE and as a consequence there was no issue of imputing such "knowledge" to the other partners.

The application of the concept of imputed knowledge to s21 is a little more foggy.

2. The extent to which the knowledge of some person other than the insured is to be imputed to the insured, in particular, to what extent, if any, is the knowledge of the insured's directors, officers, employees and other agents (including brokers) to be imputed to the company.

In *A & D Douglas Pty Ltd ACN 008 404 180 v Lawyers Private Mortgages Pty Ltd ACN 010 556 751* in considering the knowledge of a senior employee and its affect on the knowledge and therefore disclosure obligations of the insured, Dowsett J held that "it seems to be generally accepted that the position under the *Insurance Contracts Act* reflects the common law position".³⁵ At common law the knowledge of a limited class of agents are imputed to the principal. They have been described as "agents to know"

³⁴ [2006] FCA 520 at [740]

³⁵ *Ibid* at [728].



in the sense that they are responsible for keeping the insured informed about the subject matter of the insurance, either due to the fact that they are responsible for effecting the insurance over that item or because they have the management of it for the insured. If such an agent has a duty to communicate information which is relevant to the insurance, but does not do so, the principal assured will be imputed with the knowledge of that information.³⁶ Only matters actually known to an agent will be imputed to the insured.³⁷

Dowsett J acknowledged a critical qualification to the general principles of imputed knowledge which exists where an agent is guilty of fraud or some other dereliction of duty. In such a case the principal will not be imputed with the knowledge of the agent's fraud.³⁸ In applying these principles Dowsett J held that Mr Blackadder's fraud regarding the misstatement concerning assets and his serious misconduct in making the misstatement regarding the pre-sale of units was not to be imputed to the MDRN partners.

There are, in my view, two decisions of the High Court which bear upon the issue, one before the *Douglas* decision and one after: *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)*³⁹ and *Smits v Roach*.⁴⁰ It is not apparent that His Honour was referred to *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)*. There, however, the majority (McHugh, Kirby and Callinan JJ), albeit in obiter, said:

“It is also noteworthy, particularly if it should become necessary to deal with the other grounds of appeal, that the knowledge of which the subsection speaks, either actual or constructive, is the knowledge of the insured, and not of any insurance intermediary, a

³⁶ See MacGillivray on Insurance Law (10thed) at par 1812, cited at [727]

³⁷ Ibid at [734] citing *Hammer Waste Pty Ltd v QBE Mutual Ltd* [2002] NSWSC 1006.

³⁸ Ibid at [731] – [733] citing *Australia and New Zealand Bank Limited v Colonial and Eagles Wharves Limited* (1960) 2 Lloyd's Rep 241 at 254.

³⁹ [2003] HCA 25

⁴⁰ [2006] HCA 36.



term defined by the Act and clearly embracing an agent of the kind that Sedgwick was”: at [30].

This would seem to suggest that imputed knowledge is not a concept necessarily imported into s21 of the *Insurance Contracts Act* 1984 (Cth) by use of the word “knows”.

However, the majority of the High Court in *Smits v Roach*,⁴¹ in considering the issue of imputed knowledge in a different context, adopted the language of Handley JA in *Commercial Union Assurance Co of Australia v Beard* (1999) 47 NSWLR 735 at 745 which was quoted with approval by the minority in *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)* [2003] HCA 25 at [87]:

“As Handley JA rightly said:

Where the agent acts within his authority with the knowledge in question present to his mind, the principal should be bound by that knowledge, however acquired.”

The issue of imputed knowledge and its application to s21 requires clarification by the High Court. There is, in my view, a need to import the concept at least in its limited form, particularly when s21 can be applied to corporate insureds which often act and “know” through agents.

