Dear Sir

Please accept as follows and the attached documents for consideration into the above mentioned enquiry.

My name is Giles Harden Jones, I have been in a protracted legal battle with Vero Insurance for the past 3 ½ years over a deeds of indemnity and warranty insurance.

In short, I was forced to sign a deed of indemnity, at the time Vero were the only supplier of Builders Warranty Insurance in 2001.

The legal advice I have received indicates that these deeds are in fact illegal, they did not have APRA approval and are not enforceable at Law. The advice is linked to Section 34 of the Insurance Act.

Given that in the period from 2001 (Post HIH Collapse) and mid 2002, just about every builder in NSW, WA, VIC, TAS and WA had to sign one, or provide additional security in form of a bank guarantee

During this long running battle, Vero have tried every legal tactic to block, stall, delay and generally prevent the matter from going to trial. In short they are simply trying to outspend me. We have had a without prejudice admission from Vero's legal team in Perth that they are aware that they are on thin ice, but they cannot afford to have an adverse precedent on the subject of reinsurance.

I urge the enquiry to carefully read the attached judgment from the WA District Court. This came about as part of a summary judgment appeal. Judge Eaton is clear in his findings that the issue of Deeds is questionable and a trial issue. The fact that Vero are fighting this tooth and nail to prevent this from going to court is also concerning.

I defer to you, please contact me if you have any further questions.

Yours Faithfully

JURISDICTION	:	DISTRICT COURT OF WESTERN AUSTRALIA IN CHAMBERS
LOCATION	:	PERTH
CITATION	:	VERO INSURANCE LTD -v- HARDEN-JONES & ANOR [2007] WADC 98
CORAM	:	EATON DCJ
HEARD	:	21 DECEMBER 2006
DELIVERED	:	19 JUNE 2007
FILE NO/S	:	CIV 2428 of 2005
BETWEEN	:	VERO INSURANCE LTD (ACN 005 297 807) Plaintiff (Respondent) AND JENNIFER ANNE HARDEN-JONES First Defendant (Appellant) GILES HARDEN HARDEN-JONES Second Defendant (Appellant)

ON APPEAL FROM:

For File No	:	CIV 2428 of 2005
Jurisdiction	:	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	:	DEPUTY REGISTRAR HARMAN
File No	:	CIV 2428 of 2005

Catchwords:

Appeal from Deputy Registrar - Plaintiff's summary judgment application - Whether an indemnity is re-insurance - Illegality

Legislation:

Builders Registration Act 1939
District Court Rules 2005
Home Building Contracts Act 1991
Insurance Act 1973
Rules of the Supreme Court 1971

Result:

Appeal allowed - Summary judgment application dismissed
Leave to amend granted

Representation:

Counsel:

Plaintiff (Respondent)	:	Mr P McGowan
First Defendant (Appellant)	:	Mr G R Hancy
Second Defendant (Appellant)	:	Mr G R Hancy

Solicitors:

Plaintiff (Respondent)	:	Lavan Legal
First Defendant (Appellant)	:	Clavey Legal
Second Defendant (Appellant)	:	Clavey Legal

Case(s) referred to in judgment(s):

Fancourt v Mercantile Credits Limited (1983) 154 CLR 87, 99
Jacob v Booth's Distillery Co (1901) 85 LT 262
Yango Pastoral Co Pty Ltd & Ors v First Chicago Australia Ltd [1978] 139 CLR 410

1 **EATON DCJ**: The appellants are husband and wife. The husband is a qualified architect and a registered builder. The wife is a director of "Harden-Jones Architects", a business conducted by her.

2 HBC Pty Ltd is a company incorporated in Western Australia, having been registered on 30 September 1999. Giles Harden-Jones was appointed director and secretary of that company at that date. The appellants were, at all material times, shareholders of that company, holding two fully paid shares.

3 HBC Pty Ltd carried on business as "Hamersley Building Company". It was registered as a builder under the provisions of the *Builder's Registration Act 1939* on 29 June 2001. That business was conducted from premises at Suite 6, 204 Hampden Road, Nedlands, Western Australia. The office of "Harden-Jones Architects" was next to that of "Hamersley Building Company". Indeed, the letterhead of the latter prescribes its email address as being "hjarchitect@hotmail.com."

4 The principle business of Hamersley Building Company was residential home building and extensions. That business was conducted by Giles Harden-Jones.

