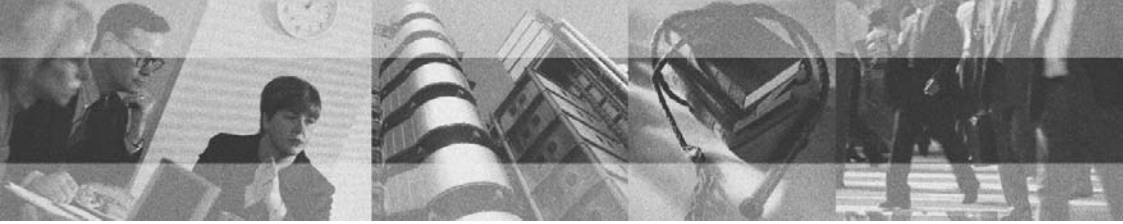


SECTION 83 OF THE FIRES PREVENTION (METROPOLIS) ACT 1774: REDUNDANT AND PLEONASTIC?

by Thomas DeVecchi and Christopher Carr

Introduction

The Fires Prevention (Metropolis) Act 1774[1] was at the time the latest in a flood of legislation brought about in response to the Great Fire of London in 1666, and dealing with the prevention of "mischiefs by fire". The first of these statutes was 19 Car 2 c.3, an Act for rebuilding the City of London. This was followed by 6 Anne c.31 and 7 Anne c.17, and a series of amending Acts: 11 Geo 1 c.28, 33 Geo 2 c.30, 4 Geo 3 c.14, 6 Geo 3 cc 27 and 37. To a great extent the content of these Acts dealt with what in effect were building regulations appropriate to the times; providing for such matters as the thickness of party walls. However, in 1763 Parliament applied its collective mind to the mischief of fire insurance fraud, and in 4 Geo 3 c.14 introduced a new provision "in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire with a view of gaining to themselves the insurance money".[2] This was repeated with minor changes in a 1772 consolidating statute,[3] and then finally in the Fires Prevention (Metropolis) Act 1774 as section 83. Section 83 is one of only two sections of the 1774 Act which remain on the statute book.[4]

It is the thesis of this article that section 83 has now become redundant. This at one time would have been an uncontroversial assertion. However, a small flurry of litigation in the 1990s ostensibly put the lie to the idea that section 83 was dead.[5] It is suggested, though, that section 83 has been obsolete for some time, and its apparent relevance has been sustained by application in ways which have distorted it beyond its original purpose. Several factors support this idea. First, it has almost never been applied by the courts in a way consistent with the purpose which Parliament originally intended; the prevention of fraud and with it the reduction in the risk of potentially catastrophic London-wide fires. Second, the recent cases which appeared to revive section 83 stretched its application beyond that originally intended, in order to achieve "justice" in the particular circumstances. This raises a policy question as to whether there is a further mischief which ought to be covered by an alternative provision. Third, its extent was originally confined to London, but the courts have held (in our view mistakenly) that it should be of more general application. The Law Commissions in their Joint Scoping Paper on Insurance Contract Law in 2005 suggested that section 83 be reviewed with a view to its repeal.[6] We welcome the recent Law Commission Introductory Paper,[7] and take the view that section 83 has outstayed its welcome. It is time for what Clarke describes as a "regular ghost at the feast" to be banished.[8] Through its application to situations for which it was never intended, it has managed to remain at the table too long.

---

1 14 Geo 3 c.78.

2 Section 10.

3 12 Geo 3 c.73, section 34.

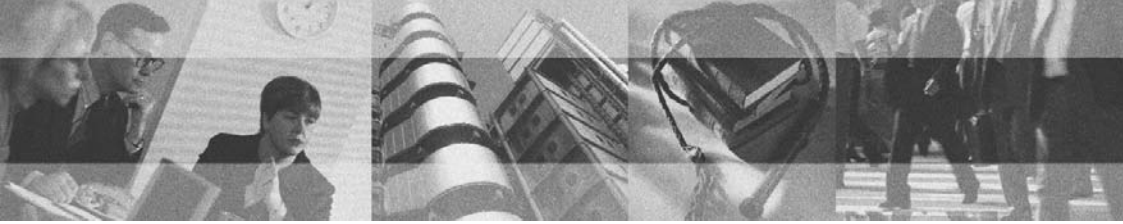
4 The other is section 86. The Metropolitan Buildings Act 1844 repealed ss 1-73, 79, 87-100 and 102 of the 1774 Act. The Metropolitan Fire Brigade Act 1865 repealed sections 80-82, 84, 85 and 101.

5 See in particular: *Viral Ltd v Security Archives Ltd* (1990) 60 P & CR 258; *Lonsdale & Thompson Ltd v Black Arrow Group plc* [1993] Ch. 361; Michael Haley, "Case Comment – Ancient laws and modern values", Conveyancer and Property Lawyer (1993).

6 Law Commission and Scottish Law Commission, *Insurance Contract Law – A Joint Scoping Paper*, (2005). In August 2006 the Law Commissions decided that section 83 would be included in the scope of its review of insurance contract law: *Insurance Contract Law – Analysis of Responses and Decisions on Scope* (2006).

7 Law Commission, *Reforming Insurance Contract Law – Introductory Paper – Section 83 of the Fires Prevention (Metropolis) Act 1774: should it be reformed?* (2009).

