Business law assignment

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Scottish Amicable Heritable Securities V Northern Assurance Co 1883 11 R 2875 Sloans Dairies V Glasgow Corp 1977 Scot CS CSIH_24 Wight V Brown 1845 11D 4594 The concept of insurable interest and the alleged need under Scots law for the requirement of insurable interest by the insured in an insurance policy, have recently come under scrutiny. Why is this, and what should be done about the problems arising from the requirement for insurable interest? How realistic are the proposals for reform?

The question makes reference to issues with the concept of insurable interest, how we managed to get to this point, lessons to be learned, any solutions to the issues, although nothing seems new that there are issues with the concept of insurable interest, the definition Mitchell v Scottish Eagle Insurance Co Limited[1], and the call to resolve the various problems arising, discussed in the 2008 issues paper. A previous Joint Scoping Paper[2] issued in 2006 by the Law Commission (LC) and the Scottish Law Commission (SLC) was a return to the area of Insurance Contract Law, in response to a report from the BILA[3] in 2002.

The Scoping Paper predates the Gambling Act[4], but at the outset, highlights issues and prospect of reform on various components of Insurance Contracts, including insurable interest. In Scots Law, insurable interest is embedded into common law, but even at the early stage of reform, the Scoping Paper highlights issues with clarity regarding statute such as Marine Insurance Act[5] requiring that names are stated of interested parties in terms of " goods, merchandise, effects or other property" then the Marine Insurance Act[6] repealing the marine element causing additional confusion.

The LC and SLC January 2008 ' Issues Paper 4 Insurable Interest'[7] will be considered here, considering an invitation for response from interested parties and stake holders, although another paper was due 2009 and by the time of writing in 2011, no new papers have been tabled.

From statute that was passed in the eighteenth century, as relationships have changed, businesses have changed and evolved, the common law has moved on causing unclear situations and potentially unfair outcomes where for example a person makes a claim is not on a pecuniary interest founded on law, Griffiths V Flemming[8], such as cohabitee in a relationship where in law there is not sufficient natural affection, Wight V Brown[9], although could have been in place for twenty plus years, in essence will fail as there is not sufficient insurable interest.

There have been many instances of this type, also where there is error with a person believing they have insurable interest and investing everything they have in a business, for a court to rule against them as the claim and policy is in their own name and not the business name Cowan V Jeffrey

Associates[10], also Sloans Dairies V Glasgow Corp[11]. As well as this situation being potentially illegal, the question could be asked of the insurance company who would probably have known of the issue with the insurable interest.

The latest reason on the returning to the reform issue within the 2008 paper is the disputed impact that the Gambling Act[12] will have on insurable interest, allegedly overwriting the Gaming Act 1845 s. 18, which states that a contract is void if at the time of the contract, the insured has no interest in and no expectation of acquiring an interest in the subject matter. There are distinctions within the broad line of issues regarding both indemnity and non-indemnity insurance.

Using life insurance as an example of non indemnity insurance would also consider other ‘ value’ insurance such as personal accident and critical illness. In non-indemnity the list of issues include group insurance, key employee insurance or issues of natural affection, eg, a grandmother will not be able to obtain insurance on the life of her grandson. Equally if insurable interest is removed, this may open up ‘ wager’ type policies or taking out insurance on a stranger or more bizarrely celebrities.

In indemnity insurance, if insurable interest is removed, there may be odds with statute such as Marine Insurance and Life Assurance Acts. Within the debate is the argument whether insurable interest is required at all. Behind this debate is the definition of insurance which separates insurance contracts from those of gaming and the need to define due to the tax requirements being different for each.

From the case Prudential Insurance V IRC[13], Mr Justice Channell stated his definition of insurance: “ The remaining essential is… that the insurance must be against something. A contract which would otherwise be a mere wager may become an insurance by reason of the assured having an interest in the subject matter – that is to say, the uncertain event which is necessary to make the contract amount to an insurance must be an event which is prima facie adverse to the interest of the assured”

In Scottish Amicable Heritable Securities Association Ltd V Northern Assurance Co[14], Moncreiff LJ Clerk[15], agrees with Mr Justice Channell’s statement: ” the insurer undertakes, in consideration of the payment of an estimated equivalent beforehand, to make up to the assured any loss he may sustain by the occurrence of an uncertain contingency” The definition is referred to in relation to insurable interest, as some elieve that the definition is enough to prove interest as the adverse event must occur to the assured as in Inglis V Stock[16], and becoming a technical argument MacAura V Northern Assurance Co Ltd[17], also in reference to insurable interest in the leading English case of Feasey V Sun Life Assurance Co of Canada,[18]and concurred by MacGillivary on Insurance para 1-11 and previously by Bell, principles[19]. If the argument that the definition is enough to prove insurable interest, then the statutory requirements are no longer required and could be repealed[20]. Several proposals have been listed for comment.