The Review of the *Insurance Contracts Act* 1984 (Cth) in 2004⁴² referred to the issue but did not deal with it.⁴³ The Report states:

“**BROKERS AND AGENTS (INTERMEDIARIES)**”

4.38 Where an insured uses the services of an intermediary (for example, a broker or agent) in order to obtain insurance the law is not clear whether a non-disclosure or misrepresentation by the insured’s intermediary to the insurer can be said to be that of the insured. There

⁴¹ [2006] HCA 36 at [47]

⁴² Review of the *Insurance Contracts Act* 1984 (Cth): Final Report on Second Stage: Provisions other than section 54, A. Cameron, N. Milne, 2004.

⁴³ See Professor Merkin’s Report



has been a suggestion by the High Court of Australia that a misrepresentation or non-disclosure to an insurer by an insured's intermediary may not be a misrepresentation or non-disclosure by the insured.⁶⁷

[67 See *Permanent Trustee Australia Limited v FAI General Insurance Company Limited (in liq)* (2003) 197 ALR 364; (2003) 12 ANZ Ins Cas 61-565 per McHugh, Kirby and Callinan J.J. where it was said (at paragraph 30) that: 'the knowledge of which the subsection [that is, subsection 21(1) of the IC Act] speaks, either actual or constructive, is the knowledge of the insured, and not of any insurance intermediary ... This is at least to suggest that the reference to the insured is intended to be a reference to the insured personally and not to its agent or broker. However, it is not essential to our reasons to determine this point.']

4.39 While several submissions were received on this issue the Review Panel believes that the law does not require amendment. It is not always clear whether an agent acts for an insurer or an insured. Where an agent acts for an insurer, such a general rule would clearly be unfair to the insured. In the few cases where the position is not clear by virtue of the principles of agency, it is preferable that the issue continue to be considered on its merits. ”

In the recent Report commissioned by the English and Scottish Law Commissions into the reform of their insurance contracts law, entitled “*Reforming Insurance Law: Is there a case for Reverse Transportation*”, Professor Merkin states:

“4.5 *The knowledge of the assured.* Under s 21(1), the fact must be “known to the assured”. The Marine Insurance Act 1906 requires disclosure of facts which “are known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him.” The English courts have established that the word “known” means actual or at the very least blind-eye knowledge (in that the assured has shut his eyes to facts that would otherwise be obvious) but there is no duty on the assured to undertake any inquiries to discover things which are not known by him.⁵⁸ The deemed knowledge of the assured necessarily applies only if he is carrying on business, and here the courts have ruled that a fact possessed by an agent of the assured only falls within the deemed knowledge of the assured if the agent was under some form of duty to disclose that fact to him⁵⁹ or if the agent was the alter ego of the assured.⁶⁰

The Australian legislation does not attempt to define “known” and does not contain the additional deemed knowledge provision in respect of an assured acting in the course of a business.⁶¹ The cases on this aspect of s



21(1) are not fully consistent but the weight of them more or less reflects the common law position.⁶² The main issue for the UK is the effect of the knowledge of an insurance broker, a matter discussed below.

4.7 Actual knowledge under (a) refers to what the assured believed to be relevant.⁷⁰ One important issue arising from the test of actual knowledge is the extent to which the knowledge of an agent can be imputed to the assured. On ordinary common law principles, as stated above, imputation is possible only where the agent is employed to transmit that information to the assured or is the alter ego of the assured.

Later in the Report it is provided:

“Misrepresentation by placing brokers

4.34 The *Insurance Contracts Act 1984* does not make express provision for the situation in which a placing broker has misrepresented an inducing fact to insurers, and it is not clear whether the knowledge of relevance and truth referred to in s 26 is that of the assured or that of his broker. It is suggested below in the discussion of the role of brokers that a false statement by a broker which does not originate from the assured should not amount to a breach of duty by the assured himself.

Brokers¹²⁴

Disclosure by placing brokers

4.35 As the law in the UK stands at the moment, the assured is under s 18 of the *Marine Insurance Act 1906* required to disclose what he actually knows, which includes the knowledge of any agent who was under a duty to know that information and to provide it to the assured.