8 Malcolm Clarke, *Law of Insurance Contracts*, Loose-Leaf Edition, August 2007), 29-3.



The original purpose of section 83

Fraud

It is clear that the purpose of section 83 as originally intended was the prevention of fraud and with it the prevention of fire. The first words of section 83 – described by Lord Westbury as section 83's "particular preamble of its own" [9] – say:

> "And in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire with a view of gaining themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered be it further enacted…"

That this is the true purpose of section 83 is supported by its application only to fire risks. If the mischief is the making of fraudulent claims, the main way in which this would be effected would be arson. A fraudster is patently unlikely to intentionally damage his own property through flood or wind damage, for example.

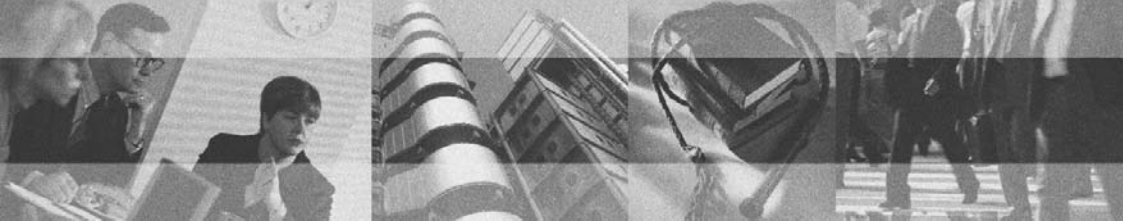
Section 83 however, as will be discussed later, has been seen as in effect being an exception to the privity rule – by granting certain "persons interested" third party rights in relation to property insurance contracts covering fire risks to the extent that they, practically speaking, have *locus standi* to make a claim almost as if they were a policyholder.[10] It is submitted that if the true purpose of section 83 is fraud prevention, this interpretation is a distortion of its true intended meaning. Section 83 grants to a third party a right to benefit (via reinstatement) from any insurance monies payable on a claim by the insured under the policy to the extent of his interest, but it does not grant that party a general right to benefit from the policy as if he were an insured.

Section 83 attempts to prevent fraud (in the sense of the insured taking the insurance money and pocketing it) by allowing for two mechanisms by which an insurer has an obligation imposed on it to reinstate the property damaged, rather than pay the insured. These appear to operate even in circumstances where the policy itself contains no term allowing the insurer to elect reinstatement.

The first is when an insurer has "grounds for suspicion" that the insured is attempting fraud in making a claim. In the circumstances where the insurer suspects, but cannot prove, fraud, he is required to perform the contract by way of reinstatement rather than payment. This ensures that, even where there is only suspicion of fraud, the insurance money is not placed in the hands of the suspected fraudster. In the circumstances where fraud can be proved, the insurer would have no liability at all – but where it cannot although there is suspicion, the insurer is required to perform but not in a way which would allow the suspected fraudster to benefit unduly from his suspected fraud.

9 *Ex p Gorely* (1864) 4 De G J & S 477.

10 Clarke, supra, Ch 5; Irish Law Reform Commission, *Report on land law and conveyancing law: the passing of risk from vendor to purchaser*, LRC 39 (1991), Ch 4(ii)(A).

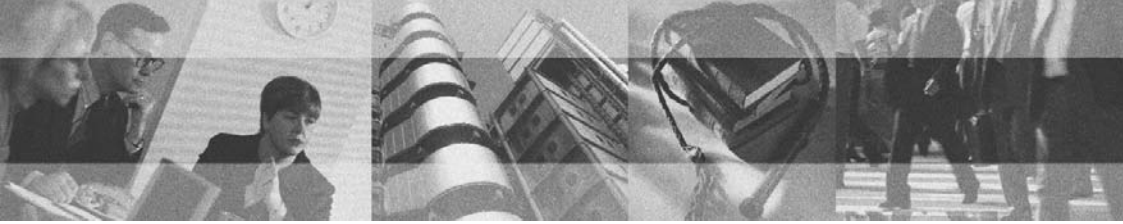


This seeks to prevent fraud by narrowing significantly the circumstances in which a fraudster can benefit from his wrongdoing. He may benefit from the insurance contract in the sense that his property will be reinstated. But this will merely put him back to his earlier position, and so the incentive to commit fraud is removed. Similarly, where the insurer's suspicion is in fact erroneous (and would be discovered to be so if there were further investigation), the innocent insured will not suffer injustice as he will have his property reinstated. In a sense it places the burden of proof on an insured to show that he did not commit fraud (although the insurer's suspicion cannot be groundless) – but not to the extent that if he cannot satisfy the burden he receives no benefit from the contract, only to the extent that if he cannot satisfy the burden he will not receive payment of money (unless he gives the requisite security), rather his property will be reinstated. It works on the premise that a fraudster will wish to receive money, but will not be interested in simple reinstatement – whereas an innocent claimant will be indifferent to reinstatement vis-à-vis receiving a payment of money.

It follows from this interpretation that the obligation to reinstate under section 83 can arise, and the fraud prevention purpose be furthered, in the absence of an interested third party. However, section 83 also offers a second mechanism for the imposition of the obligation of reinstatement on the insurer, where there is such a third party. That is, "upon the request of any person or persons interested in or intitled unto" the property concerned. This widens the circumstances in which the insurer is obliged to reinstate rather than pay, and consequently again narrows the circumstances in which a fraudster can benefit from his fraud.

