HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

Matter No S281/2009

WALLABY GRIP LIMITED APPELLANT

AND

QBE INSURANCE (AUSTRALIA) LIMITED & ANOR RESPONDENTS

Matter No S284/2009

IRENE STEWART (AS LEGAL PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE ANGUS CLUGSTON STEWART) APPELLANT

AND

QBE INSURANCE (AUSTRALIA) LIMITED & ANOR RESPONDENTS

Wallaby Grip Limited v QBE Insurance (Australia) Limited
Stewart v QBE Insurance (Australia) Limited
[2010] HCA 9
30 March 2010
S281/2009 & S284/2009

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 April 2009 and in their place order that the appeal to that Court be dismissed with costs.*

3. *First respondent to pay the appellant's costs.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with D J Russell SC for the appellant in S281/2009 and the second respondent in S284/2009 (instructed by Middletons Lawyers)

D F Jackson QC with D R J Toomey for the second respondent in S281/2009 and the appellant in S284/2009 (instructed by Turner Freeman Lawyers)

A J Sullivan QC with G F Little SC and D T Miller for the first respondent in both matters (instructed by Moray & Agnew Solicitors)

CATCHWORDS

Wallaby Grip Limited v QBE Insurance (Australia) Limited
Stewart v QBE Insurance (Australia) Limited

Insurance – Workers' compensation – *Workers' Compensation Act* 1926 (NSW) ("Act") s 18(1) required employers to obtain insurance or indemnity policy from insurer in respect of liability for injury to any worker – Act stipulated minimum level of cover in respect of employer's liability independently of Act – General terms and conditions of policy referred to in Act and in Appendix to Workers' Compensation Regulations 1926 (NSW) ("Regulations") – Where insurance policy lost – Where no evidence as to level of indemnity in policy – Whether any limitation upon indemnity imposed by Act or policy – Whether insurer or insured carries burden of proving limitation upon indemnity.

Statutory construction – Interaction between Act and Regulations – Whether Regulations can be used to construe Act.

Workers' Compensation Act 1926 (NSW), ss 18(1), 18(3)(a), 18(5).
Workers' Compensation Regulations 1926 (NSW), Div I, reg 1.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. On 18 March 2008 Kearns J of the Dust Diseases Tribunal of New South Wales gave judgment against each of QBE Insurance (Australia) Limited ("QBE") and Wallaby Grip Limited ("Wallaby Grip") in the sum of $356,510 in favour of Mrs Irene Stewart in her capacity as the legal personal representative of the estate of her late husband, Angus Clugston Stewart. Mr Stewart had died in October 2007 from the effects of mesothelioma.

2 In proceedings commenced prior to his death, Mr Stewart alleged that he had contracted mesothelioma as a result of his exposure to asbestos dust and fibre during his employment with Pilkington Bros (Australia) Limited ("Pilkington") from about 1964 to 1967. Kearns J found that Mr Stewart had been exposed to a dangerous concentration of asbestos dust given off by asbestos products used by him in the course of his employment. The products had been supplied by Wallaby Grip[1]. His Honour's findings of negligence against Pilkington and Wallaby Grip are not in issue in these appeals.

3 At the time of Mr Stewart's employment it was a requirement of the *Workers' Compensation Act* 1926 (NSW) ("the Act") that an employer obtain a policy of insurance or indemnity from a licensed insurer in respect of the employer's liability at common law for any injury to a worker. Section 18(1) in Pt III ("Insurance") of the Act then provided:

> "Subject to subsection (1A) of this section, every employer shall obtain from an insurer licensed under this Act to carry on business in the State, a policy of insurance or indemnity for the full amount of his liability under this Act to all workers employed by him and for an amount of at least forty thousand dollars[2] in respect of his liability independently of this Act for any injury to any such worker and shall maintain such policy in force".

A failure to comply with the sub-section constituted an offence[3].

