[2008] All ER (D) 332 (Jul)

*Re Whiteley Insurance Consultants (also known as Kingfisher Travel Insurance services) (a firm)

[2008] EWHC 1782 (Ch)

Chancery Division

David Richards J

25 July 2008

Insolvency - Partnership - Winding up - Partnership unlawfully selling travel insurance policies - Financial Services Authority presenting winding-up petition following investigation - Liquidators seeking directions in relation to handling of claims of policyholders - Insolvency Act 1986 - Financial Markets and Services Act 2000 - Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 - Insurers (Winding-up) Rules 2001, SI 2001/3635.

Between 2001 and 2005, Whitely Insurance Consultants (WIC), a partnership, unlawfully issued insurance policy documents. The majority of its business, and all the policies relevant to the instant application, comprised travel insurance, either single trip or annual multi-trip policies. The documents stated that policies were being issued on behalf of named or unnamed underwriters when in fact WIC either had no authority from the named underwriters or the underwriters were non-existent. The policies were issued both before and after 14 January 2005 (respectively the earlier and later periods). Different statutory regimes applied in respect of each period. Following an investigation into complaints received, the Financial Services Authority presented a petition to wind up WIC under s 367 of the Financial Services and Markets Act 2000. The liquidators issued the instant application pursuant to s 168(3) of the Insolvency Act 1986 by which they sought directions as to the treatment of claims by the persons to whom the unlawful policy documents were issued. WIC additionally issued a substantial number of policies with due authority from underwriters, on which no issues arose.

A number of issues fell to be determined, including: (i) whether by issuing unauthorised policies WIC had been carrying on a regulated activity for the purposes of the 2000 Act and was itself the insurer; (ii) in relation to the policies issued in the earlier period, whether policyholders were entitled to claim for compensation and interest under s 26 of the 2000 Act; (iii) in relation to the policies issued in the later period, whether policyholders were entitled to seek recovery under s 20(3) of the 2000 Act; and (iv) whether the Insurers (Winding-up) Rules 2001, SI 2001/3635 (the Insurers Rules) applied to the valuation of the policies issued by WIC in both periods.

The court ruled:

(1) By virtue of s 22 of the Financial Services and Markets Act 2000 and arts 10, 73 and 75 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, both effecting and carrying out contracts of insurance as principal were regulated activities. To effect a contract of insurance was to enter into new business and to carry out a contract of insurance was to perform obligations under the contract, including the payment of claims.

In the instant case, WIC had conducted itself as if it were the insurer under the unlawful policies. It received and retained premiums, it received and considered claims and, in the case of claims which it admitted, it paid the claims. In those circumstances, it was effecting and carrying out the insurance policies as principal and was liable on them to the policyholders.

R v Wilson [1997] 1 All ER 119 considered.

(2) Pursuant to s 26 of the 2000 Act, policies issued in contravention of the general prohibition, as set out in s 19, were unenforceable against the policyholder. The policyholders were entitled to elect between enforcing their policies or claiming their entitlement to recovery under s 26(2). Under that section, the policyholders

were entitled to recover the premiums paid and compensation for any loss sustained by them for having paid the premiums, subject to the qualifications in s 28 of the 2000 Act. The loss referred to in s 26(2)(b) fell to be construed as a loss in fact sustained by the policyholder rather than a notional loss.

In the instant case, it was to be assumed that the policyholders in the earlier period would have paid the same premium to a different insurer at the same time, had the policies not been taken from WIC. Accordingly, no loss had been sustained as a result of paying the premium to WIC. Accordingly, as regards the claims in respect of policies issued in the earlier period, any policyholder who had made or wished to make a claim under the policy in respect of a pre-liquidation event was to be assumed not to have claimed a return of premium (other than in respect of any unexpired portion of the premium). All other earlier period policyholders were entitled to a return of premium, but not to interest or other compensation under s 26(2)(b) of the 2000 Act. The liquidators were to proceed on the basis that the discretion to permit WIC to keep the premiums would not be exercised.

(3) In relation to the policies issued in the later period, the existence of a statutory remedy under s 20(3) of the 2000 Act did not preclude causes of action and remedies which would otherwise have been available. They did not, however, provide any claim for a repayment of premiums to policyholders in the instant case, Claims for damages equal to the premiums paid, either for misrepresentation or for breach of warranty of authority, did not appear to be available precisely because the policyholders would have paid the same premiums for other travel policies from alternative insurers. If claims arose under the policy, they would be provable as such and there was no separate claim to which s 20(3) applied. Where the policy period was continuing at the winding-up date, there was potentially a claim for the costs of the insurance for the remaining part of the policy period, but that claim could well be subsumed in the claim for the value of the policy under the Insurers Rules.

(4) The Insurers Rules applied to proceedings for the winding-up of an insurer which commenced on or after the date in which the rules came into force. The application of the Insurers Rules was not restricted to authorised insurers. The emphasis under the legislative scheme was placed on the business in fact carried out by the company, not whether it was authorised to do so.

Accordingly, the Insurers Rules applied to WIC as regards the evaluation of policies issued by it. On the facts, all claims in respect of the unexpired portions of WIC's travel policies as at the liquidation date fell to be valued in accordance with para 3(2)(a)(ii) of the Insurers Rules 2001. That applied to all policies issued in the later period. As regards policies issued in the earlier period, it did not apply where policyholders claimed a return of the premium under s 26(2) of the 2000 Act. It applied to other unexpired policies issued in the earlier period: in practice, those under which a claim was made in respect of a pre-liquidation event.

Continental Assurance Co of London plc (in liquidation) (No 3), Re [1999] 1 BCLC 751 considered.

Glen Davis (instructed by Berwin Leighton Paisner) for the applicants.

Peter Wright, solicitor advocate, (Financial Services Authority) for the Financial Services Authority.

Giovanni D'Avola Barrister.

