

INSURABLE INTEREST: IS THERE A RULE?

Introduction: No General Rule

1. Historically there has never been a general rule that requires an insured to possess an interest in the subject matter insured under an insurance policy. Instead different rules arose.

2. **Life Policies** are governed by the Life Assurance Act 1774. The 1774 Act is entitled:-

“An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances, except in cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured.”

3. The preamble states:-

“Whereas it has been found by experience that the making of insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming.”

4. Section 1 of the 1774 Act provides:-

“... no insurance shall be made by any person ... on the life or lives of any person, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gambling or wagering: and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.”

5. **Marine Policies** are governed by the Marine Insurance Act 1906 which codified the existing statutory provisions set out in the Marine Insurance Acts of 1746 and 1788.

6. Section 4 of the 1906 Act provides:-

“(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract-

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made “interest or no interest,” or “without further proof of interest than the policy itself,” or “without benefit of salvage to the insurer,” or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

7. Section 5 of the 1906 Act provides:-

“(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof.”

8. **Other policies**, including property and liability covers, are not governed by any specific statute but common law has adopted similar principles to those applied to marine insurance.

9. Section 18 of the Gaming Act renders unenforceable contracts made by way of gaming or wagering including purported contracts of insurance. It provides that:-

“All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void.”

10. Indemnity policies¹ will by their wording require the insured to have an insurable interest, either directly or indirectly, by proving that he has suffered a loss.

The Development of the different rules

11. There is one very obvious difference between the rules that apply to life and non-life policies that remains to this day.
 - (1) Section 6 of the Marine Insurance Act 1906 provides that the insured need not have an insurable interest at the time that the insurance is effected but he must have an insurable interest at the date of loss.
 - (2) The opposition result has been reached in relation to life policies, where the insurable interest must exist at the date of the taking out of the policy – Dalby v India and London Life-Assurance Co (1854) 15 CB 365.
12. There are also obvious differences between the wording of the 2 statutes.
 - (1) The 1774 Act contains no definition of insurable interest.
 - (2) The 1906 Act definition refers to standing in *“any legal or equitable relation to the adventure or to any insurable property at risk therein”*.
13. The question is whether the requirement of a legal or equitable relationship has led to a more stringent test in relation to non-life risks.

¹ The 1774 Act does not apply to indemnity policies – Siu Yin Kwan v Eastern Insurance [1994] 2 AC 199.

Feasey v Sun Life Assurance Company²

14. In Feasey it was argued that Steamship, a P&I Club, had no insurable interest in the lives of crew members who happened at any particular time to be working on rigs or vessels belonging to members of Steamship. It was accepted that Steamship could have taken out liability insurance to protect its liability to its members in respect of personal accident to such crew members but it was argued that Steamship could not take out life assurance pursuant to which it would receive fixed benefits in the event of death or bodily injury to such crew members.
15. At first instance Langley J recognised that there was a considerable body of high authority which determines that for an insured to have an insurable interest in property he must have a legal or equitable relation to it: Anderson v Morice (1875) LR 10 CP 609, Macaura v Northern Assurance Co Ltd [1925] AC 619, Deepak Fertilisers & Petrochemicals Ltd v Davy McKee (London) Ltd [1999] 1 AER (Comm) 69. However he found in favour of an insurable interest on 2 basis:-
- (1) He could see no compelling reason why a liability exposure should only be insured as such. The decisions to the contrary were in the context of property insurance and often related to insurance against the loss of a benefit and he could see no reason to import them into other types of insurance where the existence of a “legal or equitable right” is not a normally appropriate concept and the context is contingent liability and not the loss of benefit.
- (2) In any event he considered that Steamship’s contingent liability to indemnify members for the death or disablement of original persons could properly be described as a legal relationship.
16. Waller LJ adopted a different approach in the Court of Appeal. He said that the starting point in all cases appears to have been to identify the

² [2002] 2 AER (Comm) 492 and [2003] 2 AER (Comm) 587

subject of the insurance (which is usually defined by the wording of the policy); to analyse what insurable interest a person has in the subject of a the policy; and to consider whether the subject embraces that insurable interest. So:-

- (1) If the subject of the insurance is an item of property, where the insurance is to recover the value of that property, there must be a legal or equitable interest in the property in order to enable recovery: Anderson v Morice (1875) LR 10 CP 609, Macaura v Northern Assurance Co Ltd [1925] AC 619.
- (2) If the subject of the insurance is a particular life of a particular person, where the insurance is to recover a sum on the death of that person, the court has recognised an insurable interest where a pecuniary loss flowing from a legal obligation will or might be suffered on the death of that particular person: Halford v Kymer (1830) 10 B&C 724, Law v London Indisputable Life Policy Co (1855) 1 K&J 223, Harse v Pearl Life Assurance Co [1903] 2 KB 92.
- (3) There are then cases where even though the subject matter may appear to be a particular item of property, properly construed the policy extends beyond that item of property and embraces such insurable interest as the insured has: Wilson v Jones (1867) LR 2 Exch 139.
- (4) Finally there are policies in which the court has recognised interests which are not even strictly pecuniary: Griffiths v Fleming [1909] 1 KB 805, The Moonacre [1992] 2 Lloyd's Rep 501.