---

1 *Stewart v QBE Insurance (Australia) Ltd* (2008) 6 DDCR 135 at 137 [8]-[10].

2 Applying the *Decimal Currency Act* 1965 (NSW), s 4(2) to the sum of £20,000.

3 See *Workers' Compensation Act* 1926 (NSW), s 18(5).

4 Although the sub-section referred to "insurance or indemnity", insurance protection with respect to a liability to others is a form of indemnity insurance[4]. It will be observed that two kinds of indemnity are referred to in the sub-section. The first is for an employer's "liability under this Act". This indemnity is required to be complete. The liability which could arise under the Act was to pay compensation to a worker injured at the workplace[5] in the sums specified in the Act with respect to that person's incapacity for work[6]. Those provisions were contained in the 1926 Act. In 1953 the obligation to insure was extended to a second type of indemnity, an employer's liability "independently of this Act" for any injury to a worker[7]. This indemnity had to be for an amount "of at least three thousand pounds". The amount was later increased to "at least twenty thousand pounds"[8].

5 It was not in dispute in the Dust Diseases Tribunal that, during Mr Stewart's employment by Pilkington, Pilkington had had a policy of insurance or indemnity of the kind required by the Act. At issue in the proceedings before Kearns J was whether payment under the policy in question was limited to the statutory minimum of $40,000. The issue arose because the policy was not produced by QBE in response to a notice to produce. The general terms and conditions of the policy were referred to in provisions of the Act and contained in the statutory form of "Employer's Indemnity Policy", which was set out in an appendix to the regulations to the Act. However, no evidence was given by QBE as to what had been contained in the document as to the level of indemnity which had been agreed upon between Pilkington and its insurer Eagle Star Insurance Ltd ("Eagle Star") as applying to the policy. In the Further Amended Statement of Claim Mrs Stewart alleged the existence of a contract of insurance by which Pilkington was to be indemnified against its liability for damages arising independently of the Act. In its defence QBE admitted that Eagle Star was Pilkington's indemnity insurer at the relevant time and that it was responsible to

---

4 Clarke, *The Law of Insurance Contracts*, 6th ed (2009) at 501 [17-4A1], 502 [17-4A2].

5 *Workers' Compensation Act* 1926, s 7(1)(a).

6 See *Workers' Compensation Act* 1926, ss 9-11.

7 *Workers' Compensation (Amendment) Act* 1953 (NSW), s 6(1)(a)(i).

8 *Workers' Compensation (Amendment) Act* 1958 (NSW), s 2(d).

meet any liability of Eagle Star to indemnify Pilkington, but it did not admit that the policy extended beyond the statutory minimum.

6 In the course of Mrs Stewart's case Kearns J was requested to rule upon which party bore the onus of proving what the monetary limit, if any, of the indemnity was. His Honour did not consider the statutory requirement, that a policy for the minimum amount of $40,000 be obtained, to be influential in resolving this question. His Honour observed that[9]:

> "Not much can be drawn from it because it is well known that when the statutory minimum requirement of the policy was $40,000 and at other times policies were often underwritten for amounts in excess of that or for unlimited amounts. It seems to me therefore that it truly does come down to the question of onus."

7 His Honour expressed the view that an insurer ought to be in a position to produce some evidence as to the limit for which it is liable, or evidence as to whether policies tended to be underwritten for the statutory limit, for more than the limit or as unlimited[10]. In any event, his Honour concluded that at least an evidentiary onus lay upon QBE, because it was asserting a limit to its liability[11].

8 On appeal by QBE, a majority of the New South Wales Court of Appeal did not agree. Gyles AJA and Ipp JA (Brereton J dissenting) held that what was at issue was the amount of the cover. This was an essential term of the contract of insurance which, according to ordinary principles relating to proof, the party asserting the agreement and its terms was required to prove[12]. Gyles AJA pointed out that, in accepting it was Eagle Star's successor and responsible for its liabilities, QBE had not accepted that the policy of insurance was for unlimited

---

9 *Stewart v QBE Insurance (Australia) Ltd* (2008) 15 ANZ Insurance Cases ¶61-758 at 76,551 [4].

