

2. Beneficiaries of Insurance Contract

THIRD PARTY BENEFICIARIES (COMMON LAW)


• Must Qualified by Intention of the Parties

- Persons who are not parties to a liability or a property insurance contract may be able to recover despite common law privity rule in instances where the contract evidences an intention to benefit such persons: [Trident General Insurance v McNiece](#).
 - In [Trident](#), the third party was the principal contractor, while the policy extended the assured to the company, all subsidiary, associated and related companies, and all contractors. Accordingly, the insurer was liable to indemnify the third party while the latter was held liable for injuries sustained by a workman employed by it.
- N.B., the common law relied on the terms of the contract of insurance, i.e., the contract must evidence an intention to benefit such third party. Accordingly, the scope of common law is probably narrower than s 48.

THIRD PARTY BENEFICIARIES (ICA)

• Entitlements of a Third Party

○ General Rule: s 48(1)

- A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though it is not a party to the contract: s 48(1)
 - ◇ "Third party beneficiary", under a contract of insurance, means a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends: s 11(1).
 - ◆ N.B., the definition was introduced into s 11(1) in 2013 and the amendment commenced on 28 June 2014.
 - ◇  Accordingly, the section provides that every person who is specified or referred to in a contract of general insurance, whether by name or otherwise, as being entitled to insurance cover can recover loss in accordance with the policy. This is so notwithstanding that the person is not a party to the contract: s 48(1).
- s 48 makes no difference to a property insurance contract or a liability insurance contract: [Barroora v Provincial Insurance](#).
- Not a party to the contract
 - Whether or not a person is a party to the contract involves an objective construction of the contract: [Barroora v Provincial Insurance](#).
 - ◇ a In [Barroora](#), the third party (the Capital) had a charge over the property damaged by fire.
 - 6 The relevant policy contained a definition of 'the insured' which referred to the person or persons 'so named in the Certificate'.
 - 8 The relevant Certificate named the insured as the plaintiff (Barroora), and only the plaintiff.
 - r However, the Capital's name appeared under the heading 'Extensions' and therefore the policy was held to extend to it.
 - g N.B., this case was before 28 June 2014 and therefore its decision was based on [Trident](#).
 - If a person is defined as an "insured", it doesn't necessarily follow that the person is a party to the contract of insurance. Instead, it may only be a third party beneficiary: [ABN AMRO Bank NV v Bathurst Regional Council](#).
 - ◇ In [ABN AMRO](#), the fact that by definition, the subsidiary was an "Insured Entity" and therefore one of the "Insured" under the policy did not make it a party to the contract of insurance.
 - a Only the policyholder had completed a proposal form;
 - 6 The contract of insurance was between the insurer and the policyholder;
 - 8 The evidence did not support a conclusion that the policyholder had acted in the negotiation for, and entry into, the contract of insurance as agent of the subsidiary.
 - Directors' and Officers' Liability Insurance
 - ◇ Issue is whether directors covered by a Directors' and Officers' Liability Insurance policy are parties to the contract or third party beneficiaries entitled to claim under s 48.
 - ◇ In [CE Heath Casualty & General Insurance Ltd v Grey](#), the Court of Appeal gave effect to the expressed intention of the parties in finding that the directors were contracting parties.
 - ◇ In [Green v CGU Insurance](#), it was held that the directors were contracting parties, at the time of the policy was effected.
 - ◆ In this case, the court pointed following points is relevant in deciding whether the directors are contracting party:
 - a Whether the terms of the policy contains a definition of insured which supports a finding that it was intended that each director is an "insured" and contracting party at the time the Policy is effected.
 - 6 The extent of the directors' knowledge that insurance is being effected for their benefit;
 - 8 The extent of the directors' involvement in carrying out the arrangement under the package proposal;
 - r The commercial context of the insurance package; and
 - g The obligations under the policy.

2. Beneficiaries of Insurance Contract

THIRD PARTY BENEFICIARIES (ICA) (CONT.)

• Entitlements of a Third Party (Cont.)