Further, where insurance is placed by an agent to insure (normally a placing broker), the agent is under s 19 of the *Marine Insurance Act 1906* required to disclose not just what the assured knows (s 19(b)) but also what the agent knows or ought to have known in the ordinary course of his business (s 19(a)). Difficulties have arisen under s 19(b) in respect of fraud by the agent, in respect of the definition of agent to insure and also in respect of the type of knowledge disclosable by the agent, in particular whether it is confined to information known to him by reason of his agency agreement with the assured or whether it extends to information of which he is aware by reason of his status as a market professional.¹²⁵



4.36 In the context of non-marine insurance law in Australia, section 21 of the *Insurance Contracts Act* 1984 does not contain any express provision with regard to the knowledge of agents or with regard to the placing of risks by brokers. As far as imputation of knowledge to the assured from an agent is concerned, insurers have the benefit of the common law imputation of knowledge principle from agent to principal. Section 21 says nothing specific about this, but it is inherent in the legislation that information known to a broker or other agent employed by the assured to place the risk is deemed to be known to the assured and thus has to be disclosed if it meets the other requirements of s 21.¹²⁶ Moreover, as far as the test for knowledge of relevance are concerned, the broker will almost inevitably be aware of the relevance of information to the insurer in question, the assured will be bound by that knowledge,¹²⁷ and even if the broker is not actually aware of the relevance of the information, it is apparent that – in the terms of the fallback test in s 21(1)(a) – a reasonable broker in his position ought to have been so aware.¹²⁸

The question whether the broker's knowledge of the relevance of a fact rendered the fact one which had to be disclosed under s 21 is unresolved, the New South Wales Supreme Court holding in *Permanent Trustee Australia Co Ltd v FAI Insurance Co Ltd*¹²⁹ that this is the case, with that approach being strongly doubted¹³⁰ but not actually rejected on appeal.¹³¹ In short, therefore, an assured who uses a broker to place the risk may find that he is guilty of nondisclosure by reason of facts known to his broker but not known to him, or by reason of the broker's knowledge of the relevance of facts to the particular insurer which was not appreciated by the assured himself.

¹²⁵ The leading authorities are *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774 and *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 All ER 791.

¹²⁶ *Ayoub v Lombard Insurance Co (Aust) Pty Ltd* (1989) 5 ANZ Ins Cas 60-933; *Lindsay v CIC Insurance Ltd* (1989) 16 NSWLR 673; *Macquarie Bank Ltd v National Mutual Life Association of Australasia Ltd* (1996) 40 NSWLR 543. Cf *Smits v Roach* [2006] HCA 36.

¹²⁷ *Evans v Sirius Insurance Co Ltd* (1986) 4 ANZ Ins Cas 60-755.

¹²⁸ The test applied in *Plasteel Windows Aust Pty Ltd v C E Heath Underwriting Agencies Pty Ltd* (1989) 5 ANZ Ins Cas 60-926.

¹²⁹ (1998) 44 NSWLR 186.

¹³⁰ The High Court was clearly not enamoured with the decision of the lower court on this point.

¹³¹ (2003) 197 ALR 364. Treasury Review II, 2004, considered this issue but decided that the law should not be changed and that the question should be resolved on its merits: paras 4.38 and 4.39. The issue was in effect ducked. The February 2007 proposals for amending legislation are silent on the point.



3. How might a severability and/or non-imputation clause in an insurance contract affect the imputation of knowledge in the context of a corporate insured; and is it possible to apply such a clause to a situation where the insurer would otherwise be entitled to avoid the contract for a fraudulent non-disclosure or misrepresentation.

There is no reason why an insurance policy might not regulate the circumstances in which, from its officers or (otherwise) agents, knowledge may be imputed to the company.