10 *Stewart v QBE Insurance (Australia) Ltd* (2008) 15 ANZ Insurance Cases ¶61-758 at 76,551-76,552 [11]-[12].

11 *Stewart v QBE Insurance (Australia) Ltd* (2008) 15 ANZ Insurance Cases ¶61-758 at 76,551-76,552 [11].

12 *QBE Insurance (Australia) Ltd v Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,461 [4], [7] per Ipp JA, 77,469 [48] per Gyles AJA.

cover[13]. In his Honour's view the only conclusion which could safely be drawn from the legislation at the relevant time was that "the policy must have contained provision for cover for an amount of at least $40,000"[14]. There was no onus on QBE to negative the possibility of unlimited cover; the ultimate onus was always carried by Mrs Stewart as plaintiff, his Honour held[15].

9 In submissions in these appeals, brought by Wallaby Grip and Mrs Stewart, QBE sought to give further support to that conclusion by reference to the regulations made under the Act and the terms they prescribed for every policy of indemnity insurance taken in compliance with the Act. One such term was as to the amount of the cover; another was as to how alterations to the policy were to be effected.

10 Regulation 1 of Div I of the regulations to the Act provided that "Every policy of insurance or indemnity shall contain only such provisions relating thereto as are contained in the form of policy in the Appendix hereto."[16] An insurer was liable to a penalty if it issued a policy otherwise than in the form provided[17].

11 The form of "Employer's Indemnity Policy" in the Appendix to Div I recited the requirement of s 18(1) that, so far as concerned an employer's liability to employees for injury independently of the Act, an employer was to obtain a policy of indemnity insurance "for an amount of at least forty thousand dollars". The insurer's obligation to indemnify was stated in the operative part of the policy in the following terms:

> "NOW THIS POLICY WITNESSETH that in consideration of the payment by the Employer to the Insurer of the abovementioned

---

13 *QBE Insurance (Australia) Ltd v Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,469 [49].

14 *QBE Insurance (Australia) Ltd v Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,469 [49].

15 *QBE Insurance (Australia) Ltd v Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,470 [50].

16 Workers' Compensation Regulations 1926 (NSW), Div I, reg 1(a).

17 Workers' Compensation Regulations, Div I, reg 1(b).

> Premium … IF … the Employer shall be liable to pay compensation under the Act to or in respect of any person who is or is deemed by the Act to be a worker of such Employer *or to pay any other amount not exceeding forty thousand dollars* in respect of his liability independently of the Act for any injury to any such person,
>
> THEN, and in every such case the Insurer will indemnify the Employer against all such sums for which the Employer shall be so liable". (emphasis added)

It may be observed that the amount of $40,000 was expressed as the maximum amount payable under the indemnity and that this is not what s 18(1) requires.

12 The form of policy further provided that the indemnity was made subject to observance by the employer of the conditions which were listed. One condition was that the policy could not be altered without the consent of the insurer and an endorsement of the alteration on the policy, the condition to which QBE referred in its submissions.

13 QBE's argument was that the regulations provided for a policy of indemnity insurance in mandatory terms, which fixed the limit payable at $40,000, and that it should be presumed that a policy was issued in these terms. As part of the statutory scheme, the policy was intended to provide cover up to the specified maximum amount unless the process of alteration and endorsement was followed. QBE conceded that a policy might be taken for a higher level of indemnity, but it contended that in such a case, s 18(3)(a) required that a policy first be issued in the prescribed form and then be subjected to the procedure for variation. QBE then contended that, applying principles relating to proof of contractual provisions, Mrs Stewart, as the party claiming a variation of the contract from its original form, would be required to prove that a higher level of indemnity had been agreed upon.