○ In accordance with the contract

- The phrase 'in accordance with the contract' means a s 48 claimant must take the policy as it is found: [GMACA v RACQ Insurance](#).
 - ◇ a In [General Motors Acceptance Corporation Australia v RACQ](#), the policy was limited to 'damage to the vehicle caused by an accident'. Accident was defined as 'an event that is unexpected and unintended from your point of view'.
 - 6 The vehicle was deliberately destroyed by the insured or someone at her direction.
 - 8 The third party (General Motor) argued that the burning of the vehicle was an 'accident' because it was unexpected and unintended from the General Motor's point of view, even though it was expected and intended from the insured's point of view.
 - r This argument was rejected. In the present case, it was found neither the insured or any s 48 claimant had a right to recover "in accordance with the contract" under the terms of the relevant contract of insurance.
 - g s 48 does not operate to extend the scope of cover provided by the policy.

• Obligation of the Third Party

○ Same as the insured & Discharge the insured's liability

- Subject to the contract, the third party beneficiary has, in relation to his claim, the same obligation to the insurer as if he were the insured, and may discharge the insured's obligation in relation to the loss: s 48(2).
- The obligations must be "in relation to the third party beneficiary's claim", that is, limited to post-contractual obligations: [ABN AMRO](#).
- The obligations must be obligations that the third party beneficiary would have if the third party beneficiary were the insured.
- Section 48(2) is expressed to be subject to the contract of insurance.
- s 48(2) does not confine the source of the relevant obligation and it may be contract, equity or statute: [Waston Estate of v Conolly](#).
 - ◇ a In [Waston](#), Mr Watson was involved in many litigations related to his position as liquidator, he retained the defendant law firm to act for him. His estate (he died later) pleaded that the law firm was negligent in a number of respects.
 - 6 Mr Watson was a third party beneficiary to his professional indemnity insurance.
 - 8 He made a claim under the policy and Allianz compromised the claim.
 - r Clause 37 of the policy required the insured to subordinate his right to the insurer if payment had been made, for the insurer to recover contribution/indemnity or recovery.
 - g Issue was whether Mr Watson, as a third party beneficiary, was also under an obligation to repay to Allianz the amount obtained by way of recovery from the defendant law firm pursuant to the principle of subrogation? — Answer: YES

• Defences of the Insurer

○ Same defence as if the claim was made by the insured

- The insurer has the same defences as the insurer would have in an action by the insured, including, but not limited to, defences relating to the conduct of the insured (whether the conduct occurred before or after the contract was entered into): s 48(3).
- Section 48(3) was amended in accordance with a recommendation of the Review Panel to make it clear that an insurer, faced with a claim by a third party beneficiary, should be entitled to raise defences based on the conduct of the insured, regardless of the nature of the conduct or when the conduct occurred.
- Therefore, the amendment, which adds clarifying words to s 48(3), means that s 48 claims made pursuant to contract of insurance entered into or renewed after **28 June 2014** should not depend on the nature and timing of the conduct of the insured.

○ Fraudulent Non-disclosure by the Insured

- In (fraudulent) non-disclosure case, s 48(3) means an insurer can rely on the non-disclosure by an insured as against a s 48 claimant: [Commonwealth Bank of Australia v Baltica General Insurance](#); [CE Heath Casualty & General Insurance Ltd v Grey](#).
 - ◇ In [Baltica](#), Commonwealth bank was the third party beneficiary. Its claim under the policy was rejected and upheld by the Court because the insured failed to give notice in writing to the insurer in respect of the increased risk. — Gile J noted
 - a Prior to s 48 a third party had no rights of recovery at all.
 - 6 The High Court in [Advance \(NSW\) Insurance Agencies Pty Ltd v Matthews](#) held that an insurer is entitled to avoid a contract of insurance for fraudulent non-disclosure notwithstanding the existence of an innocent co-insured.
 - 8 Therefore, the case indicates in non-disclosure case, s 48(3) means an insurer has the same defences against a claim raised by a third party beneficiary as he would have in an action by the insured.

○ Breach of a term of the policy

- An insurer's ability to rely upon a breach of a policy term by the insured as against s 48 claimant will depend, inter alia: [CE Heath](#).
 - on the terms of the contract, and
 - whether the s 48 claimant is to be fixed with the consequences of the breach according to the contract.
- [GIO Australia Ltd v P Ward Civil Engineering](#) provides an example of where the terms of the contract denied cover to a s 48 claimant. Simpson J (NSW Sup Ct) found that the insurer was entitled to the benefit of a defence arising from the exclusion of cover when a motor vehicle was being driven by an unlicensed driver.