Persons held to be "interested" include owners,[11] landlords,[12] tenants,[13] lessees,[14] mortgagees,[15] the purchaser of land prior to completion,[16] and remaindermen.[17] Clarke has offered three hypotheses for the meaning of "persons interested".[18] The first of these is: "[i]f the sole purpose of the Act were to deter ill-minded insured, tempted to fire the property, this suggests that a person interested is anyone who might have a public interest in deterrence." It is submitted that this is the correct hypothesis. The main thrust of section 83 is the deterrence of fire. This is particularly clear when one bears in mind the historical context. Section 83 was one of many provisions the aim of which was to prevent at almost any cost catastrophically destructive fires such as that in 1666. To give effect to that purpose, as wide a number of persons as possible ought to have been presumed intended by the words "interested persons". Parliament must have wished as wide class of people as possible to be able to intervene and scupper the plans of the "ill-minded" people who would otherwise have been motivated to commit arson and run away with insurance monies.

11 *Ex p Gorely*, supra.
12 *Vernon v Smith* (1821) 5 B & Ald 1.
13 *Wimbledon Golf Club v Imperial Ins Co* (1902) 18 TLR 815.
14 *Portavon Cinema Co Ltd v Price & Century Ins Co Ltd* [1939] 4 All ER 601.
15 *Sinnot v Bowden* [1912] 2 Ch 414.
16 *Rayner v Preston* (1881) 18 Ch D 1.
17 *Re Quicke's Trusts* [1908] 1 Ch 897.
18 Clarke, supra, 5-7C.



It has been suggested that "persons interested" are limited to those people with a claim on the policy money: *Westminster Fire Office v Glasgow Provident Investment Society*.[19] We would suggest that this is at odds with a proper interpretation of section 83, and that the answer to this can be found in the words of Mr Justice Parker who, referring to the use of the words "contending parties" near the end of the provision, said:

> "If 'the contending parties' means the parties claiming to be interested in the policy moneys the clause may possibly appear to suggest no one except the persons so interested has any right to require the policy money to be laid out in rebuilding; but, as a matter of fact, this right is expressly given not to the persons interested in the policy moneys, but to the persons interested in the premises destroyed by fire, and I can see no reason why 'the contending parties' should not include the persons who, though not interested in the policy moneys, are interested in the subject-matter of the insurance and are insisting on the insurance money being laid out in rebuilding. This construction seems to me in full accordance with the general object of the enactment, which is to deter fraudulent people from arson, and not to provide a solution of difficulties arising out of rival claims to policy moneys."[20]

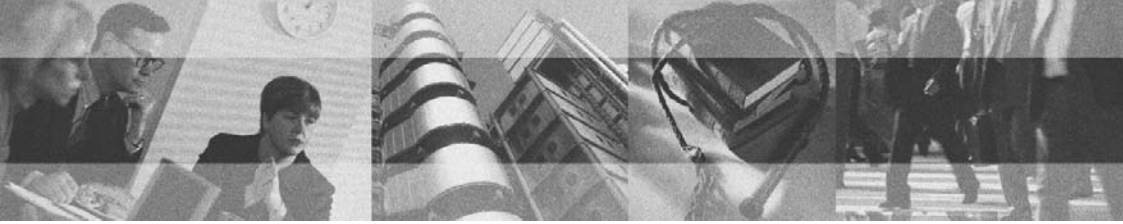
It is suggested therefore that one interpretation of the general meaning of section 83 offered by the courts (albeit only obiter) that is close to its original intention is that put forward by Mr Justice Forbes:

> "It seems quite clear to me that s.83 of the 1774 Act was intended to deal with a situation which arises in this way. An insurance company giving fire cover is bound under the contract to pay the insurance moneys to the assured. If it does so, the assured is quite entitled simply to put the money into his pocket without in any way reinstating the building. Two possible dangers arise from this. One is that it may be a temptation to an ill-minded owner to set fire to the building in order to pocket the insurance money. The insurance company is accordingly entitled under the section, upon suspicion that this is the case, of its own volition to use the money to reinstate the building instead of paying it to the assured. The other danger is that there may be other persons interested in the building who would be damnified if the money were not so used. In such a case they are authorised to serve a notice on the insurance company requiring the money to be used for reinstatement i.e. not paid to the assured… .The whole scheme of the section is to prevent the insurance money being paid to an assured who might make away with it."[21]

19 (1888) 13 App Cas 699.

20 *Sinnot v Bowden*, supra.

21 *Reynolds and Anderson v Phoenix Assurance Co Ltd and Others* [1978] 2 Lloyd's Rep 440.



Practical significance of section 83

There have been cases where section 83 has been applied in a way at least consistent with the interpretation offered above. These are, however, few in number and somewhat advanced in years.

The first of the mechanisms described above (where the insurer himself has grounds of suspicion) has been of little practical significance since the day the 1774 Act took effect.[22] There have been no reported cases where the insurer's statutory duty to reinstate where he had grounds to suspect fraud has been at issue. This can be explained, it is suggested, by two rather simple practical considerations. First, it is common (at least in the modern era) for the insurer to have an option to reinstate included in the insurance contract. There would be no need in ordinary circumstances for the insurer to have grounds of suspicion when it wishes to reinstate as it can simply exercise this option. Second, it can be said that insurers have significant discretion under English law not to pay insurance money or reinstate at all when fraud is suspected. They can seek to prove fraud and avoid the insurance contract altogether. Indeed, since 1774 techniques of fire and criminal investigation have advanced significantly so that this task is now substantially easier for insurers. Also, the current state of the law in relation to misrepresentation and non-disclosure, for example, gives insurers significant discretion to deny claims without the need to prove fraud.[23] And further, under English law, claims can be denied by insurers without fear of liability for any further loss incurred by an insured as a result of late or non-payment.[24]

The courts have on occasion sought to enforce the duty of reinstatement arising under the second mechanism (the request of an interested party). However, we suggest that the last occasion in England on which it was applied in a manner consistent with its purpose was the case of *Sinnot v Bowden* in 1912.[25] In that case, B charged a house with payment to C of a sum of money and covenanted to insure and keep insured the mortgaged property against fire. At the date of the mortgage deed the property was insured, and B subsequently renewed the insurance. The house was destroyed by fire. Following that, S, a judgement creditor of B, obtained a garnishee order nisi attaching the money due under the policy. After the date of the order C served the insurance company with notice that he required the money to be applied in rebuilding the house.