Judgment

[2008] EWHC 1782 (Ch)

CHANCERY DIVISION (COMPANIES COURT)

25 July 2008

MR JUSTICE DAVID RICHARDS

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

THE HON. MR JUSTICE DAVID .RICHARDS:

Introduction

1. This application by the liquidators of Whiteley Insurance Consultants (WIC) requires consideration of the remedies provided by sections 20, 26 and 28 of the Financial Services and Markets Act 2000 (FSMA). I am told that this is the first occasion on which the Court has been asked to consider the effect of these provisions, at least as they apply to contracts of insurance.

2. Whiteley Insurance Consultants (WIC), a partnership now in liquidation, unlawfully issued insurance policy documents between December 2001 and 2005. The documents stated that policies were issued on behalf of named or un-named underwriters when in fact either WIC had no authority from the named underwriters or the underwriters were non-existent. The liquidators apply to the court under section 168(3) of the Insolvency Act 1986 for directions as to the treatment of claims by the persons to whom these policy documents were issued. WIC additionally issued a substantial number of policies with due authority from underwriters, on which no issue arises.

3. The first issue is whether WIC was itself the insurer under the policies which it purported to issue on behalf of others. If so, claims in respect of the policies differ depending on whether the documents were issued before 14 January 2005 or in the period starting with that date. Before 14 January 2005 WIC was not, and was not required to be, authorised under the Financial Services and Markets Act 2000 (FSMA) to carry on its ostensible business as an insurance intermediary. Before 14 January 2005 the issue of policies by WIC as a person without any authority under FSMA was a breach of the general prohibition under section 19 of FSMA. From 14 January 2005, as a result of regulatory changes made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2003 (S1 2003/1476), acting as an insurance intermediary, as WIC purported to do, required authorisation from the Financial Services Authority (FSA). WIC was authorised in that capacity and from 14 January 2005 the issue of unauthorised insurance policies by it was deemed under section 20 of FSMA to be a contravention of an FSA requirement. The nature and basis of possible claims differs depending on whether the policy documents were issued before or after that date (respectively, the Earlier and the Later Period).

Facts

4. The sole partners of WIC have at all times been Christopher Edward Whiteley and his wife Janice Susan Whiteley. WIC carried on business as an insurance intermediary in its own name and under the names of Kingfisher Travel Insurance and Kingfisher Insurance Services. Although it offered policies in a number of classes of insurance, the great majority of its business, and all the policies relevant to the present application, comprised travel insurance, either single trip or annual multi-trip policies. Some policies were sold direct to consumers, but most were promoted through travel agents and financial advisers under various schemes. A policyholder would be issued with a validated receipt, giving details of the insured, the period of cover and the premium paid, and travel insurance policy wording. The latter were pre-printed to include either the name of the insurer or the words "underwritten by a Panel of Insurers through Whiteley Insurance Consultants."

5. No issue arises in respect of policy documents issued before 1 November 2001. With effect from November 2001, under the terms of a written agreement made in February 2002, WIC issued policies on behalf of a panel of insurers for which Travel & Personal Underwriters Limited (TPU) acted as underwriting agents. WIC's authority to issue policies for TPU under various schemes expired on a number of dates in 2004, as confirmed by a consent order made in proceedings brought in the Commercial Court by TPU against WIC. WIC continued to sell policies under some of those schemes without authority from TPU or any other insurer, both before and after 14 January 2005. From November 2001 it also purported to issue on behalf of TPU types of policy for which it had no authority. For example, it sold policies under one scheme which was confined to insureds under the age of 65 to persons of 65 or older.

6. Between April 2004 and February 2005, WIC issued documents and received premiums in respect of policies stated to be "underwritten by ARISA Assurances SA". This is a genuine insurer based in Luxembourg but, although Mr Whiteley negotiated for an agency agreement with it, none was concluded and these policies were issued without authority. The evidence indicates that the number of travellers affected was of the order of 40,000 with total premiums paid and retained by WIC of £618,159. WIC itself paid claims on these policies of £580,028, with a further £1,337,218 in claims outstanding. At least £32,957 in premiums was received in the Later Period.

7. From January or February 2005, WIC was issuing policies stated to be "underwritten by a Panel of Insurers arranged through Whiteley Insurance Consultants". In fact there were no insurers on cover for these policies and any claims received were paid by WIC.

8. The liquidators have found WIC's records to be poor, with no comprehensive database of policyholders' names and addresses. Travel agents selling policies arranged by WIC were often not required to provide details of the addresses of policyholders. Although the liquidators have been able to identify some 17, 250 policyholders who bought their policies directly from WIC and some 5,000 policyholders who bought their policies through travel agents, they estimate that unauthorised policies may have been issued to approximately 81,000 policyholders, affecting as many as 123,000 travellers.

9. Following complaints, the FSA investigated WIC. On 26 April 2005 the FSA presented a petition to wind up WIC under section 367 of FSMA. By section 367(2), the power to wind up extends to a partnership. The present liquidators were appointed as joint provisional liquidators on the same day. WIC was ordered be wound up on 15 June 2005. By virtue of section 367(7) the Insolvency Act 1986 applies to the winding-up as if WIC were an unregistered company.

10. As the partners of WIC, Mr and Mrs Whiteley are liable for the claims against WIC and liable to meet calls on them as contributories made by the liquidators. Two calls totalling £2,379,000 were made in 2006, which have by orders of the court been made enforceable as judgments and secured by third party debt orders. Mr Whiteley has estimated his assets at about £3.34 million, including his pension plan representing about two-thirds of the assets.

11. Mr and Mrs Whiteley were served with the present application and supporting evidence but have taken no part. The evidence includes the final notice dated 2 December 2006 issued by the FSA, prohibiting Mr Whiteley from performing any function in relation to any regulated activity. The grounds included deliberately causing WIC to sell insurance policies without an underwriter in place. Mr Whiteley did not challenge the decision of the FSA or the facts on which it was based. On 17 January 2008 a disqualification order for a period of 12 years was made against him under the Company Directors Disqualification Act 1986. After hearing Mr Whiteley's oral evidence, the court found that he had deliberately issued policies knowing that there were no insurers in place. For the purposes of the present application, it is appropriate to proceed on the same basis, a conclusion which is amply supported by the unchallenged evidence filed in support of the application.