○ Fraud

- An insurer is not entitled to raise arson by an insured as a defence against a third-party claimant: [VL Credits v Switzerland GI](#).
 - ◇ In [VL Credits](#), the mortgagee was not a party to the contract of insurance and the arson was made by the lessee (the insured). The insurer refused to pay, arguing if it could prove arson by the insured, then that would provide it with a defence against the mortgagee. — The argument was rejected.

2. Beneficiaries of Insurance Contract

THIRD PARTY BENEFICIARIES (ICA) (CONT.)

- Defences of the Insurer (Cont.)
 - Fraud (Cont.)
 - The conclusion seems that if an insured and a s 48 claimant are covered under a contract of insurance severally (as opposed to jointly), then the insurer will not be able to rely upon the fraud of the insured against the innocent s 48 claimant: [CE Heath Casualty](#).
 - ◇ This is most commonly seen where the contract covers both mortgagee and mortgagor.
 - ◇ It is likely that an insurer's liability to each will be several and an innocent mortgagee will be able to recover under a contract of insurance either pursuant to s 48 or the common law.

DIRECT ACCESS CLAIMS

- What are Direct Access Claims?
 - Third parties' rights (NOT third party beneficiary): s 51(1)
 - If:
 - a) the insured or any third party beneficiary under a contract of liability insurance is liable in damages to another person; and
 - b) the contract provides insurance cover in respect of the liability; and
 - c) the insured or third party beneficiary has died or cannot, after reasonable inquiry, be found;then the other person may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the liability of the insured or third party beneficiary.
 - ◇ Third parties (not third party beneficiary) have the right to proceed directly against the insurer in all types of liability insurance, in the event that the insured or third party beneficiary has died or cannot be found after reasonable inquiry.
 - ◆ The insurer is liable to the extent that it would have been liable to the insured.
 - Cases prior to 28 June 2014
 - A direct access claim cannot be made in relation to the liability of a third party beneficiary who has cover under a contract of liability insurance and who has died or cannot after reasonable enquiry be found if the contract was not entered into or renewed after **28 June 2014**: [Ripper v Gatenby](#); [Aspioti v Leigh](#).
 - ◇ Prior to 28 June 2014, the noun "insured" in s 51 refers only to party to a contract of insurance, and does not include another person to whom the insurance cover provided by the contract extends.
 - (Insured) liable in damage (to another person)
 - s 51 will not be limited to those circumstances where there is a wrong committed by an insured (or third party beneficiary) against a third party. Instead, a third party may institute the proceedings with a view to establishing the insured's liability: [Vollstedt v Calibre](#).
 - ◇ a In [Vollstedt](#), the vendor's real estate agent and certain accountants were sued for making misrepresentation to the plaintiff concerning the purchase of a business.
 - 6 The real estate agent died before the proceedings were commenced.
 - 8 The accountant then sought to join HIH (the real estate agent's insurer) to the proceedings on the basis of s 51.
 - r Held the insurer was liable.
 - ◇ s 51(1)(a) does not require a third party to determine either by way of judgement or settlement, liability against the insured before instituting proceedings against the insurer: [Hancock Memorial Foundation v Fieldhouse \(No 5\)](#).
 - ◆ This is because the section is a remedial provision and should be given a purposive construction.
 - s 51 may be called in aid by a third party notwithstanding that the insurer has declined the insured's claim: [Vollstedt v Calibre](#).
 - ◇ In this case, the insurer declined the insured's claim (made by the executors of the insured) on the ground of failure of the insured to give notice of the claim made until 12 months after the principal proceeding had commenced.
 - Damage refers to loss suffered by a third party. It is not restricted to damages for tort or breach of contract: [Vollstedt v Calibre](#).
 - Insurance cover in respect of the liability
 - The third party cannot be placed in a better position than the insured. If the liability is not covered by the policy, the third party is not entitled to claim damages directly against the insurer: [Bayswater Car Rental Pty Ltd v Hannell](#).
 - ◇ a In [Bayswater](#), Bayswater rented a car to Perranton, who left the country and could not be found after the car accident.
 - 6 Under the rental agreement, Bayswater agreed to indemnify the loss arising from the rented car, on a court judgement against the renter for third party property damages.
 - 8 This was held to be an insurance, although the term contained a sentence 'not being an insurer'.
 - r However, the third party could not rely on s 51 in this case because the obligation of the owner to indemnify for the renter's liability only arose on the judgement of the court being obtained by the third party against the renter for an amount of damage.
 - g It is only at that stage that the owners liability arises.
 - e s 51 was not intended and could not alter the terms of the contract between the parties.