Parker J held that section 83 applied and could be invoked by a mortgagee. He further held that the mortgagee's right to have the insurance monies applied to reinstatement which arose could not be displaced even by a garnishee order absolute. We suggest this was consistent with our interpretation above. Following the occurrence of the insured event, a claim was made and monies became payable; the third party, concerned that the monies might be applied to something other than reinstatement, gave notice to the insurer under section 83. The result in law was an obligation on the insurer to apply the monies in reinstatement.

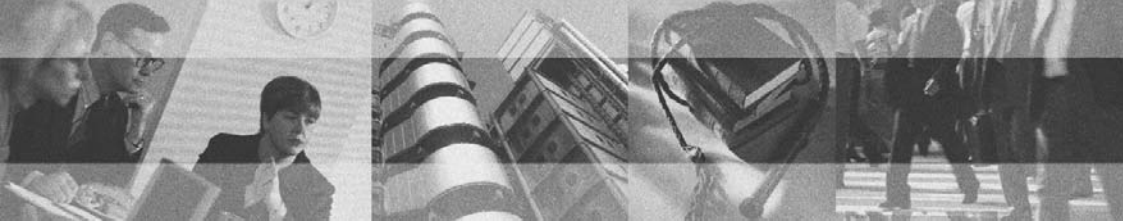
---

22 See also the New Zealand Law Commission, *Some Insurance Law Problems*, NZLC R46, (1998), Part 4.

23 See for example, p 15 of the Law Commissions' CP 182 on Insurance Contract Law (2007).

24 *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep 111. The Law Commissions are expected, however, to produce a second Consultation Paper on Insurance Contract Law during 2009 which will include proposals on this issue.

25 Supra.



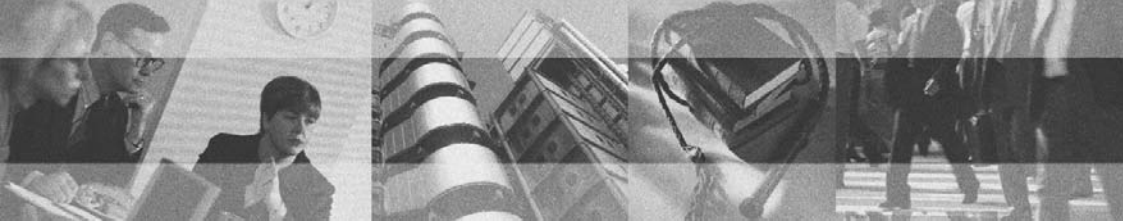
Since then there have been eight reported cases which cited section 83. In *Matthew v Curling*, a lessor alleged the lessee had breached a covenant to reinstate, and the Court of Appeal simply suggested that the plaintiff would have been entitled to relief under section 83 if an action had been brought against the insurer.[26] In *Argy Trading Development Co Ltd v Lapid Developments Ltd*,[27] Mr Justice Croom-Johnson stated that section 83 may have applied had there been relevant insurance monies. However, he noted that in the circumstances it was unlikely that any of the interested parties would have either tried or been able to insist on reinstatement. In *Mumford Hotels Ltd v Wheeler and Another*,[28] and *Re King (deceased) Robinson v Gray and Another*,[29] section 83 was mentioned but in both cases it was not applied because there had been no request from an interested party by the time the money was paid out.[30] In *Portavon Cinema Co Ltd v Price*,[31] Mr Justice Branson held that section 83 (in our view correctly) does not create an insurance in the interested party's favour. And in *Reynolds v Phoenix Assurance*,[32] although Mr Justice Forbes gave us the useful dictum mentioned above, section 83 was not applied because the purported request in relation to it had been made by the insured (and not a third party).

Thus, in six of the eight cases section 83 was not applied. In the remaining two, *Vural* and *Lonsdale*, as we argue below, section 83 was misapplied or misinterpreted. The courts have not been provided with a factual scenario to which section 83 could be correctly applied since 1912. Given that house fires and insurance fraud are clearly still with us, it must follow that interested parties in the situations envisaged have found other mechanisms to ensure reinstatement of their property. What are these mechanisms?

One answer may simply be the improvement of practice in drafting lease agreements, for example. If parties are able to draft clauses which deal expressly with one party's duty to insure and to use any insurance money payable in reinstating the premises, and these clauses are robust, then section 83 is unlikely to be of much use. In most circumstances the interested party should have a viable action against the insured if he does not reinstate. The same may be true of any situation where the interested party's relationship with the insured arises from a contractual arrangement; such as a mortgagor and mortgagee. Another answer may be that the categories of persons the 1774 Act envisaged might be interested persons may frequently be policyholders themselves. It is common practice for local authorities in their role as landlords, for example, to arrange a policy on behalf of leaseholders, rather than as the insured itself. Such arrangements are also obviously the product of terms in the lease agreement. In conclusion on this point, in general it appears to be open to potential interested parties to protect their interest contractually, rather than to resort to statutory protection.

