

[¶61-103] **BARROORA PTY LIMITED v PROVINCIAL INSURANCE (AUSTRALIA) LIMITED**

New South Wales Supreme Court, Commercial Division

Judgment delivered 4 February 1992

Extract of judgment below

Insurance — Privity of contract — Insurable interest — Whether chargee a party to the contract of insurance — Whether chargee could enforce contract at common law if not a party to it — Application of High Court decision in Trident v McNiece — Extent of exception to old rules of privity of contract — Whether sec 48 of Insurance Contracts Act applies — Whether chargee had insurable interest in property — Whether chargee entitled to indemnity if insured guilty of arson — Insurance Contracts Act 1984 (Cth), sec 3, 8, 20, 48 — Life Assurance Act 1774 (Imp).

The defendant insurer issued a combined insurance policy in favour of the first plaintiff (the insured) by which the insurer undertook to indemnify the insured against loss of or damage to certain property by fire. Certain of that property was destroyed by fire. The insurer declined the claim alleging that one or more of the principals of the insured were guilty of arson. The insured had given the second plaintiff (the chargee) a charge which was fixed as to certain assets and floating as to others.

This case was concerned with the preliminary issue of the rights of the chargee if arson was established against the insured.

The chargee submitted that it was one of the insured by reference to its having been named in the policy under the heading “extensions”. It also submitted that it was entitled to enforce the contract at common law although not a party to it, based on the decision in Trident General Insurance Co Limited v McNiece Bros Proprietary Limited (1988) 165 CLR 107. The chargee also submitted that it was entitled to the benefit of sec 48 of the Insurance Contracts Act 1984 (Cth). The chargee submitted it had an insurable interest in the relevant property, but the insurer argued that there was no insurable interest in the stock over which it only had a floating charge.

Held: for the second plaintiff (the chargee).

(1) On construction of the contract, the chargee was not a party to the contract of insurance, because the policy definition of “the insured” refers to the person “so named in the Certificates” and the relevant Certificate names only the first plaintiff as the insured.

(2) An exception to the old rules of privity of contract has been recognised in Trident v McNiece. Its boundaries are not yet defined. The considerations which led to their Honours holding that there was an exception to the old rules which should be recognised seem to be equally applicable to contracts of property insurance as liability insurance.

(3) With particular reference to the criteria mentioned by Mason CJ and Wilson J in *Trident v McNiece*, it would be unjust not to hold that the chargee was entitled to enforce the contract since the insured sought to have the chargee "held covered" and the insurer, viewing its conduct objectively, agreed to that request. It follows that this case falls within the exception to the old rules which the High Court recognised.

(4) For the reasons given above, the reference to the chargee in the Certificate of Insurance is a reference to it as a person to whom the insurance cover provided by the contract extended, and therefore is entitled to the benefit of sec 48 of the Insurance Contracts Act.

(5) If the chargee had a floating charge over the stock then for the purposes of any contract of insurance to which the Insurance Contracts Act applies that is a sufficient interest.

(6) In theory the chargee is entitled to be indemnified to the extent that the value of its security in the stock was diminished by the fire.

(7) The effect on this case of the decision in *Trident v McNiece* is that the insurer is bound to indemnify both the insured and the chargee, and the insurer's liability to those two companies is a several liability. Therefore if the chargee was not implicated in the supposed arson of the insured it is entitled to be indemnified against its loss.

(8) The defence of arson as pleaded was not available against the chargee as alleged.

[Headnote by the CCH INSURANCE LAW EDITORS]

J Allsop (instructed by Phillips Fox) for the plaintiff. HD Sperling QC with J Stevenson (instructed by Leigh M Virtue and Collins) for the defendant.

Before: Brownie J.