In *In re HealthSouth Corp. Ins. Litig.*, 308 F. Supp. 2d 1253 (N.D. Ala. 2004), for example, the relevant clause provided that:

“With respect to the exclusions ..., only facts pertaining to and knowledge possessed by any past, present or future chief financial officer, President or Chairman of any Insured Organization shall be imputed to any Insured Organization to determine if coverage is available for such Insured Organization”

A related topic is the consequence upon innocent insured’s of non-disclosure of material matters by co-insured. The issue normally arises in the context of directors and officers insurance, but they can also appear in connection with other liability policies covering more than one insured. A typical clause in a policy, directed at dealing with this situation, is as follows (**Policy 1**):

If more than one person or entity is insured under this Policy, then any non-disclosure, misrepresentation or breach of any terms or conditions of this Policy by one Insured shall not prejudice the rights of any other Insured to indemnity, provided that the other Insured is innocent of, and has no knowledge of such conduct (or should not reasonably have had prior knowledge).

Another is as follows (**Policy 2**):



Severability of Proposal

*Failure by any **Insured** to comply with the duty of disclosure under the Insurance Contracts Act 1984 (Cth) or misrepresentation by any **Insured** to **Liberty** shall not prejudice the right of any other **Insured** to cover under this **Policy**. Cover is only provided to an **Insured** who is innocent of and has no prior knowledge of such conduct. Such **Insured** shall as soon as practicable after becoming aware of such conduct, advise **Liberty** in writing of all relevant facts.*

There is authority in the United States for the proposition that absent a severability clause it is unlikely that the Courts will infer that severability was intended by the parties⁴⁴. However, it has been argued in some cases that severability might exist even a severability clause is not in place. In *Hosey v Seibels Bruce Group*, for example, and in the absence of a severability clause, the Court held that the insured interests of a husband and wife were severable, and that neither arson or fraud on the part of the wife excluded the husband from coverage under the home insurance policy.

Other policies carve out circumstances from the severability protection otherwise provided. For example:

[N]o knowledge possessed by any DIRECTOR or OFFICER shall be imputed to any other DIRECTOR or OFFICER except for material information known to the person or persons who signed the application. In the event that any of the particulars or statements in the Application is untrue, this Policy will be voided with respect to any DIRECTOR or OFFICER who knew of such untruth.

In *Cutter & Buck Inc v Genesis Ins Co*, 306 F. Supp. 2d 988, 1011 (W.D. Wash.2004), aff'd 144F. App'x 600, 2005 WL 1799397 (9th Cir. Aug. 1, 2005), it was held that the

⁴⁴ *Nat'l Union Fire Ins Co of Pittsburgh v Sahlen*, 807 F. Supp. 743, 746 (S.D. Fla. 1992), aff'd 999 F. 2d 1532 (11th Cir. 1993) cf *Hosey v Seibels Bruce Group*, SC, 363 So. 2d 751, 753-54 (Ala. 1978)



provision voided coverage as to all insureds because of misrepresentations knowingly made by the person who signed the policy.

A fulsome severability clause includes two elements: a clause requiring that each insured be viewed as if a separate insured; and that no misrepresentation or omission by one insured is imputed to another insured without knowledge of the misrepresentation or omission⁴⁵. A fulsome severability clause would not be qualified by a clause which excluded from its operation misrepresentations or omissions from signatories.

Of the clauses in Policy 1 and Policy 2 above, Policy 2 better protects a co-insured, because it does not refer to information of which the innocent insured ought to have been aware.