2. Beneficiaries of Insurance Contract

DIRECT ACCESS CLAIMS (CONT.)

• What are Direct Access Claims? (Cont.)

○ Insurance cover in respect of the liability (Cont.)

- Contractual term like “legally liable”, may not necessarily mean there must be a judgement against the insured as a precondition for application under s 51: [Webb v Estate of Darryl Arthur Herbert C/- The Public Trustee](#).
 - ◇ a In [Webb](#), the term of the policy read “the insurer will pay to or on behalf of the insured all sums which the insured shall become legally liable to pay for the compensation ... in respect of ... bodily injury...”.
 - 6 This insurer tried to rely on Bayswater to argue the expression “legally liable” refers to a legal liability established in the sense of being crystallised by judgement, arbitral award or agreement.
 - 8 This argument was rejected by the Court. They said so far as Bayswater is concerned, the terms of the policy there in question expressly provided indemnity only “on a court judgment”.
- Therefore, the effect of s 51 is to place the third party ‘in the shoes’ of the insured (or the third party beneficiary): [Webb](#).

○ Cannot be found — for company

- The words “cannot be found” in s 51(1)(b) extended to the deregistration of a corporate insured: [Norsworthy v SGIC](#).
- But recovery from the insurer of a deregistered company is covered by s 601AG of the [CA](#), rather than s 51 of the [ICA](#).
 - ◇ A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if: s 601AG.
 - a) the company had a liability to the person; and
 - b) the insurance contract covered that liability immediately before deregistration
 - Section 601AG creates a new cause of action and leave of the Court is not required.
 - s 601AG(a) and (b) are not pre-condition to commence the proceedings against the insurer: [Tzaidas v Child](#).
 - In this case, McCallum J rejected an argument that the term “liability” in s 601AG is confined to a liability that was ascertained, crystallised or determinate immediately before deregistration.
 - But both s 601AG(a) and (b) are conditions of recovery, i.e., to be recovered under s 601AG, the claimant must prove:
 - a whether the deregistered company had a liability to the claimant; and
 - 6 whether the scope of the insurance policy extended to the risk before the company was deregistered.
 - Further, for a deregistered company, need to query whether the claim against the company can be made before the deregistration? If the answer is YES, it is unlikely the insurer will be liable for the indemnity: [Norsworthy v SGIC](#).

• Consequence of the direct access claims

○ Discharge liability

- Payment by the insurer to the third party discharges its liability under the contract of insurance as well as the insured’s or the third party beneficiary’s liability to the third party to the extent of the payment: s 51(2).

• Relationship between s 51 & Other Legislation

○ Unaffected other rights

- Any other rights which the third party may have under some other legislations are unaffected by s 51: s 51(3).
 - ◇ What this means is that s 51 is not intended and cannot alter the terms of the contract between the parties providing they were not contracting out of the section.

• Other legislations providing third party access

○ Bankruptcy Act (1966) (Cth), s 117

○ Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 6.

- Some points of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946: [Chubb Insurance Company of Australia v Moore](#)
 - 8 s 6 is not limited to “occurrence” based liability policies, but also applies to “claims made” insurance.
 - r s 6 does not create a charge where the alleged conduct of the insured giving rise to the claim for damages or compensation happened before the policy came into effect.
 - g s 6 does not apply to claims brought in courts outside New South Wales, only those brought within it.
 - e Any charge on insurance moneys to meet the insured’s liability, is limited to moneys payable to meet that liability (whether pursuant to a judgment or settlement) and does not include defence costs payable by the insurers in accordance with the terms of the relevant D&O policies before judgment is entered or a settlement reached.