5 In mid 2001, Hamersley Building Company undertook a building project at 31 and 33 Clement Street, Swanbourne involving the construction of two residential units or houses. Under the provisions of the *Home Building Contracts Act 1991* a builder must not perform residential building work unless a policy of insurance that complies with Part 3A, Div 2 of that Act is in force in relation to that work. In about July 2001, Hamersley Building Company applied for insurance pursuant to that requirement from HIA Insurance Services Pty Ltd. In December 2001 the plaintiff/respondent, then known as Royal and Sun Alliance Insurance Australia Limited, issued policies of insurance in compliance with the Act to HBC Pty Ltd with respect to building work at 31 and 33 Clement Street, Swanbourne. Prior to the issue of the policies, the plaintiff/respondent (hereafter referred to as "Vero") required that Mr and Mrs Harden-Jones each enter into a general deed of indemnity whereby each would indemnify Vero against "all claims, payments, costs and any other expenses, losses and damages" that Vero might reasonably and properly sustain or incur that result from (a) the proposer's act or omission; and (b) a claim made by an insured under the terms of a policy. The proposer, in each case, was HBC Pty Ltd. On 6 November 2001 Mr and Mrs Harden-Jones each granted an indemnity in those terms and the policies, in due course, issued.

6 The work at Clement Street, Swanbourne on both lots was being undertaken for the owner, Abersea Pty Ltd. It seems that work was undertaken by HBC Pty Ltd at that project during the first part of 2002. It got into financial difficulties. On or about 5 September 2002 a creditor's meeting was called and later in that month a liquidator was appointed. The work at Clement Street had not been completed. On 9 October 2002 Abersea Pty Ltd claimed under the terms of the policies issued by Vero. The latter engaged L.A.C. Building Consultants Pty Ltd to provide a report on those properties. Both were inspected on 23 October 2002 and a first inspection report for each was issued to Vero on 4 November 2002. Those reports suggested that, in addition to work required to complete the projects, there was also defective work requiring rectification. It appears that Vero called for quotations for the completion of the work to be done and that, in due course, that work was undertaken by Jaxon Construction Pty Ltd. Vero paid that company $61,896.20 for 31 Clement Street and $58,044.70 for 33 Clements Street. By letter of 10 March 2005, Vero made claim against Mr and Mrs Harden-Jones under the provisions of the deeds of indemnity. The demands were not met.

7 On 28 October 2005, Vero filed a writ in this court against seeking to recover damages in the sum of $110,977.64 plus interest pursuant to the deed of indemnity in each case. Both defendants entered an appearance to the writ on 9 November 2005. On 3 February 2006, Vero amended its statement of claim. On 10 March 2006, the defendants filed a defence to the amended statement of claim admitting certain of the plaintiff's allegations, not admitting other matters and making a general denial as to their liability.

8 On 25 May 2006, Vero, by chamber summons, applied to strike out the defence, for leave to apply for summary judgment and for summary judgment. That application was heard by Deputy Registrar Harman on 7 August 2006. On 21 December 2006 he granted summary judgment to the plaintiff against each defendant.

9 On 4 January 2007, Mr and Mrs Harden-Jones filed a notice of appeal from that decision. On 24 April 2007 they applied by chamber summons for leave to amend their notice of appeal and their defence in terms of a minute of proposed amended defence filed on that day.

10 The appeal and application were heard by me on 21 May 2007. Both counsel for the appellants, Mr G R Hancy, and for the respondent, Mr P G McGowan, filed written submissions prior to the hearing of the appeal and spoke to those submissions before me.

11 Rule 15 of the *District Court Rules 2005* provides that if a party is dissatisfied with the decision of a registrar, the party may appeal to a Judge. That appeal is by way of a new hearing of the matter that was before the Registrar.

12 Order 14 of the *Rules of the Supreme Court 1971* provides that where a statement of claim has been served on a defendant and the defendant has entered an appearance, the plaintiff may, on the ground that the defendant has no defence to the claim included in the writ, apply to the court for judgment against the defendant.

13 On the hearing of such an application, unless the court dismisses the application, or the defendant satisfies the court with respect to the claim or part of the claim to which the application relates that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the plaintiff against the defendant on that claim or part thereof as may be just, having regard to the nature of the remedy or relief claimed. The power of a court to order summary judgment is required to be exercised "with exceptional caution" and should never be exercised unless it is clear that there is no real question to be tried (***Fancourt v Mercantile Credits Limited*** (1983) 154 CLR 87, 99). In the present case counsel for the appellants submits that there is a real question to be tried. Counsel for the respondent submits to the contrary.

14 The appellants rely upon the affidavits of Giles Harden-Jones sworn 2 August 2006 and 9 February 2007, upon the affidavit of Jennifer Harden-Jones sworn 2 August 2006 and upon the affidavit of Terrence Michael Clavey sworn 2 August 2006. The respondent relies upon the affidavits of Elon Charles Zlotnick sworn 23 May 2006 and Stefan Molcik sworn 18 May 2006.