14 Relevant provisions and purposes of the Act do not support the scheme constructed by QBE. Central to the statutory scheme to which QBE referred was s 18(3)(a). The terms of reg 1 were said to reflect the intention of s 18(3)(a), which stated that:

> "Every policy of insurance or indemnity shall, in so far as it relates to any liability referred to in subsection one of this section, contain only such provisions as are prescribed"

although the paragraph went on to provide that a policy may also contain other provisions concerning the employer's liability at common law, other than for a worker's personal injury, and for the employer's liability under other statutes.

15 Other provisions in s 18(3)(a) assume importance to QBE's argument:

> "Every such policy shall provide that the insurer shall as well as the employer be directly liable to any worker insured under such policy and in the event of his death, to his dependants, to pay the compensation *or other amount* for which the employer is liable, and that the insurer shall be bound by and subject to any judgment, order, decision, or award given or made against the employer of such worker in respect of the injury for which such compensation or amount is payable.
>
> In this paragraph the expression '*other amount*' means an amount not exceeding the amount for which the employer has obtained a policy of insurance or indemnity in respect of his liability independently of this Act for any injury to any such worker." (emphasis added)

16 The principal purpose of these provisions was to create a liability in the insurer to an injured worker or the worker's dependants. Pursuant to the policy the insurer was obliged to pay them the compensation "or other amount" for which the employer was liable. The "other amount", as its definition made clear, was the amount to be paid by the insurer with respect to the employer's liability independently of the Act. It was an amount paid otherwise than for compensation under the Act. With respect to such liability, the obligation of the insurer was to pay to the worker or the dependants the amount for which the employer was liable under a judgment or other determination. However, the amount to be paid by the insurer was not to exceed the amount of indemnity which the employer had obtained by way of the policy.

17 Section 18(3)(a) assumes importance to the construction of the operative part of the policy appended to Div I of the regulations and therefore to the question of when, and under what conditions, an insurer's obligation arises, a matter dealt with later in these reasons. For present purposes it may be observed that s 18(3)(a), and in particular the definition of "other amount", recognised that the level of cover was a matter for an employer to determine. Consistently with s 18(1) it could be for any amount, so long as it exceeded the minimum set by

that sub-section, and of course the indemnity might not be subject to any limit, as Kearns J observed. The insertion of the amount of $40,000 in the policy could therefore have been intended only as an example of the amount of an indemnity agreed upon. The use, for that purpose, of the minimum amount is understandable, but it could not have been intended to prescribe it as the amount for which each policy must issue, nor could it have been intended to create the presumption for which QBE contends. Beyond the minimum, the amount for which a policy of indemnity insurance could be taken was at large.

18 A purpose of the Act, stated in its description, was to "provide for the compulsory insurance by employers against their liabilities in respect of injuries to workers". That purpose was for the benefit of workers. Section 18 gave effect to this purpose and ensured that workers had recourse to the indemnity given by the employer's insurer. The amount required by s 18(1) as the minimum level of indemnity, from time to time, may have been chosen by the legislature having regard to factors such as the range and size of businesses conducted by employers in New South Wales. But, consistent with the Act's general purpose, it did not impose any limit upon the indemnity to be obtained, leaving that to the decision of individual employers.

19 Given that the indemnity could be for any amount, it does not seem sensible to suggest that the Act required that a policy be first obtained for the minimum amount referred to in s 18(1) and then amended by endorsement. It is difficult to see what purpose, let alone a statutory purpose, would be served by requiring that a policy document be issued to each employer, regardless of the level of cover the employer required, and that it then be altered to reflect the true agreement reached with the insurer. It could not be said to be a step necessary to ensure the purposes of the Act were achieved. Section 18(5) was the only provision which provided for a check upon compliance with the Act. It required that an employer produce for inspection, on notice, "a policy of insurance or indemnity obtained by him and in force at a specified date". If a policy was not produced, it could be taken that the employer had failed to comply with s 18(1). Obviously the amount of the indemnity provided for could be ascertained if a policy was produced. But so long as the policy produced met or exceeded the minimum, the requirements of s 18 were satisfied.