17. Waller LJ held:-

- (1) It was unattractive for a court to refuse to give effect to a commercial contract.³
- (2) The policy fell within the 1774 Act as it was a policy whose subject matter was lives. Whilst it was clear that Steamship were not wagering, that was not of itself enough to satisfy the Life Assurance Act 1774: it remained necessary to show that Steamship possessed an insurable interest.
- (3) It is from the terms of the policy that the subject of the insurance must be ascertained and from all the surrounding circumstances that the nature of the insured's insurable interest must be discovered. He said at paragraph [71]:

“... I would suggest that it is difficult to define insurable interest in words which will apply in all situations. The context and the terms of a policy with which the court is concerned will be all-important. The words used to define insurable interest in, for example, a property context, should not be slavishly followed in different contexts, and words used in a life insurance context where one identified life is the subject of the insurance may not be totally apposite where the subject is many lives and many events.”

- (4) There is no hard and fast rule that because the nature of an insurable interest relates to a liability to compensate for loss, that insurable interest could only be covered by a liability policy rather than a policy insuring property or life or indeed properties and lives.

³ Indeed it has been a continuing theme throughout the authorities for a long time that the Court should lean in favour of an insurable interest. In Stock v Inglis (1884) 12 QBD 564 at 571 Brett MR said:-

“In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer.”

- (5) The question of whether a policy embraces the insurable interest intended to be recovered is a question of construction. The subject or terms of the policy may be so specific as to force a court to hold that the policy has failed to cover the insurable interest but a court will be reluctant so to hold.
- (6) It is not a requirement of property insurance that the insured must have a “legal or equitable” interest in the property as those terms might normally be understood. It is sufficient for a sub-contractor to have a contract that related to the property and a potential liability for damage to the property to have an insurable interest in the property. The reference in section 5 of the 1906 Act to a person interested in a marine adventure standing “in a legal or equitable relation to the adventure” is a broad concept.
- (7) In a policy on life or lives the court should be searching for the same broad concept.
18. The Court of Appeal held (Ward LJ dissenting) that Steamship did have an insurable interest.

Conclusion

19. It would appear from the comments of Waller LJ in Feasey that there may be a single rule applicable to life and non-life policies, albeit that it is very difficult to define and will depend upon the terms of the policy and all the surrounding circumstances.⁴
20. However, given the continuing desire to see that insurers who receive premiums pursuant to commercial bargains pay on those bargains, and given the continued prohibition against gaming and wagering, there must be real doubt as to whether or not the rule has any place to play in the

⁴ Even the dissenting judge in the Court of Appeal, Ward LJ, thought that “*for the sake of clarity and consistency, insurable interest should bear as nearly as possible the same meaning for all categories of insurance.*” Indeed his dissenting judgment stemmed largely from importing the concept of legal and equitable obligation from the property cases into the realm of life policies.

modern world. Insurance business is no longer conducted in a coffee shop. Nowadays insurance policies are commercially negotiated contracts and with the development of the good faith obligations relating to representations and disclosures there seems little place for any rule relating to insurable interest. If an insurer wants only to compensate for an insured's actual loss he can write an indemnity policy: if he is prepared to write a contingency policy the duty of disclosure should ensure that he has all the information necessary to decide commercially whether he wants to underwrite the risk and if so at what premium.

21. Even if the concept of insurable interest is not to be abolished entirely it requires further consideration.
22. Macaura has not been followed in Canada, is not the law in the US and the law has been changed by statute in Australia. The only requirement in those jurisdictions is that the assured has a relation in fact to the subject matter of the insurance giving rise to an economic interest.
23. The 1774 Act has been repealed in Australia and New Zealand. We should consider doing the same.

(1) There seems little place in modern society for the Victorian restrictions that have been placed on those in whom we can have an insurable interest in the absence of some legal obligation or pecuniary interest. On the face of it the only kind of "family" relationship which gives rise to an insurable interest is that of husband and wife, but it seems wholly unacceptable today that, for example, cohabiting couples in an established relationship (whether heterosexual or homosexual) should not be permitted to insure each others' lives, and it comes as no surprise to read that insurance companies do, in fact, issue and honour policies in such cases.⁵

⁵ Clarke, Law of Insurance Contracts para 3-5.

(2) Further the requirement for an interest (and the valuation of that interest) only at the date of the policy leads potentially to bizarre results in the insuring of the lives of key employees who may have left the employment at the time of their death and in the insuring of debtors lives by creditors.⁶

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⁶ In certain Canadian provinces the consent of an employee is required for the continuation of his employer's insurance on his life after his contract of service has terminated.