The question that then arises is whether it should be for the law to intervene in the circumstances where an interested party has failed to protect his own interest. It seems to us that it should not, as a properly advised interested party should be able to achieve adequate protection. However, it also seems to us that in 1774 there *was* a good public policy reason

26 [1922] 2 AC 180, per Atkin LJ. It was also noted by Younger LJ that section 83 could not apply if the insured had no insurable interest.
27 [1977] 1 WLR 444.
28 [1963] 3 All ER 250.
29 [1963] 1 All ER 781.
30 This principle having been established by *Simpson v Scottish Union Ins Co* (1863) 1 H & M 618, 628.
31 Supra.
32 Supra.



for statutory intervention – and that this reason no longer exists. As we have already mentioned, the main concern of Parliament in passing the 1774 Act and its predecessors was the prevention of vast and catastrophic fires in London. Thus the main purpose of section 83 was not the protection of private interests (which even then perhaps could be protected by contractual arrangements) but the protection of the wider public interest. With the advent of sturdier, fire-resistant buildings, a professional fire service and the consequent greatly reduced risk of catastrophic fires, this public policy reason for statutory intervention has vanished.

Not the purpose of section 83

Third party rights where the insured has not claimed

The question has arisen as to whether a third party has a cause of action against the insurer under section 83 when the insured has not made a claim or has no viable claim.[33] The notion that he has such a cause of action is indeed, as we argue below, central to the revival of section 83 seen in cases such as *Vural* and *Lonsdale*.

However, it is submitted that it follows from a purposive interpretation of section 83 that a third party does not have a claim against the insurer in those circumstances. There is only a danger of fraud if the insured has made a claim and so stands to receive the insurance money. Thus, if the purpose of the provision is the prevention of fraud, then the mechanisms in section 83 can only operate, and the insurer only have the obligation of reinstatement imposed on him by them, where a claim has been made.

It could be argued against this that section 83 has two purposes which co-exist and overlap to a certain extent. One is the prevention of fraud. The other is the prevention of loss to interested third parties by reason of fire where they were not named on the insurance policy (whether or not there was suspicion of fraud). This might follow from the words "whereby the lives and fortunes of many families may be lost or endangered."

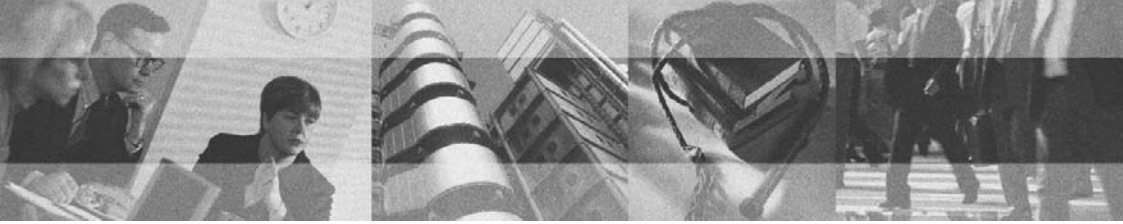
However, the word "whereby", it is submitted, suggests that what follows it are to be understood as consequences of the actions of "ill-minded persons… with a view of gaining themselves the insurance money." The better view is thus that the sub-purpose of section 83, in the context of interested third parties, is the prevention of loss to those parties *occasioned by* fraud. It still follows from this that section 83 only comes into play where a claim has already been made.

Further support for this assertion can be found later in section 83. One of the circumstances in which the insurer is not obliged to reinstate is where "the party or parties claiming such insurance money shall, within sixty days next after his, her or their claim is adjusted, give sufficient security… ." This clearly envisages section 83 operating only in the circumstances where a claim has been made by the insured.

Section 83 was not intended to operate in a way similar to that of the Third Parties (Rights Against Insurers) Act 1930 or that of the Contract (Rights of Third Parties) Act 1999. The substantive effect of section 83 is not to make the interested third party a contracting party. In a case where that suggestion was made, Mr Justice Branson said this:

> "In my view that is a misinterpretation of the statute. There is all the difference in the world

33 For example, if he has suffered no loss as in *Lonsdale*, supra.



between giving A, who is interested in the premises upon which B has taken out a policy, a right to call upon B's insurers to expend those policy moneys upon the property, and saying that the statute has invested A with an insurance upon those properties. One is a statutory right and the other is a right arising *ex contractu*, and I think it is quite wrong to say that the effect of Sect. 83 of the Fires Prevention (Metropolis) Act is to make anybody assured. What it does do is give him, though not an assured, a statutory right to direct people, who have to pay money to an assured in respect of premises, to expend those moneys in a particular way."[34]

The apparent revival of section 83

And yet in the 1990s there was a clear step change in the courts' approach to section 83. It seems to us that its original intention was forgotten, the dicta of Forbes J and Branson J set aside, and a new purpose created.

In *Vural* the claimant tenant leased business premises from the defendant landlord. The lease obliged the landlord to insure, and the tenant to reimburse the landlord for a fair proportion of the premiums to be paid. A fire destroyed the beech wood parquet floor in the factory, which the landlord after some delay replaced with a linoleum floor. Seeing the original wood floor as key to his business, the tenant sued for damages for breach of contract – a preliminary issue for decision being whether there was an implied duty on the landlord to pursue a claim with the insurance company. Knox J held that there was an implied duty on the landlord to protect the interests of the tenant – but did not specify whether this arose from an implied contractual term or as a proprietary obligation.