12. There are substantial claims made by persons other than policyholders, including insurers for unpaid premiums, HMRC for unpaid tax, the Financial Services Compensation Scheme, employees, utility providers and trade creditors. The liquidators have received notices of possible claims from 5,422 policyholders, of which 845 are for travel loss claims totalling £735,265, 3,455 are for return of premiums totalling £457,496 (including some on policies which had expired before appointment of the provisional liquidators) and 1,122 are for the cost of alternative insurance cover totalling £154,251.

The present application

13. The liquidators have taken extensive steps to bring this application to the attention of all interested parties. In accordance with directions given by the court, the application and supporting evidence were also served on the FSA, the Financial Services Compensation Scheme, the liquidation committee which comprises representatives of a number of substantial creditors and HM Revenue and Customs which is a creditor for unpaid insurance premium tax. On the hearing of this application, only the FSA has appeared. The liquidation committee has not appeared but has requested the court to have regard to letters from their solicitors which set out their position on some of the issues raised by this application. In accordance with further directions by the court, notice of the application and its hearing were given by letter to those creditors and policyholders for whom the liquidators have addresses, and was advertised in a number of national, local and trade papers. A response was received from one possible creditor, but no creditor or policyholder appeared at the hearing. For reasons given by the liquidators in a witness statement made before the above directions were given, it was not considered appropriate to seek the appointment of representative creditors and policyholders. Mr Glen Davis, counsel for the liquidators, has carefully presented the available arguments on the issues which arise for decision.

14. The issues on which directions are sought by the liquidators raise questions of law or general principle, and do not involve the determination of issues of fact.

Did WIC carry on insurance business?

15. The first issue, which is common to all claims arising in both the Earlier and the Later Periods, is whether by issuing unauthorised insurance policies WIC was carrying on a regulated activity for the purposes of FSMA and was itself the insurer. Section 22 makes provision for the definition of regulated activities. By reason of articles 10, 73 and 75 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S1

2001/544) (RAO), both effecting and carrying out contracts of insurance as principal are regulated activities. To effect a contract of insurance is to enter into new business and to carry out a contract of insurance is to perform obligations under the contract, including the payment of claims: *Re AA Mutual Insurance Co Ltd* [2005] 2 BCLC 8 at para 14 per Lewison J. The purpose of the addition of the words "as principal", which had not appeared in earlier equivalent legislation, was to confirm that it did not extend to agents duly authorised by insurers: see *In re a Company* (No 007816 of 1994) [1997] 2 BCLC 685.

16. In issuing the unauthorised policies, WIC ostensibly contracted as agent for a named insurer, such as ARISA, from which it had no authority or on behalf of unnamed and non-existent insurers, such as "a Panel of Insurers".

17. Whether, and in what circumstances, a person will be personally liable as principal on contracts which he has purported to make on behalf of a principal who has not given authority or does not exist raises issues of some complexity: see the discussion in Bowstead and Reynolds on Agency (18th ed 2006) at paras 9-018 - 9.019, 9-081 - 9-094. In the present case, not only did WIC know, at least in the case of policies issued on behalf of the unnamed "Panel of Insurers", that there was no principal when it issued the policies but in the case of all the unauthorised policies it conducted itself as if it were the insurer. It received and retained premiums, it received and considered claims and, in the case of claims which it admitted, it paid the claims. In such circumstances, it is in my judgment inescapable that it was effecting and carrying out the insurance policies as principal and was liable on them to the policyholders.

18. A similar point arose in *R v Wilson* [1997] 1 WLR 1247. The defendant distributed documents purportedly issued by a company offering a debt collection and debt indemnity service. Persons with whom he dealt paid sums to him which they understood to be premiums for insurance cover provided by the company. He was charged under section 2(1) of the Insurance Companies Act 1982 with carrying on an insurance business in the United Kingdom without authorisation under that Act. His appeal against conviction was dismissed and Evans LJ, giving the judgment of the court, said at p 1252:

> "The jury found that the appellant was playing an active and significant part in selling insurance, and he did this in contravention of s 2, whether he was acting on his own behalf or on behalf of a genuine company, which was unauthorised under the Act. If there was such a company and his dealings were solely on behalf of the company, then we can assume that he would not incur any personal liability towards third parties and he committed no offence under s 2 although the company would do so; as stated above, we need not decide whether that is correct or not. But if the company was a figment of his imagination, or if he had no authority to act on its behalf, then he would incur personal liability towards third parties and in our judgment he would commit the offence under s 2. That would be because the business that he carried on, whatever it consisted of, could only be his."

19. Two points of central importance to the issues raised by this application follow from this conclusion. First, by issuing and performing contracts of insurance in the circumstances described above, WIC was carrying on a regulated activity for the purposes of FSMA. Secondly, WIC is itself the principal on such contracts which may therefore be enforced against it.

Claims under FSMA: general points

20. As I have indicated, the claims under FSMA which may be available to policyholders depend on whether their policies were issued in the Earlier or the Later Period. As will be seen, they are very different in their nature and effect. There are nevertheless three general points to be made at this stage. First, a principal purpose of FSMA is to establish a regime designed to provide protection to the consumers (as defined in sections 5(3) and 138 of FSMA) of financial services. This is achieved both by the creation of a regulatory regime, including the conferring of functions and powers on the FSA, and by the creation of specific statutory remedies in favour of consumers including those to be considered on this application. Secondly, the creation of statutory remedies does not exclude other common law or statutory remedies which may be available to consumers: *Gorham v British Telecommunications plc* [2000] 1 WLR 2129 at 2141, 2144 and 2146. Thirdly, the statutory claims relate to the full range of investments and activities to which FSMA applies. In many cases, claims will involve investments on which a return, whether by way of income, capital growth or otherwise, was expected. General insurance, such as travel insurance, is for obvious reasons very different. In exchange for payment of the premium, the policyholder should have the benefit of the cover provided by the policy with the entitlement and expectation that claims, if made and substantiated, will be paid. Moreover, if in the present case WIC had not issued the policies in question, it can be assumed that the policyholders would have purchased similar insurance elsewhere and probably at a comparable price.