Some of the proposals augment the existing arrangement in terms of natural affection and some attempt to make the law clearer in terms of statute. The Scots common law would remain unaffected by the existing statute in place such as the Life Assurance Act[21] as it already requires compliance that

there should be insurable interest. The problems include: Natural Affection: to increase the law and allow people to be able to insure each others lives, such as dependant children and parents, Cohabitees within a relationship, possibly extending this affection to fiance(e)’s and grandmother/ grandchild.

In Scots law there are provisions for a child to insure parents. Pecuniary Loss: to extend the law to be more available and further the current test recognised by law and where the reasonable expectation of pecuniary or economic loss on the death of the life assured. Consent: the proposal to allow an assured to consent to a person’s insurable interest and to agree a limited amount. Group Insurance: the proposal to clarify the situation regarding group insurance, with the possible provision of policies for wider families and employee groups. Life Assurance Act 1774 s. : to repeal the section as over technical. Insufficient insurable interest: Where there is error in the contract, to hold the contract void and not criminal. Non-life, non-indemnity policy: Is insurable interest still required? Indemnity Insurance: Would it suffice to depend on the indemnity principle, which would negate the need for statute, together with the repealing the criminal penalties imposed by the Marine Insurance (Gambling Policies) Act[22]? To abolish the Scots law indemnity insurance requirement of insurable interest, as the indemnity principle applies also.

One response was sent from Lloyd’s Market Association (LMA) giving an opinion on the above proposals. The opinion is from an underwriters viewpoint and does not cover a wide range of stake holders. In general the majority of proposals were agreed to with exception of consent, where they disagreed that a person could consent to another person having insurable

interest over them, particularly with the possible risk of coercion. To the question of ‘ is insurable interest still required? ’ the response was that the concept should stay rather than removing it and open up the possibility of ‘ morally hazardous behaviour’.

On the critical point of whether the Gambling Act[23] has removed insurable interest from non-indemnity insurance, bringing the law into conflict with Marine Act and Life Assurance Act, LMA are not convinced that there has been, or will be any difference whatsoever. They state that there has not been any influence on insurable interest from the Gambling Act[24] upon insurance contracts, also they will as a matter of course as the prudent insurer, always ensure when under writing a life contract that there is insurable interest to the assured party.

LMA also recommend that Gambling Act[25] is codified, which removes certain activities from the Act, essentially making the situation clearer and negating the need for statute reform. This clarification would not sit well with those advocating the removal of insurable interest. LMA commented that the LC and SLC suggestion to abolish any statutory reference to insurable interest in Scots law, would not be the wisest proposal in reference to the response on insurable interest above. Another response was sent from Association of Friendly Societies (AFS), a financial help organisation.

The AFS broadly supports the proposals, with the general view that insurable interest should be retained in the form of the indemnity principle, although did not agree that a legal requirement on the insurers to ‘ ensure and clarify’ insurable interest, would be helpful. There are differing views to the

proposals aired, and on a system that is predominantly founded on trust. The LC and the SLC were looking to root out all of the issues firstly in the Scoping Paper, then subsequently in the Issues Paper, although the consultation has been ongoing for a number of years.

Even with the perceived issues caused by the Gambling Act[26] in allegedly validating insurance contracts with no insurable interest in conflict with legislation, the LC's are three years into the second review. The outcome of the 2008 review is expected in 2011. The views of the respondents have generally been accepting of the extension of insurable interest for specific areas, such as natural affection, which would allow various members of a family to insure each other, although some insurable interest would still need to be shown dependant on the dependency.

Eg, why would a grandmother be required to insure a grandchild as a matter of course, and without good reason. There is also opinion that suggests why change anything at all, as there is a belief that the system is not broken and does not need reformed, from one underwriters view that the Gambling Act[27] has had no impact on the formation of insurance contracts. Following from this, the respondents are generally in agreement that the concept of insurable interest should not be removed for either types of insurance contract.

Feedback would also suggest that before an underwriter would satisfy themselves of the risk in a contract of insurance, they would inevitably ensure that sufficient insurable interest did indeed exist, and that in essence the concept will not die off despite any removal of statute. Factors could

come to play in the outcome of any review which all must come together in forming a coherent structure of insurance contract.

International factors could have influence on the outcome, such as decision or guidance from the European, or to move down the path of statutory reform as in Australia, although not without its own list of issues. The insurance companies seem non vexed of change, if the above responses are to be taken into account, as they have put forward an opinion on the Gambling Act[28], although would welcome some clarity on the position and the extension of the insurable interest concept to other interested parties through natural affection.

Presently under common law there is provision in indemnity and non-indemnity insurance contracts to have insurable interest, which they disagree should be removed, but at the same time indicating that they will still embrace the concept of insurable interest and the indemnity principle, when dealing with either commercial or consumer contracts.

Common law could suggest that through the Prudential V IRC[29] and Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co[30] , given that the definition of insurance will carry through the non requirement of the concept of insurable interest, although the insurance companies are unlikely to alter practice in any event and continue to insist on insurable interest. BIBLIOGRAPHY Books Black et al, Business Law in Scotland, 3rd ed Thomson/ Green C Ashton, Fundamentals of Scots Law, Thomson & Green (2003)

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