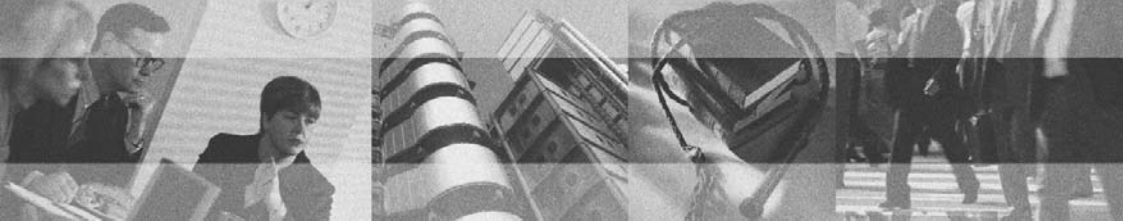
In argument, section 83 reared its head. Mr Neuberger for the landlord submitted that it was not possible for a term to be implied out of necessity because in the circumstances the tenant would have had rights in relation to the insurer under section 83. In reply, Mr Levy for the tenant submitted (in our view correctly) that section 83 did not grant the tenant the rights suggested in these circumstances as it did not operate until a claim had been made by the insured. Knox J although ultimately not accepting Mr Neuberger's argument did endorse *obiter* his characterisation of section 83 stating:

"The 1774 Act in my judgment does allow the person who has interest in the demised premises but is not the insured person to apply to the insurers before the insured makes a claim. In terms it authorises and requires the insurers to act upon the request of any person interested in or entitled unto the demised premises without specifying any time before which such request may not be made. It is no doubt obvious enough that there has to have been a policy of fire insurance and a fire before the 1774 Act operates but I see no requirement for the insured to have made a claim."

For the reasons described above, it is our view that this is incorrect. Nonetheless, the scene was now set for the first reported application of section 83 by a court since 1912.

In *Lonsdale*, the first defendant landlords were the freehold owners of a warehouse in Liverpool, which they let to the plaintiffs. In the lease, the landlords covenanted to insure the property and in case of destruction or damage to lay out any insurance monies payable in reinstating the

34 *Portavon*, supra, at p 166.

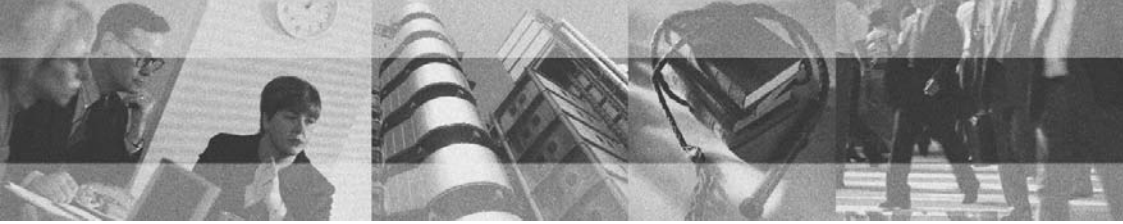


premises. The tenant was not a co-assured. Nine years after the start of the lease, the landlords contracted to sell the freehold, subject to the lease in favour of the tenant. However, before completion the warehouse was destroyed by fire. Despite this, completion proceeded and the full price of the freehold was paid in accordance with the terms of the contract without regard to the fire damage. A notice was served under section 83 on the second defendant insurers.

The insurers denied all liability alleging that as the landlords had been fully compensated for the injury to their freehold interest (through receipt of the purchase price), they had suffered no loss – and they were only entitled to be indemnified to the extent of the injury to that interest. The extent of the landlord's interest thus became the central issue in the proceedings. Jonathan Sumption QC, sitting as a Deputy High Court Judge, found that the insurance and reinstatement clauses gave the landlord an insurable interest for the reinstatement value of the property. The logic was that if the landlord is accountable for the proceeds to the owners of other interests (as he was here under the policy), then he will not be receiving more than an indemnity if the insurer pays the full amount for which the property was insured. Moreover, it was found the obligation owed to the tenant continued beyond the contract to sell the freehold. To this point, *Lonsdale* was a neat extension of the principles established by the House of Lords in *A. Tomlinson (Hauliers) Ltd v Hepburn*.[35]

However, from this point to the final decision there was in our view a leap of logic. Ultimately the insurer was found to be liable to the tenant for the full reinstatement cost of the premises. At no point, however, was the right of the tenant (as a third party) to the benefit of the insurance policy discussed explicitly. There was no suggestion that the landlord had brought a claim - although the tenant had sent a section 83 request to the insurer, and obviously later on brought the claim against both. It seems to us that the logic employed in *Lonsdale* allows a claim to be brought by the landlord against the insurer (as it confirms he has an insurable interest) and by the tenant against the landlord (for failure to reinstate). The usual rules of privity should prevent the tenant receiving a remedy direct from the insurer, unless an exception could be found. And in the context it can only be assumed that an exception was found through the use of section 83. As we have discussed, if this is the case, then *Lonsdale* is at odds with an interpretation of section 83 based on its original purpose. Section 83 grants to a third party a right to benefit (via reinstatement) from any insurance monies payable on a claim by the insured under the policy to the extent of his interest, but it does not grant that party a general right to benefit from the policy as if he were an insured.

35 [1966] AC 451.