The Earlier Period: ss 26 and 28 FSMA

21. Prior to 14 January 2005 WIC was not, and did not need to be, an authorised person under FSMA. Accordingly, section 19 of FSMA applied in respect of the unauthorised policies issued by it before that date:

> "(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is-
>
> (a) an authorised person; or
>
> (b) an exempt person.
>
> (2) The prohibition is referred to in this Act as the general prohibition."

22. A contravention of the general prohibition, as set out in section 19, constitutes an offence: section 23. The civil consequences, so far as relevant, are prescribed by sections 26 and 28:

> "Agreements made by unauthorised persons.
>
> 26. (1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover-
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it.
>
> (3) "Agreement" means an agreement-
>
> (a) made after this section comes into force; and
>
> (b) the making or performance of which constitutes, or is part of, the regulated activity in question.
>
> (4) This section does not apply if the regulated activity is accepting deposits.
>
> ...
>
> Agreements made unenforceable by section 26 or 27
>
> 28. (1) This section applies to an agreement which is unenforceable because of section 26 or 27.
>
> (2) The amount of compensation recoverable as a result of that section is-
>
> (a) the amount agreed by the parties; or
>
> (b) on the application of either party, the amount determined by the court.
>
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow-
>
> (a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained.
>
> (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must-

(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or

(b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.

(6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition.

(7) If the person against whom the agreement is unenforceable-

(a) elects not to perform the agreement, or

(b) as a result of this section, recovers money paid or other property transferred by him under the agreement, he must repay any money and return any other property received by him under the agreement.

(8) If property transferred under the agreement has passed to a third party, a reference in section 26 or 27 or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement.

(9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27."

23. Before the Financial Services Act 1986, the issue of a policy by an unauthorised insurer was an illegal act and the policy was treated as illegal and hence unenforceable even by the innocent policyholder. It was considered that, in the absence of statutory provision to the contrary, the same would be true of unauthorised investment contracts. Following the recommendation of Professor L.C.B Gower in his report on the Review of Investor Protection (1984 Cmnd 9125) at para 10.32, the Financial Services Act provided in section 5 that an investment agreement made by an unauthorised person in the course of carrying on investment business was unenforceable against the investor. Section 5(6) provided that such an agreement was not illegal or invalid to any greater extent than was provided in section 5, so that the investor could enforce the agreement against the other party. Section 113 made similar provision for contracts of insurance.

24. The effect of these provisions, that contracts made by unauthorised persons were enforceable against, but not by, such persons, was re-enacted as regards all agreements to which FSMA applies, including contracts of insurance, in sections 26(1) and 28(9) of FSMA.

25. Under section 26 the policies issued by WIC in the Earlier Period are therefore unenforceable against the policyholder but this is of no practical significance because it can be assumed that the premiums on all such policies were duly paid. The policyholders may elect between enforcing their policies or claiming their entitlement under section 26(2). Under section 26(2) the policyholders are entitled to recover the premiums paid and compensation for any loss sustained by them for having paid the premiums. This is subject to two qualifications as provided by section 28. First, under section 28(3) the court may, if satisfied that it is just and equitable in the circumstances of the case, allow the premiums to be retained by WIC. Secondly, if a policyholder recovers the premiums paid by him, he must under section 28(7) repay any claims under the policy which have been paid by WIC.

26. In applying these provisions, the liquidators propose to proceed on the basis that any policyholder who made and was paid a claim would not wish to claim a return of premium. Given that the average premium is estimated to be about £140, this is clearly the sensible approach. The position is potentially more difficult as regards claims which were either not paid or not made until after the liquidation date. The course which would be in the best interests of policyholders with such claims depends on the proper valuation of their claims in the liquidation. I consider this issue below. On the basis of my conclusions on that issue, the appropriate course is for the liquidators to assume that the following would advance their claims under their policies rather than seek a return of premium, assuming in each case that their claims exceed the premiums paid on their policies: (i) policyholders whose claims were due for payment before the liquidation date; and (ii) policyholders whose claims, whether made before or after the liquidation date, arose out of events occurring before the liquidation

date. They will be entitled to prove for these claims. By contrast, policyholders who would have had claims arising out of events after the liquidation date would under the valuation rules be entitled to prove only for that part of the premium as was proportionate to the unexpired part of the policy period at the liquidation date. It would therefore be in their interests to claim a return of premium under section 26(2) of FSMA.

27. All policyholders from the Earlier Period who claim a return of the premiums paid by them are also entitled to claim compensation under section 26(2)(b) for any loss sustained by them as a result of parting with the premiums. As Scott LJ observed in *SIB v Pantell (No 2)* [1993] Ch 256 at 270 on section 5 of the Financial Services Act 1986, it combines a restitutionary remedy and a compensatory remedy. Compensation for the interest which could have been earned on the premiums would certainly be within section 26(2)(b), but it may be that if a party could establish that he had paid the premium out of borrowed money he could recover the actual costs of borrowing incurred by him. The precise scope of the remedy provided by section 26(2)(b) raises difficult issues. Would it for example extend to profits which would have been earned on an alternative use of the money which the claimant can establish he would have pursued, or do the words "as a result of having parted with it" confine the remedy to more direct losses such as interest or, in the case of other property such as shares transferred by the investor under an agreement, dividends and other benefits which the investor would have received on the shares if he had retained them? By providing a substantive remedy for the loss of the use of money, section 26(2)(b) foreshadows the developments in the common law established by the House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 678 and assistance by way of analogy may be obtained from the speeches in that case. It should be noted that the remedy actually established by the claimant in that case was for unjust enrichment, i.e. a disgorgement of the benefit obtained by the defendant, rather than as here a remedy to compensate the claimant for his loss, but compensatory remedies are extensively discussed in the speeches.