Confusion as to the insured

15 The plaintiff's amended statement of claim asserts that by certificates of insurance numbered 137708 and 137709, the plaintiff issued two policies on 18 December 2001 for home building work carried out by HBC Pty Ltd at 31 and 33 Clement Street, Swanbourne for the owner of the properties, Abersea Pty Ltd, pursuant to a lump sum contract for home building work dated 12 December 2001. That allegation was not admitted by the defendants in their defence. The two certificates of insurance referred to in the plaintiff's pleading are annexed to the affidavit of Stefan Molcik sworn 18 May 2006. In annexing those certificates the deponent, who described himself as the southern regional manager of Vero, deposed

to his belief that on or about 18 December 2001 Vero entered into a home building insurance policy with HBC Pty Ltd as builder for the insurance of building works to be completed by that company for Abersea Pty Ltd at 31 and 33 Clement Street, Swanbourne. The relevant certificates certify that a policy of insurance complying with s 25D or s 25G of the *Home Building Contracts Act 1991* had been issued for the relevant work. Section 25G relates to owner builders. Section 25D relates to builders and provides that a policy of insurance complies with Div 2 of Part 3A of the Act in the case of residential building work to be performed by a builder on behalf of another person, other than a developer, under a residential building work contract, if it insures that person and that person's successors in title against the risk of losing an amount paid by way of deposit under the residential building work contract, up to a limit of $13,000 or such other limit as is prescribed; and the risk of loss, other than indirect, incidental or consequential loss, resulting from non-completion of the residential building work by reason of the insolvency or death of the builder or by reason of the fact that, after due search and enquiry, the builder cannot be found.

16 Quite clearly, the certificates of insurance referred to are erroneous on their face because they refer to, in each case, the registered builder as being HBC Pty Ltd and, in each case, the owner as being HBC Pty Ltd. Clearly, the owner was Abersea Pty Ltd and the insurance policy, I infer, was issued for the benefit of Abersea Pty Ltd in each case. The certificate of insurance, in each case, is wrong. I infer that the relevant policy of insurance said to comply with the provisions of s 25D of the *Home Building Contracts Act 1991* is not and that the owner or insured is Abersea Pty Ltd. In my view, this apparent error would not give rise to a triable issue.

Illegality

17 At the core of the appellants' contentions is the proposition that the deeds of indemnity required by Vero as a condition of providing home indemnity insurance are re-insurance. Counsel for the appellants points to s 21 of the *Insurance Act 1973* which provided at the time, *inter alia*, that a body corporate that carries on insurance business without being authorised under the Act to do so is guilty of an offence. Insurance business is defined by the Act to include the business of undertaking liability, by way of insurance (including re-insurance), in respect of any loss or damage, including liability to pay damages or compensation, contingent upon the happening of a specified event and includes any business incidental to insurance business as so defined. Section 34 of the

Act provided, *inter alia*, that a body corporate authorised under the Act to carry on insurance business shall have arrangements, being arrangements approved by the Australian Prudential Regulatory Authority (APRA) on application by the body corporate, for re-insurance of liabilities in respect of risks against which persons are, or are to be, insured by the body corporate in the course of its carrying on insurance business. The approval of APRA must be in writing. Counsel for the appellants contends that the requirement for a deed of indemnity in the case of the appellants amounts to re-insurance and that Vero has not treated the deeds of indemnity as re-insurance and had not provided any notification to APRA of its re-insurance arrangements.

18 Counsel for the respondent contends that the deeds of indemnity are not re-insurance but accepted before Deputy Registrar Harman and before me that, for the purposes of deciding this application, they should be regarded as such.

19 HBC Pty Ltd was in correspondence with HIA Insurance Services Pty Ltd in September 2001, having submitted certain information to the proposed insurer in support of its application for insurance. In mid-October 2001 HIA Insurance Services advised Mr Giles Harden-Jones that it would provide insurance for the project upon receipt of a general deed of indemnity executed by each of the appellants. By letter of 6 November 2001 HBC Pty Ltd returned both deeds, executed by the appellants, and inquired as to when the "facility" would be in place.

20 The deeds of indemnity were in identical terms, other than as to the indemnifier in each case. The proposer, in each case, was HBC Pty Ltd. By way of important information the deed recited that the insurers named in the policy would be entitled, by virtue of the deed, to seek compensation from the indemnifiers personally for any claim the insurers might pay under building indemnity policies issued for HBC Pty Ltd. Each deed recited that it was not a policy of insurance. It recited further that each indemnifier had requested that the insurer issue a policy for specific building work to be done by HBC Pty Ltd and that the insurer would not consider issuing such a policy unless the indemnity were provided.

21 The terms of the indemnity were as follows:

> "We indemnify you against all claims, payments, costs and any other expenses, losses and damages that you reasonably and properly sustain or incur that result from:

(a) the proposer's act or omission; and

(b) a claim made by an insured under the terms of a policy."

22 HIA Insurance Services Pty Ltd issued certificates of insurance dated 18 December 2001 for each of the Swanbourne projects, the registered builder being HBC Pty Ltd.