20 It would hardly be surprising that employers may have obtained much higher levels of cover or even, as Kearns J observed, opted for a full indemnity. In submissions for Mrs Stewart on her appeal three examples were given of reported decisions in the period in question, in which awards of damages for

injuries to workers, substantially in excess of the statutory minimum, were made[18].

21 A basis for the statutory scheme for which QBE contends would have to be found in the provisions of the Act. No such scheme is discernible. The regulations and the words of the policy cannot be used to construe, and thereby to alter, provisions of the Act which created them[19]. Moreover, the requirement in s 18(3)(a), that a policy contain "only such provisions as are prescribed", can only refer to provisions which are required, permitted or necessitated by the Act, in accordance with the regulation-making power given[20]. The inclusion of a maximum amount for indemnity in all policies first obtained by employers was neither permitted nor required.

22 Regulation 1 and the policy, read conformably with s 18(1) and (3)(a), could not require, as a term of every contract of insurance contained within the policy, that the maximum amount payable under the indemnity was $40,000. QBE's argument that it can be assumed that the policy was issued in this form fails.

23 The amount which QBE was obliged to pay under the contract of insurance contained within the policy was not proved. The question is, which party had the burden of that proof and bears the consequences of the failure of proof? That question is resolved by reference to how the contract of insurance was intended to operate and, more particularly, to the circumstances in which, and the conditions under which, an insurer's obligation to indemnify arose. These are matters involving the proper construction of the contract and the nature of the insurance provided by it.

---

18 *Proctor v Shum* [1962] SR (NSW) 511; *Teubner v Humble* (1963) 108 CLR 491; [1963] HCA 11; *Thurston v Todd* (1966) 84 WN (Pt 1) (NSW) 231.

19 *The Great Fingall Consolidated Ltd v Sheehan* (1905) 3 CLR 176 at 184 per Griffith CJ; [1905] HCA 43; *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 625 per Mason J; [1985] HCA 38; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J; [1988] HCA 5; *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 112 [26]; [2008] HCA 38.

20 See *Workers' Compensation Act* 1926, s 66.

24 Gyles AJA considered that it was necessary for Mrs Stewart to prove "the amount of the cover" because it was "an essential part of the primary obligation to insure."[21] In what follows in his Honour's reasoning it is apparent that his Honour was not referring to a term which is essential in order to avoid uncertainty of agreement. Such a situation would not arise here in any event, since it was known that the amount to be paid under the indemnity was at least $40,000.

25 His Honour referred with approval to the judgment of Jordan CJ in *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association*[22], where a condition necessary to the accrual of liability of an insurer, a "condition precedent", was contrasted with one which creates a particular exception to the insurer's obligation. The insured[23] bears the onus of proving the fulfilment of the firstmentioned condition. It is well accepted that the insurer must prove that a loss falls within an exception.

26 Gyles AJA did not consider the general rule relating to proof of an exception to be apposite to this policy[24]. In his Honour's view:

> "Where the extent of cover is defined by a maximum amount it may be said that cover is limited to that amount but that is not to categorise that amount as an exception to, condition of or limitation to cover. It is an essential part of the primary obligation to insure."

27 Bailhache J in *Munro Brice & Co v War Risks Association Ltd*[25] referred to a condition of the kind spoken of by Jordan CJ in *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* as one which wholly qualified the insurer's promise. In such a case an insured plaintiff was

---

21 *QBE Insurance (Australia) Ltd v Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,469 [48].

22 (1942) 42 SR (NSW) 231 at 234.

23 In the balance of these reasons all persons claiming under a policy will be referred to as "the insured".

24 *QBE Insurance (Australia) Ltd v Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,469 [47]-[48].