28. This is not the case in which to explore the extent of the remedy under section 26(2)(b). The individual sums at stake in this case are small. If the premiums had not been paid to WIC, they would have been paid to other insurers for similar travel policies. At most the liquidators would be entitled to treat policyholders as entitled to compensation for the loss of the interest that would have been earned on the premiums if they had not been paid, and leave it to individual policyholders to establish some greater loss.

29. The question, however, arises as to whether policyholders are entitled even to compensation for the loss of interest. In my view, they are not. The claim under section 26(2)(b) is for "any loss sustained by [the policyholder] as a result of having parted with [the premium]". In my view that must be a loss in fact sustained by him, rather than a notional loss. If, as may be assumed here, the policyholder would have paid the same premium to a different insurer at the same time, he has in fact sustained no loss as a result of paying the premium to WIC. The claim is for compensation, not an award of interest such as might be paid under section 35A of the Supreme Court Act 1981 (as amended). I was shown by Mr Davis the original form of the predecessor to section 26(2) which was in the Financial Services Bill introduced to Parliament in 1986. It provided that an investor was "entitled to recover any money or other property paid or transferred by him under the agreement, together with interest on such money." The alternative formulation now found in section 26(2) was, it would seem, introduced with a view to providing compensation for investors who have parted with property other than money as well as for those who paid money. It might be argued that as regards money the intention remains to provide an award of interest. In my view, by adopting the formulation now found in section 26(2), the whole basis was changed from an award of interest to compensation for loss in fact sustained. This would not preclude an award of interest under other powers, such as section 35A, but for the reasons given below interest under section 35A would not give rise to a provable claim in the liquidation of WIC.

30. It has long been an established principle in insolvency law that, in general, interest on a debt is not admissible as a provable debt. This is now included is rule 4.93 of the Insolvency Rules 1986 which provides as follows:

> "(1) Where a debt proved in the liquidation bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the company went into liquidation or, if the liquidation was immediately preceded by an administration, any period after the date that the company entered administration.
>
> (2) In the following circumstances the creditor's claim may include interest on the debt for periods before the company went into liquidation, although not previously reserved or agreed.
>
> (3) If the debt is due by virtue of a written instrument, and payable at a certain time, interest may be claimed for the period from that time to the date when the company went into liquidation.
>
> (4) If the debt is due otherwise, interest may only be claimed if, before that date, a demand for

payment of the debt was made in writing by or on behalf of the creditor, and notice given that interest would be payable from the date of the demand to the date of payment.

(5) Interest under paragraph (4) may only be claimed for the period from the date of the demand to that of the company's going into liquidation and for all the purposes of the Act and the Rules shall be chargeable at a rate not exceeding that mentioned in paragraph (6).

(6) The rate of interest to be claimed under paragraphs (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the date when the company went into liquidation."

31. Where, as in this case, a claim is for compensation under section 26(2)(b) would be based on the loss of interest earned on the premium, it might be said that it is an inadmissible claim to interest. In my view, this is probably correct, because the policyholder became entitled to repayment of the premium as soon as it was paid and the compensation is for loss of interest on that sum. Rule 4.93 is, I would consider, directed to the substance of the claim, rather than whether it is labelled as compensation or as an award of interest. However, it is a difficult point on which I have not adversarial argument, and I need not express a concluded view. An award of interest under section 35A made after the liquidation date would not be a provable debt.

32. A further point was raised by Mr Davis. An award of interest made after the liquidation date under a discretionary power such as section 35A of the Supreme Court 1981 is not, or is arguably not, provable on a separate ground, by analogy with the decision in *Glenister v Rowe* on a post-bankruptcy award of costs in respect of pre-bankruptcy proceedings. In my judgment, this is not applicable to compensation under section 26(2)(b) which is expressed as an entitlement and does not depend on an exercise of discretion by the court.

33. There are other possible claims, principally by policyholders whose policies were current at the liquidation date. They were encouraged to purchase alternative cover. The cost of doing so would be recoverable as damages for breach of contract, to the extent that the new cover was for a period covered by the policy with WIC. However, it is in many cases unlikely that the cost would exceed a refund of the premium paid to WIC and it would not be possible to claim both. There are some small claims for incidental costs, such as the costs of communicating with the liquidators incurred by current policyholders in enquiring about their insurance cover. Such costs are, in my view, provable as damages for breach of contract.

Discretion under s 28(2) FSMA

34. Finally, as regards the Earlier Period, the question arises whether the court would be likely to exercise its discretion under section 28(3) of FSMA to allow WIC to retain the premiums paid under all policies, including those under which no claim was made. It is not for the court on this application to exercise the discretion. That could be done only on an application to which the relevant policyholders, or their representatives, were joined as parties. But if the Court considers that there is a serious prospect that the discretion would be exercised, the liquidators could be directed or given leave to seek an order under section 28(3). This is a contentious issue. Although not represented at the hearing, the creditors' committee have set out, in letters from their solicitors, their submission that the discretion should be exercised. Their principal arguments in favour of an exercise of the discretion are: first, the policyholders enjoyed cover from WIC during the policy periods and claims were in fact paid before the liquidation, so that none of the policyholders whose policies expired before the liquidation suffered any real loss; secondly, the costs of communicating with policyholders and dealing with their claims is disproportionate to the small size of the individual claims and the even smaller recovery which will be made in the liquidation in respect of them; and thirdly, the admission of such claims will greatly reduce the dividend which can be paid on each claim, to the substantial disadvantage of other creditors who have suffered losses as a result of WIC's insolvency, while bringing little benefit to the policyholders with claims to a return of premiums under section 26(2).

35. In my judgment the second and third of these factors are not factors to which the court should have regard when considering the discretion under section 28(3). Section 28(3) requires the court to be satisfied that it is just and equitable "in the circumstances of the case" to allow "the agreement" to be enforced or to allow money paid "under the agreement" to be retained. This directs attention to the circumstances of the individual case before the court, that is the circumstances in which the agreement in question was made and subsequently performed. Section 28(4) requires the court to have regard in a case arising under section 26 to the issue mentioned in section 28(5), that is:

> "whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement."