It is possible for the severability clause to conflict, and need to be construed with, an exclusion clause. In *Am. Family Mut. Ins. Co v White*, 65 P.3d 449 (Ariz. Ct. App. 2003), for example, a teenage boy struck another boy in the head with a metal pipe. He pleaded guilty to a criminal charge. The victim's parents sued the assailant and his parents. The assailant's insurer sought to avoid liability under the policy. The severability clause in the policy provided : "*This insurance applies separately to each insured*" (both the parents and the boy were insureds). An exclusion clause in the policy excluded liability for "*bodily injury ... arising out of ... violation of any criminal law for which any insured is convicted*". The Court held that the exclusion clause prevailed. It has been said elsewhere that the purpose of the severability clause was to allow each insured full coverage up to the policy limits, not to extend beyond and contradict the bargained coverage⁴⁶. The use of the word "the", instead of "any" as underlined above,

⁴⁵ Bittle, LF "*Protecting "White Hats" From the Sins of "Black Hats"*", ABA Tort Trial & Insurance Practice Section, Insurance Coverage Litigation Committee Midyear Program February 16 2007

⁴⁶ Cal. Cas. Ins. Co v Northland Ins. Co, 932 S.W.2d 416 (Cal. Ct. App. 1996), cited in Bittle, LF "*Protecting "White Hats" From the Sins of "Black Hats"*", ABA Tort Trial & Insurance Practice Section, Insurance Coverage Litigation Committee Midyear Program February 16 2007



may have given increased scope for an argument that the exclusion did not apply to the parents⁴⁷.

It follows that there is no reason why a severability and/or non-imputation clause cannot be applied to a situation where the insurer would be otherwise entitled to avoid the contract for a fraudulent non-disclosure or misrepresentation so as to avoid that consequence in relation to an innocent co-insured.

[4.2] Is the event covered by the policy

There are many instances where the availability of cover under a policy will depend upon whether the insured has done a particular act, for example, incurred liability to a third party by reason of an “accident”. Whether loss was the result of an accident may depend upon the state of mind of the person whose act caused the loss. The issue arises as to whether and, if so, in what circumstances, the state of mind of this person can be considered to be the state of mind of the corporate insured or attributable to it.

Issues of this nature arose in *East End Real Estate Pty Ltd t/as City Living v CE Heath Casualty and General Insurance Ltd* a case which concerned the construction of a professional indemnity insurance policy which, among other things, insured real estate agents against any breach of professional duty. An exclusion in the policy provided:

“Any claim brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the insured or a Director or partner of the insured except as provided under Special Extension 2...”

Special Extension 2 was in the following terms:

⁴⁷ It is said to be generally “well settled” in the United States that an exclusion referring to conduct by “the” insured combined with a severability clause requires the policy and the exclusion to be read independently as to each insured: see Bittle, LF “*Protecting “White Hats” From the Sins of “Black Hats”*”, ABA Tort Trial & Insurance Practice Section, Insurance Coverage Litigation Committee Midyear Program February 16 2007, and cases therein cited



“2. DISHONESTY. It is agreed and declared that the Policy is extended to indemnify the insured in respect of claims for damages made against them for breach of Professional duty arising out or contributed to by the dishonest, fraudulent, criminal or malicious conduct of employees, Directors or partners of the insured. Provided that the Policy shall not provide indemnity to any person committing or condoning such dishonest, fraudulent, criminal or malicious act.”

The case concerned whether an individual real estate agent, Mr Fallshaw, who had failed to advise his client of a better offer for their unit was “dishonest”. Mr Fallshaw was a director and the holder of one of two issued shares in the insured plaintiff. His wife held the other share. The court held that the plaintiff was clearly vicariously liable for Mr Fallshaw’s breach of duty in failing to advise his clients of the higher offer.

The plaintiff submitted that where the dishonest conduct was found to be that of a director the policy did not preclude recovery by the plaintiff corporate insured because the policy draws a distinction between the corporate insured and the director, which distinction transcends the principles whereby an individual, in certain circumstances, may be treated as the company.

[4.3] Fraud in relation to the making of a claim

If a company has made a claim for indemnity, the act of an individual said to be acting on the insured’s behalf will only defeat the insured company’s claim when the act of the individual can be regarded as the act of the insured company itself: *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia*.⁴⁸

If the act was the act of an employee or agent of the company then this will not necessarily mean that the insured cannot recover its loss under the insurance contract: *General Accident Fire and Life Assurance Corp v Midland Bank Ltd*.⁴⁹

⁴⁸ (1986) 85 FLR 285.