25 [1918] 2 KB 78 at 88.

required to prove such facts as brought the claim within the promise and, in that sense, bore the onus of proof. The approach taken by Gyles AJA placed Mrs Stewart in that position. However, his Honour assumed that the "amount of the cover" was bound up with the insurer's obligation to indemnify. His Honour did not look to the terms of the insurer's promise in order to determine whether this was so. As the judgments in *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* and *Munro Brice & Co v War Risks Association Ltd* make plain, the matter of proof follows largely upon the construction of the terms of the contract of insurance and the insurer's promise contained within it.

28 In insurance contract law an insurer promises to pay money to the insured if the circumstances stated in the policy exist. The insurer's promise may be equated with the cover provided by the insurance contract[26]. The insured must prove such facts as are necessary to prove that the loss was covered by the contract[27], or as Bailhache J said in *Munro Brice & Co v War Risks Association Ltd*, the plaintiff must prove such facts as bring the claim within the terms of the insurer's promise[28].

29 Professor Malcolm Clarke in *The Law of Insurance Contracts*[29] refers to three elements as ordinarily present in the circumstances necessary to the performance of the insurer's promise. The first is the insured event. Much may turn upon how it is described. The other two elements are the subject matter, which may be a class of persons, and the cause of the loss, usually referred to as the risk. The contract of insurance in this case identifies the insured event as the liability of the employer for injury to a worker arising at common law; the subject matter is workers, of whom Mr Stewart was one; and the risk was injury to a worker. Each of these elements was established. The question then is whether there is any other circumstance necessary to be established by

---

26 Clarke, *The Law of Insurance Contracts*, 6th ed (2009) at 466 [16-1].

27 Clarke, *The Law of Insurance Contracts*, 6th ed (2009) at 476 [16-3A].

28 *Munro Brice & Co v War Risks Association Ltd* [1918] 2 KB 78 at 88. His Lordship said that proof was "prima facie"; this has been regarded as incorrect, since proof is on balance of probabilities: see Clarke, *The Law of Insurance Contracts*, 6th ed (2009) at 476 [16-3A]; however, his Lordship may, in context, have been speaking of a step towards proof.

29 6th ed (2009) at 466 [16-1].

Mrs Stewart before QBE could be said to be obliged to indemnify under the policy.

30 Indemnity insurance involves payment for the loss actually suffered by the insured[30]. It may be compared with other forms of insurance, where a value is given with respect to the subject matter of the policy and the insured recovers that amount. As Kitto, Taylor and Owen JJ explained in *British Traders' Insurance Co Ltd v Monson*[31], the agreement in the case of a valued policy is not as to the amount of the loss, but as to the value of the subject matter, and the assessment of the loss of the insured must proceed on the basis of that agreed valuation.

31 It is said that it is necessary for an insured under a contract of indemnity insurance to prove the extent or amount of the loss claimed[32], but this is because the indemnity concerns only actual loss. The purpose of the proof required is not to establish that the loss is within the cover of the contract of insurance; it is to establish that loss has occurred and to give it a value. In the circumstance where there is a limit placed upon the extent of the indemnity, proof of actual loss does not create "a condition precedent" to that obligation[33]. Where an indemnity is limited to payment of a specified, maximum sum, proof of actual loss will identify whether all or part of the loss is recoverable, but that is merely a practical consequence. It does not reflect a condition of the insurance contract.

32 The word "indemnity" implies payment for the loss suffered, which is to say the whole loss. Many contracts of indemnity insurance involve a full indemnity. Nevertheless something less than payment of the full amount may be provided for under an insurance contract. This may be achieved by placing a cap or ceiling on the amount payable under the indemnity[34], which then operates as a

---

30 *British Traders' Insurance Co Ltd v Monson* (1964) 111 CLR 86 at 92-93; [1964] HCA 24.

31 (1964) 111 CLR 86 at 93.