Again the focus is on the agreement in question, although of course it is a consideration which will normally

be applicable to a significant number of agreements. It is clear that WIC did not reasonably believe that it was not contravening the general prohibition, as the creditors' committee accepts.

36. The subsequent insolvency of WIC is a factor which is unrelated to the circumstances of the case as between WIC and each policyholder. Even if it were permissible for the court to have regard to it, and to the points made by the creditors' committee on costs and the size of distribution, I would not regard them as factors which made it just and equitable to deprive the policyholders of the claims which they were otherwise given by section 26(2). Creditors with small claims are as much creditors entitled to participate in the distribution of the available assets of an insolvent company as those with large claims, and that is so despite the attritional effect of a large number of small claims.

37. This does not deal with the first point raised by the creditors' committee, that policyholders were covered by WIC during the policy period and therefore enjoyed the benefit of a policy enforceable by them. I do not regard this as a sufficient reason for exercising the discretion under section 28(2). First, it is true of all agreements to which section 26 applies that they are enforceable against the unauthorised person. Secondly, there can be no assumption that WIC would been able to meet in their entirety all claims which might have been made by the policyholders. Thirdly, WIC through Mr Whiteley in many cases knew, and in all cases should have known, that it was contravening the general prohibition and while the issue mentioned in section 28(5) is not conclusive against the exercise of discretion (as it was under sections 5(3) and 132(3) of the Financial Services Act 1986), it is nonetheless a weighty factor against the grant of relief.

38. In considering the question of discretion under section 28(3), two further issues were raised by the liquidators or the FSA which I should consider. First, it was said that it was the company, not a third party like the creditors' committee, which could invite the court to exercise the discretion. In a general sense, this is true. It would not normally be appropriate for a third party to be joined in proceedings to argue for an exercise of the discretion. But that is not the correct analysis of the present case. This is not an application to exercise the discretion, but an application for directions as to whether the liquidators should apply in adversarial proceedings for the discretion to be exercised or should proceed with the winding up on the basis that the discretion had, or had not, been exercised. On an application for directions by a liquidator, the liquidator must place before the court all the relevant considerations and it is appropriate for creditors with adverse interests to make submissions on issues which affect them.

39. Secondly, the question was raised whether the discretion under section 28(3) could be exercised after the commencement of a winding-up of the unauthorised person. The argument is that the debts provable in a liquidation are those which exist at the date of winding up, albeit including those which are then future or contingent, and that, by a parity of reasoning with the decision in *Glenister v Rowe*, a debt could not cease to exist for these purposes by reason of a subsequent exercise of discretion by the court under a provision such as section 28(2). In *Glenister v Rowe* the Court of Appeal held that costs which were ordered after the date of bankruptcy to be paid by the bankrupt were not provable because no debt of any sort existed at the bankruptcy date; there was no debt in respect of costs unless and until the court exercised its discretion to order costs.

40. There is, however, no authority to support the application of this approach in reverse, so as to disable the court from exercising a discretion which would otherwise be available to reduce or eliminate a debt, and it would not in my view be correct as a matter of policy or principle. It would seem extraordinary in circumstances where it was just and equitable to permit the company to retain money, that the court should not be entitled so to order simply because a liquidation has intervened. There is no warrant for it in the relevant provisions of FSMA, so that if it applies at all it must be as an incident of insolvency law. It is not, as in *Glenister v Rowe*, a case of exercising discretion to create a debt which did not exist at the winding-up date. It is a case of exercising a discretion to which the debt was at the winding-up date potentially subject. In terms of insolvency law, the conventional analysis is that in putting a value on the claim it is necessary to take account of this contingency. Once the contingency has occurred and the discretion has been exercised so as to eliminate the debt, the hindsight principle requires the claim to be valued at nil. A related, but alternative, analysis is that which founded the decision of the Privy Council in *Wight v Eckhardt Marine Gmbh* [2004] AC 147. In that case, a person with a valid debt as at the winding-up date was not entitled to prove for it after the debt had been discharged in accordance with its proper law. Lord Hoffmann said at para 33:

> "It therefore seems to their Lordships that the principle of pari passu distribution according to the values of debts at the date of winding up does not necessarily lead to the conclusion that someone who was a creditor at that date must be allowed to participate in the distribution even when he is no longer a creditor at all. There is nothing unfair, or contrary to principle, in a rule which requires that anyone who claims to participate in a distribution should have the status of a creditor at the time when he makes that claim. It would be strange if the court can have regard to subsequent events in valuing a creditor's contingent claim at much less than it would have

been thought to be worth at the date of the order but not to the fact that someone has ceased to be a creditor at all."

It would, Lord Hoffmann said at para 29, be "pure conceptualism" to apply the principle of valuation as at the winding-up date "so as to require payment of a dividend to someone who, at the time of the distribution, is not a creditor at all".

41. As regards claims in respect of policies issued in the Earlier Period, my conclusions are therefore as follows. First, any policyholder who has made or wishes to make a claim under the policy in respect of a pre-liquidation event should be assumed not to claim a return of premium (other than in respect of any unexpired portion of the policy). Secondly, all other policyholders are entitled to a return of premium, but not to interest or other compensation, under section 26(2)(b). Thirdly, the liquidators should proceed on the basis that the discretion under section 28(3) to permit WIC to retain premiums would not be exercised.

The Later Period: s 20 FSMA

42. As already indicated, the regime for policies issued in the Later Period is significantly different. WIC was by then an authorised person and, while by carrying on insurance business it contravened requirements imposed on it, the contravention did not make the policies void or unenforceable: section 20(2)(b). There is no statutory entitlement to recover premiums paid under the policy comparable to section 26(2). By section 20(3), in prescribed cases the contravention is actionable "at the suit of a person who suffers loss as a result of the contravention". As the policyholders were largely or exclusively "private persons" as defined in the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256), any claims by them under section 20(3) would be prescribed cases as provided by regulation 4.