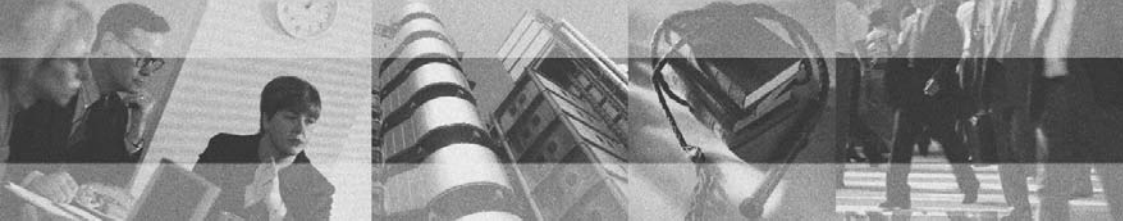
The geographical scope of section 83

The long title of the 1774 Act states that it is "An Act for the further and better Regulation of Buildings and Party-walls; and for the more effectually preventing Mischiefs by Fire within the cities of London and Westminster, and the liberties thereof, and the other Parishes, Precincts, and Places, within the Weekly Bills of Mortality, the Parishes of Saint Mary-le-Bon, Paddington, Saint Pancras, and Saint Luke at Chelsea, in the County of Middlesex…". Section 1 of the Act provided that "it may tend to the Safety of the Inhabitants and present Inconveniences to Builders, and Workmen employed in Buildings, within the said Cities, Liberties, Parishes, Precincts, and Places, if the Regulation contained in the said Act were repealed, and other Regulations Provisions respecting such Building were established by law…". This section appeared to be something of a preamble to the Act; this was the view taken by Lord Westbury in *Ex parte Gorely*.[36] The long title and the preamble suggest that the Act is limited in its geographical scope to the places explicitly mentioned, those being certain parts of London.

However, this view is not shared by the case law. Despite the small number of cases on the provision, there is clear authority that section 83 applies outside of London. This was the view taken by the Lord Chancellor, Lord Westbury, in *Ex parte Gorely* where he held that the Act applied in relation to property in Dover. He put forward this view on the basis that, whereas the previous section of the Act contained "enactments, carefully worded, to extend only to the districts within the limits defined in the preamble",[37] section 83 "is heralded by a particular preamble of its own, which recites a general and universal evil as being the occasion of its being passed".[38] As this section was designed to prevent a general evil, an evil capable of occurring outside of London, the Lord Chancellor held that the section therefore must be capable of application outside of London. Further supporting his argument was the fact that the words "within the limits aforesaid", "were evidently omitted, and omitted designedly".[39] However, these words were not present in many of the preceding sections, sections which, despite that, were almost certainly limited to London in their application.

The Lord Chancellor's former view is the stronger one. The "mischief" in section 83 is just as harmful outside London as it is within it. This purposive interpretation lends credence to the argument that section 83 should apply outside of London. However, if this is true and section 83 is to apply more widely simply because it is capable of such an application, then it is hard to see why the same should not have been true of the rest of the Act (which did not apply outside of London) before much of it was repealed. In addition, a purposive interpretation may actually lead to the view that the Act does not apply outside of London. As stated above, the purpose of the 1774 Act and its predecessors was, in response to the Great Fire of London, to try to reduce the risk of a fire starting and having a similarly widespread effect. This suggests that the Act was designed to apply within London as this is where the "mischief" was most dangerous.

36 4 De G J & S 477.
37 Ibid at 480.
38 Ibid at 480-481.
39 Ibid at 481.



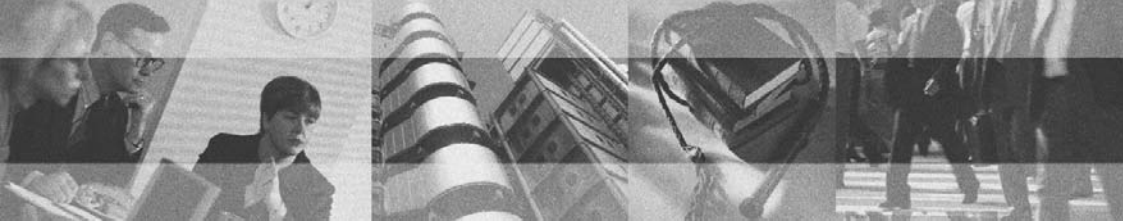
Indeed, if section 83 was intended to apply outside the limits laid down earlier in the Act, it is not apparent why this was not specifically legislated. Section 84,[40] a section trying to prevent mischief as equally co-extensive as that in section 83, provided that it was to apply "within the limits aforesaid or within the Kingdom of Great Britain". There would have been no need to insert such wording if section 84 would have been capable of wider application simply because of the nature of the harm it was trying to prevent.

Since *Ex parte Gorely*, the House of Lords and the Privy Council have both considered the scope of section 83. In *Society Westminster Fire Office v Glasgow Provident Investment*,[41] the House of Lords had to consider whether section 83 extended to Scotland. Lord Watson opined that "if a question were to arise as to its applicability within the realm of England, beyond the Bills of Mortality, the decision in *Ex parte Gorely* would require to be carefully considered".[42] He went on to say "In my opinion the Act was not intended by the Legislature to have any application to Scotland. It was passed in order to amend previous legislation which had no reference to that country, and the whole tenor of its enactments, and the remedies which these provide, appear to me to indicate that they were not meant to be administered by Scottish Courts".[43] Clearly, *Ex parte Gorely* and *Society Westminster* cannot both be correct. Either section 83 is confined to London or it applies to the whole of Great Britain. Section 84 applies to Scotland despite the absence of reference to Scottish proceedings or remedies and therefore this is not a good enough reason for section 83 not to apply to Scotland. The better view is, as above, that section 83 is limited to London and that this is the reason why it does not apply to Scotland.