32 See Clarke, *The Law of Insurance Contracts*, 6th ed (2009) at 476 [16-3A].

33 To use the words of Jordan CJ in *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* (1942) 42 SR (NSW) 231 at 234.

34 *Colinvaux's Law of Insurance*, 8th ed (2006) at 9 [1-09].

limitation upon the amount recoverable[35]. As was explained by the Privy Council in *AMP Fire & General Insurance Co Ltd v Miltenburg*[36], with respect to the statutory form of policy here in question, but for such a limitation, under the terms of the policy the insurer would be obliged to pay the sum awarded by a judgment[37].

33 A consideration of the terms of the policy confirms the correctness of this approach. Read conformably with s 18(1) and (3)(a), the operative part of the policy provided that the indemnity given by the insurer attached to the liability of the employer. The indemnity therefore extended to payment of the amount for which the employer was liable, according to a judgment or other determination. There was no qualification upon the insurer's promise, as discussed in *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* or *Munro Brice & Co v War Risks Association Ltd*. A limitation could be placed upon the extent of that indemnity, so that the insurer was obliged to pay no more than a specified sum under the indemnity, but that did not prevent the obligation to indemnify from arising. The question is whether such a limitation was put in place. It is to that question that matters of proof are directed.

34 The approach taken by the majority in the Court of Appeal proceeded upon an assumption about the terms of the insurance. It foreclosed the prospect that the amount of the cover could only be expressed as a limitation upon the amount payable under the indemnity, when regard is had to the terms of the policy and the indemnity contained within it. Indeed both Ipp JA and Gyles AJA saw the question as not involving a limitation on the amount payable.

35 QBE did not raise an exception in its defence, as Gyles AJA observed, but it did seek to raise a limitation, albeit obliquely. The difference between the two is that an exception may prevent an insurer's liability from arising, whereas a limitation of the kind here in question operates after the obligation to indemnify has arisen and upon the amount payable pursuant to it. It limits the extent of the insurer's liability. What they have in common is the purpose of limiting an insurer's liability, where the circumstances necessary for it have otherwise been

---

35 *Halsbury's Laws of England*, 4th ed (2003 reissue), vol 25, par 668.

36 [1982] 1 NSWLR 393 at 397.

37 *AMP Fire & General Insurance Co Ltd v Miltenburg* [1982] 1 NSWLR 393 at 397.

shown to exist. In each case the insurer should bear the onus of proving the limitation.

36 In *The "Torenia"*[38] Hobhouse J observed that the "legal burden of proof arises from the principle: [h]e who alleges must prove" and that the "incidence of the legal burden of proof can therefore be tested by answering the question: [w]hat does each party need to allege?", by reference to the contract of insurance[39]. In the present case it was necessary for Mrs Stewart to establish that a contract of insurance under the Act was in existence at the relevant time and that Pilkington was liable to her husband for his injuries. The first was admitted, the second was established by evidence. It followed that the claim was within the terms of the cover provided and the insurer's obligation arose. QBE had to do more than decline to admit that Pilkington was entitled to an indemnity greater than the statutory minimum, a matter which, in any event, had not been raised in the Further Amended Statement of Claim. It was required to establish what limit, if any, had been placed upon its liability to indemnify. It did not do so.

37 This analysis follows upon the construction of the policy of insurance. Looking to the policy in its statutory setting, it may be observed that conditioning a worker's right to recovery to proof of the level of indemnity agreed between the employer and the insurer does not accord with the general purposes of the Act. It creates an obstacle to recovery, when the statutory intention was to facilitate claims against insurers. The Act does not provide a means by which a worker is informed of the arrangements made by the employer. A worker may never have seen the policy.

38 The appeals should be allowed and QBE should pay the costs of the appellant in each appeal. The orders of the Court of Appeal should be set aside and it should be ordered instead that the appeal to that Court by QBE be dismissed with costs.

---

38 [1983] 2 Lloyd's Rep 210.

39 *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 215.