43. I will deal later with the valuation of claims under the policies, but the issue which arises here is whether policyholders have a claim under section 20(3) or otherwise to a return of the premiums paid by them, whether as damages or otherwise. I take first the case of a policyholder whose policy period expired before the commencement of the winding-up, without any occurrence giving rise to a claim under the policy. He suffered a loss in the sense that he paid a premium to WIC and was issued with a policy by WIC in contravention of FSA requirements and therefore in circumstances where WIC should not have taken the premiums and where, it may be assumed, the policyholder would not have paid them if they had known that WIC lacked the necessary authority. But the policyholder received an enforceable policy and, it is to be assumed, he would otherwise have taken out a travel policy at a similar premium with a different insurer. In these circumstances, it cannot be said that he has suffered a loss in an amount equal to the premium or in any other amount as a result of the contravention. If the policyholder has an unpaid claim under the policy, such claim is provable and there is no separate claim to which section 20(3) applies. If the policy period was continuing at the winding-up date, there may be a claim for the costs of insurance for the remaining part of the policy period, but this claim may well be subsumed in the claim for the value of the policy under the Insurers Rules dealt with below.

44. As already discussed, the existence of a statutory remedy under section 20(3) does not preclude causes of action and remedies which would otherwise be available. They do not, however, provide any claim for a repayment of premium to policyholders in this case. Claims for damages equal to the premiums paid, either for misrepresentation or for breach of warranty of authority, do not seem to be available precisely because the policyholders would have paid the same premiums for other travel policies. If claims have arisen under the policy, they will be provable as such. Rescission of the policy on grounds of misrepresentation would lead to a claim for return of the premium, but it does not appear to me that rescission is available where the policyholder received in return a policy which was enforceable throughout its term. A claim for repayment of the premium on grounds of total failure of consideration, as upheld by Knox J in *In re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430, is not available now that insurance contracts made in contravention of FSMA requirements are enforceable against the insurer.

Valuation of claims under the policies

45. The first issue which arises when considering the valuation of claims made under the policies issued by WIC, in either the Earlier or the Later Period, is whether the Insurers (Winding-up) Rules 2001 (S1 2001/3635) (the Insurers Rules) apply. There have been special provisions for the valuation of non-life policies in a winding-up of the insurer since the Assurance Companies Act 1909. The Insurers Rules replaced the Insurance Companies (Winding Up) Rules 1985 (the 1985 Rules) on 1 December 2001 when FSMA came into force.

46. Rule 3 of the Insurers Rules provides that the Rules apply to "proceedings for the winding-up of an insurer which commences on or after the date on which Rules come into force." Unless the Insurers Rules are

restricted in their application to authorised insurers, they will apply to WIC. There is no basis for restricting the Rules to authorised insurers. Rule 2 provides that "insurer" carries the meaning given by article 2 of the Financial Services and Markets Act (Insolvency) (Definition of "Insurer") Order 2001 (S1 2001/2634). Article 2 defines insurer as:

> "any person who is carrying on a regulated activity of the kind specified by article 10(1) or (2) of the Regulated Activities Order (effecting and carrying out contracts of insurance) but who is not-
>
> (a) exempt from the general prohibition in respect of that regulated activity;
>
> (b) a friendly society; or
>
> (c) a person who effects or carries out contracts of insurance all of which fall within paragraphs 14 to 18 of Part I to the Regulated Activities Order in the course of, or for the purposes of, a banking business."

47. The exceptions do not apply and articles 10(1) and (2) of the Regulated Activities Order specify effecting and carrying out contracts of insurance. The emphasis is therefore on the business in fact carried on by a company, not on whether it was authorised to do so. A restriction of the Insurers Rules to authorised insurers would make little sense and I am clear that they do apply to WIC, as regards the valuation of policies issued by it. They do not contain provisions applicable to claims to a return of premiums, such as arising under section 26 of FSMA, to which the Insolvency Rules 1986 will apply in the usual way: rule 3(2).

48. It is convenient here to mention the contrasting position as regards the Insurers (Reorganisation and Winding Up) Regulations 2004, which bring into effect in the UK the provisions of EC Council Directive of 19 March 2001 on the reorganisation and winding up of insurance undertakings (2001/17/EC). Regulation 8 provides that the general law of insolvency has effect in relation to "UK insurers" subject to the provisions of that Part of the Regulations. "UK insurer" is defined in regulation 2(1) as "a person who has permission under Part IV of the 2000 Act to effect or carry out contracts of insurance". As WIC never had such permission, it follows that the 2004 Regulations, which for example give preferential status to insurance creditors, do not apply to WIC.

49. Returning to the Insurers Rules, the valuation of general business policies is governed by rule 6 and by schedule 1. Rule 6 provides:

> "Except in relation to amounts which have fallen due for payment before the liquidation date and liabilities referred to in paragraph 2(1)(b) of Schedule 1, the holder of a general business policy shall be admitted as a creditor in relation to his policy without proof for an amount equal to the value of the policy and for this purpose the value of a policy shall be determined in accordance with Schedule 1. "

Paragraph 1 of schedule 1 deals with periodic payments under a general business policy, which is not relevant to WIC's business. Paragraph 2 and 3 provide as follows:

> "2.--(1) This paragraph applies in relation to liabilities under a general business policy which arise from events which occurred before the liquidation date but which have not--
>
> (a) fallen due for payment before the liquidation date; or
>
> (b) been notified to the company before the liquidation date.
>
> (2) The value to be attributed to such liabilities shall be determined on such actuarial principles and assumptions in regard to all relevant factors as the court shall direct.
>
> 3.--(1) This paragraph applies in relation to liabilities under a general business policy not dealt with by paragraphs 1 or 2.
>
> (2) The value to be attributed to those liabilities shall --
>
> (a) if the terms of the policy provide for a repayment of premium upon the early termination of the policy or the policy is expressed to run from one definite date to another or the policy may be

terminated by any of the parties with effect from a definite date, be the greater of the following two amounts:

(i) the amount (if any) which under the terms of the policy would have been repayable on early termination of the policy had the policy terminated on the liquidation date, and

(ii) where the policy is expressed to run from one definite date to another or may be terminated by any of the parties with effect from a definite date, such proportion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which that premium was paid; and

(b) in any other case, be a just estimate of that value."