⁴⁹ [1940] 2 KB 388.



The rationale for drawing a distinction between, on the one hand, those so intimately connected with the company that their acts are the acts of the company and, on the other, the acts of mere employees and agents, has its basis in public policy. Public policy requires a degree of moral blameworthiness to attach to a claimant before their claim is denied for the act of another: *Entwells Pty Ltd v National and General Insurance Co Ltd*.⁵⁰ Moral blameworthiness can only attach to those directly committing the act or to those who encourage or knowingly permit it. In tort, by way of contrast, a person may be vicariously responsible without any moral blameworthiness for the acts of its servants or agents. In such a case it has been said that “indeed it might almost be said to be itself against public policy if an insurer could refuse payment to an innocent insured because of the blameworthy act of the servant or agent which inflicted the very loss upon him for which he has insured.”⁵¹

Ipp J in *Entwells* also relied upon these reasons in arriving at a proper construction of the policy. In his view:

“...the insurance covers loss caused by the deliberate act of an employee or agent of the insured company unless the individual concerned causes the loss with the authority of the company or is so closely connected with the company that his acts can be said to be its acts.”⁵²

In *Entwells Pty Ltd v National and General Insurance Co Ltd* the plaintiff owned premises from which they ran a supermarket. A fire started on the premises which caused considerable damage to the plant, equipment, stock and merchandise. The plaintiff was insured against loss by fire with the defendant.

⁵⁰ (1991) 5 ACSR 424 citing *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia* (1986) 85 FLR 285 at 311 per Asche J.

⁵¹ *Entwells v National and General Insurance Co Ltd* (1991) 5 ACSR 424 at 426 citing *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia* (1986) 85 FLR 285 at 311.

⁵² *Ibid* at 426.



The plaintiff was a small family company comprising a husband and wife (Mr and Mrs Nikolic) and their son, Sasha. They were the only directors and shareholders of the company. The supermarket business was run by Mrs Nikolic and Sasha. They each had clearly defined areas of responsibility: Mrs Nikolic was in charge of buying, stock, sales and staff while Sasha was in charge of the financial and administrative aspects of the business.

The defendant, having investigated the fire, declined the plaintiff's claim for indemnity. They argued:

- (a) that the plaintiff's loss was caused by the deliberate act of another with the connivance of the plaintiff; and
- (b) that Mrs Nikolic, acting on behalf of the plaintiff, had submitted a fraudulent claim for loss of stock.

The court found that either Mrs Nikolic or Sasha had connived at burning down the supermarket. This gave rise to the issue as to whether the conduct of Mrs Nikolic or Sasha was to be regarded as the conduct of the plaintiff. If it was, the plaintiff would be denied cover. If it was not, the plaintiff would still be entitled to recover, notwithstanding the conduct of its director.

There was no evidence that either individual had the authority of the company to burn down the premises so the issue was whether the acts of either of them could, by reason of the close connection which each had with the company, be regarded as the acts of the company itself.

It was found that each acted as managing director with the approval of the plaintiff. Each had been separately entrusted with the exercise of part of the powers of the company. Each was in control of part of the company's operations and neither was responsible to anyone else in the performance of their duties. As such, it was held, they constituted the "active and directing" will of the company and their conduct was the conduct of the company. As a consequence, the plaintiff was unable to recover



under the policy because the fire had been lit by an unidentified person in connivance with the plaintiff.

[5] Conclusion

This paper considers aspects of the law of attribution, as categorized by the Privy Council in *Meridian's* case.

Three categories of attribution there considered, primary, general and special, are a convenient way of categorizing circumstances of attribution of knowledge, intention and liability from its constituting organs and persons related to it. In particular, this paper has considered issues relating to corporate knowledge, in the context of common insurance issues and other related issues.