The Privy Council, in *Abel Lemon & Co Pty Ltd v Baylin Pty Ltd*,[44] considered the applicability of section 86 of the Act to Queensland.[45] In considering section 86, the Privy Council also considered section 83 and 84. Lord Keith, giving the sole judgment, noted that the correctness of *Ex parte Gorely* had been questioned by Lord Watson in *Westminster Fire Office* but stated that "it is now far too late to consider disturbing long standing decisions in favour of the general application, in England at least, of the three sections".[46] It has been seen that section 83 cannot apply generally, and yet only to England. It is equally clear that long standing interpretations of the law should not necessarily be considered correct due to the mere lapse of time.

Possibly the strongest argument in favour of the general applicability of section 83 was put forward by counsel in *Simpson v Scottish Union Insurance Company.*[47] The argument was that the corresponding clause (section 34) in the previous statute of 1772,[48] had contained the

40 Section 84 provided that servants who caused fires by their negligence were liable to pay £100 whatever the damage caused and however serious their negligence.
41 Ser IV Vol XV at p 89.
42 Ibid at p 94.
43 Ibid.
44 (1986) 60 ALJR 190.
45 The Australian Courts Act 1828 provided that all statutes in force within the realm of England at the time of the passing of the Act should be applied in the administration of justice in the courts of New South Wales (New South Wales, at the time, encompassed present-day Queensland).
46 (1986) 60 ALJR 190 at 191.
47 (1863) 1 H & M 618.
48 12 Geo 3 c 73.



words "within the limits aforesaid" which do not appear in section 83 of the 1774 Act. This was, it was suggested, a deliberate omission and showed that the limits present in other parts of the statute were not to extend to section 83. However, section 35 of the 1772 Act (the corresponding clause to section 84 of the 1774 Act) also contains the words "within the limits aforesaid". If it was sufficient, in order to ensure the general application of the provision, merely to omit these words, then this could have been done in section 84. This section of the 1774 Act, though, expressly included the words "within the limits aforesaid or within the Kingdom of Great Britain". As counsel in the *Simpson* case argued, such alterations are made "advisedly"[49] and as such it must have been thought necessary to include these words in order to make the section applicable more generally than just to London. The fact that these words were not included in section 83 lends further support to the view that section 83 was limited to London.

The Lord Chancellor's judgment in *Ex parte Gorely* remains the highest binding authority as to the application of section 83 outside of London (at least in England). However, for the reasons given above, we suggest that this judgment misapplied section 83 in applying the provision outside of the places specifically set out in the statute. The strongest arguments are in favour of section 83 being limited in its application to "the cities of London and Westminster, and the liberties thereof, and the other Parishes, Precincts, and Places, within the Weekly Bills of Mortality, the Parishes of Saint Mary-le-Bon, Paddington, Saint Pancras, and Saint Luke at Chelsea, in the County of Middlesex".

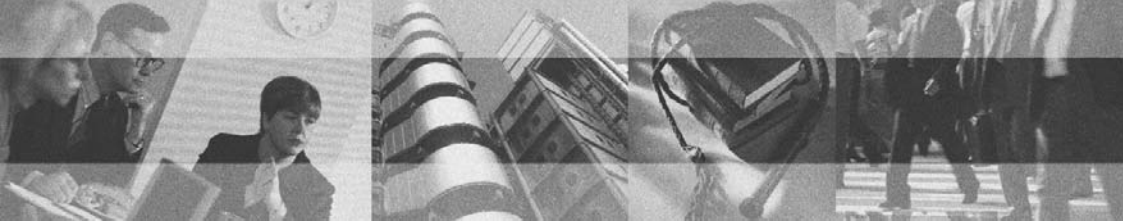
Conclusion

In interpreting section 83, the courts have conflated two apparent mischiefs. One is simply the prevention of arson by fraudsters, by allowing for two mechanisms by which the perpetrators of such nefarious behaviour can be prevented from receiving insurance monies prima facie due to them. It was envisaged that incidental to these mechanisms could be the receipt by an interested party of a certain share of any benefit which becomes due under the policy. The second seems to be in some ways a straightforward third party problem. It is common for those with an interest in a property not to be named as an insured on an insurance policy covering that property. Consequently they will often be in a position where they may wish to benefit from a policy to which they are not a party.

As we have argued, section 83 was never intended to cover the latter. It follows from the clearly apparent purpose of fraud prevention that section 83 could only be active where a claim has already been made by the policyholder. It does not grant a right to an interested party simply to make a claim under the policy.

However, it is our view that in any case at least the first of these mischiefs no longer has currency in the modern statutory landscape. Modern practices in conveyancing and in the drafting of leases allow tenants (those inevitably being the main focus in this context) to protect themselves with well-drafted clauses obliging the landlord to insure, pursue claims and apply any proceeds in reinstatement. The only situation where section 83 seems to become useful is when this link breaks down, and the tenant wishes to seek a remedy from the insurer. Such a situation can only

49 (28 Beav. 398; affirmed 2 De G F & J 223).



arise from a gap, in effect, in the drafting of the agreements. In 1774 there was a clear public interest in the law intervening where such gaps arose. Legislators were keen to close off any avenues through which an "ill-minded" person could benefit from setting fire to a building. The consequences of such acts could be devastating not just to "persons interested" in the relevant property, but to a whole city. In the 21st century it is more appropriate for the consequences of leaving such gaps to fall at the feet of the parties.

However, the second mischief raises a policy question: should interested third parties be able to make claims against an insurance policy where the insured has suffered no loss, or is unable or disinclined to make a claim for any other reason? Perhaps, and this is a matter which the Law Commission may well examine. But to use section 83 to cover this gap is in our minds reviving a dead letter which should remain dead.