50. By virtue of the opening words of rule 6, amounts which have fallen due for payment before the liquidation date are the subject of proof in the usual way. Other claims arising out of events which occurred before the liquidation date are dealt with in paragraph 2. Unlike paragraphs 1 and 3, there was no equivalent to paragraph 2 in the 1985 Rules. Its inclusion in the Insurers Rules would seem to be a response to the possible lacuna identified by a submission made in *Transit Casualty Co v the Policyholder Protection Board* [1992] Lloyds LR 358, although Hoffmann J was able to construe the 1985 Rules so as to bring such claims within what is now paragraph 3(2)(b). The practical result in the present case is the same. Where events occurred before the liquidation date giving rise to claims which had not fallen due for payment before that date, I doubt whether any actuarial principles or assumptions are required in the context of WIC's travel policies beyond taking account of such post-liquidation events as are necessary to quantify or finalise the claims.

51. Paragraph 3 applies as regards the unexpired portion of any policies and draws an important distinction for present purposes depending on whether the policies are "expressed to run from one definite date to another". If they are, paragraph 3(2)(a) applies and (assuming sub-para (i) does not apply) the claim is for that part of the premium which is proportionate to the unexpired portion of the policy period. If they are not, paragraph 3(2)(b) requires a just estimate to be made, in which case the hindsight principle allows subsequent events, or their absence, to be used to fix the value of the claim: see *Transit Casualty Co v PPB.*

52. Mr Davis drew my attention to the change in the statutory definition of "policy" since *Transit Casualty Co v PPB*. The starting point of Hoffmann J's reasoning in that case was the then current definition in the Insurance Companies Act 1986: "any policy under which there is for the time being an existing liability already accrued or under which a liability may accrue". The definition is now contained in the Financial Services and Markets Act 2000 (meaning of "Policy" and "Policyholder") Order 2001 (S1 2001/2361). Policy is defined as "a contract of insurance including one under which an existing liability has already accrued" and "policyholder includes, among others, any person to whom, under the policy, a sum is due or to whom a sum, payment or benefit is contingently due, payable or to be paid." I agree with Mr Davis' submission that this change is not material as regards the reasoning in *Transit Casualty Co v PPB,* or its applicability to the Insurers Rules, so far as not altered by the introduction of paragraph 2 of schedule 1.

53. In determining the basis on which claims in respect of the unexpired portion of the period of cover under policies current at the date of WIC's winding-up are to be valued, it is therefore necessary to distinguish those policies which are "expressed to run from one definite date to another" from the others (if any). Paragraph 3 (2)(a) will apply to the former, entitling the holders to claim repayment of a proportionate part of the premium paid under the policy. The liquidators' evidence states that there are no policies to which the alternative conditions set out in paragraph 3(2)(a) apply (policy terms providing repayment of premium on early termination of the policy or for termination by any of the parties with effect from a definite date). The liquidators have put in evidence samples of policy documents, for both single trips and annual cover. Many of them state in terms that the period cover runs from one specified date to another specified date. Subject to a point discussed in the next paragraph, they are therefore policies to which paragraph 3(2)(a) applies. Other policies state the commencement date and state the period of cover, whether a year or a lesser period of days, so that the termination date is clear from the policy document but it does not as such state the termination date. These, too, in my judgment fall within paragraph 3(2)(a) as policies which are expressed to run from one definite date to another.

54. Some or all of both the annual and single trip policies contain a provision which states: "If the return is necessarily and unavoidably delayed due to circumstances beyond the control of the insured person cover will be extended free of charge for the period of that delay." The effect of the possibility of an extension to the period of cover for the purposes of paragraph 2(2)(a) of schedule 1 to the 1985 Rules, the equivalent of paragraph 3(2)(a) of schedule 1 to the Insurers Rules, was considered in *In re Continental Assurance Co of London plc (No 3)* [1999] 1 BCLC 751. The policies in issue provided indemnity insurance to football clubs

against the additional expense of winning a league championship or other success. Some of the policies covering English clubs stated the period of cover to be "16 August 1991 to 31 May 1992, or completion of all League and play-off matches." The evidence showed that the English football season could be extended for a variety of reasons, so that there was no definite date by which all matches would be completed. Carnwath J construed the policies as covering not a definite period stated in the policy but the duration of the event, that is the relevant league or other season. The experts agreed in their evidence that dates were often inserted for purely administrative reasons and that such policies were generally accepted as continuing to the end of the event, and not as being confined to the stated period. The policies were not therefore within paragraph 2(2)(a) and, in the circumstances, it would not be possible to calculate the proportion of the premium for which a claim could be made under paragraph 2(2)(a).

55. In my judgment, the position under WIC's travel policies is different. The period of cover under both annual and single trip policies is definite. The extension occurs only if the return home from a single trip is unavoidably delayed beyond the anticipated return date or, in the case of an annual policy, the return home is delayed from a trip which would otherwise have been completed in the policy period. The provision for an extension does not detract from the essential quality of the policy as being for a set period, whether a year or the stated duration of a single trip. The extension, if required, is expressed to be "free of charge" and so causes no difficulty in the calculation of the proportion of the premium for which a claim can be made.

56. It follows that all claims in respect of the unexpired portions of WIC's travel policies as at the liquidation date should be valued in accordance with paragraph 3(2)(a)(ii) of schedule 1 to the Insurers Rules. This will apply to all policies issued in the Later Period. As regards policies issued in the Earlier Period, it will not apply where policyholders claim a return of the premium under section 26(2). It will apply to other unexpired policies issued in the Earlier Period, i.e. in practice those under which a claim is made in respect of a pre-liquidation event.

57. I will hear counsel for the liquidators on the form of order in the light of the conclusions reached in this judgment and on directions for giving notice to policyholders.