23 Do the deeds of indemnity in each case represent re-insurance? Re-insurance is the means by which a "primary" (or "direct") insurer reduces its exposure to a risk which it has covered by off-loading part (sometimes all) of that risk to a re-insurer. In many cases the primary insurer "cedes" to the re-insurer exactly the same types of insurance it has covered. (Kelly and Ball, Principles of Insurance Law, par [16.0010]). A contract of re-insurance is not an insurance against the perils insured under the primary policy. It is an insurance of the re-insured against its liability in respect of those perils (*op cit* par [16.0060]). Generally speaking, a contract of re-insurance is a contract of indemnity insurance (insuring the re-insured against liability) even when the primary insurance is itself a contract of non-indemnity insurance. (*op cit* par [16.0070]).

24 The appellants, by their minute of proposed amended defence to the amended statement of claim, seek to plead that each of the general deeds of indemnity was a contract of re-insurance by which the appellants were required to indemnify the respondent against the respondent's liability under a contract of insurance to an insured. Further, they seek to plead that the respondent was not at any time authorised by APRA to enter into re-insurance arrangements in the form of general deeds of indemnity with individuals who were not conventional re-insurers and that the respondent's conduct in entering into the general deeds of indemnity was a breach of or non-compliance with certain provisions of the *Insurance Act 1973* (Cth). Section 22 of that Act provided that a body corporate may apply to APRA for an authorisation to carry on insurance business. The term "insurance business" includes re-insurance. If APRA authorises an applicant, it must give written notice to the applicant and ensure that notice of the authorisation is published in the Commonwealth Gazette.

25 The appellants argue that, the general deeds of indemnity being contracts of re-insurance, they were illegal and that the respondent was committing an offence under the provisions of the Act by entering into those deeds.

26 The respondent submits that if the general deeds of indemnity were, indeed, contracts of re-insurance, which is disputed, then the failure to

obtain approval from APRA to engage in re-insurance does not render, as a matter of course, the deeds of indemnity unenforceable. The respondent contends that the purpose of the section creating the offence is to penalise the entity engaging in the conduct rather than to prohibit any particular contract of re-insurance. The Act, says the respondent, does not contain an express provision dealing with any consequential effect on a contract entered into between an insurer committing an offence and a third party. There is, therefore, no scope for the argument that a contract of insurance, so made, is illegal. In any event, the respondent contends, that the general deeds of indemnity are not contracts of re-insurance.

27 The respondent relies upon the authority of ***Yango Pastoral Co Pty Ltd & Ors v First Chicago Australia Ltd*** [1978] 139 CLR 410. In that case First Chicago Australia Ltd had sued Yango Pastoral Co Pty Ltd for a sum of money alleged to be due under a personal covenant contained in a mortgage. Other defendants were sued as guarantors. The Defendants pleaded that the plaintiff had entered into the transaction in question as part of an unauthorised banking business and that the mortgage, the loan and the guarantees were illegal and unenforceable. The case primarily turned upon the impact of s 8 of the *Banking Act 1959* which provided:

> "Subject to this Act, a body corporate shall not carry on any banking business in Australia unless the body corporate is in possession of an authority under the next succeeding section to carry on banking business."

The section then provided for a penalty of $10,000 per day during continuance of any contravention. It was, therefore, an offence against the Act to contravene the section and was punishable, upon conviction, by the imposition of the penalty referred to. In the High Court the appeal was dismissed with the Court holding that s 8 of the *Banking Act 1959 (C'th)* prohibits a body corporate from carrying on any banking business in Australia unless it is in possession of an authority to do so but that neither a mortgage nor guarantees given to a body corporate carrying on an authorised banking business to secure a loan made by it in the course of that business are void or unenforceable. Mason J (at p 420) observed that the Act contained no definition of the expression "banking business". He asked whether s 8 expressly prohibited the making of a contract of loan and decided that it did not. He then asked whether the section, by implication, prohibited the making of a contract of loan. In answer to that question he said (at 426):

> "Where, as here, a statute imposes a penalty for contravention of an express prohibition against carrying on a business without

> a licence or an authority and the business is carried on by entry into contracts, the question is whether the statute intends merely to penalise the person who contravenes the prohibition or whether it intends to go further and prohibit contracts the making of which constitute the carrying on of the business. In deciding this question the Court will take into account the scope and purpose of the statute and the consequences of the suggested implication with a view to ascertaining whether it would conduce to, or frustrate, the object of the statute."

He concluded, after some consideration, that the legislative intention expressed by the Act was that a contract made by a corporation carrying on banking business in breach of s 8 is not illegal and void, but rather that it is a valid contract and that the only penalty which the corporation suffers in consequence of its breach of the section is a liability to conviction and fine under the provisions of the section. Therefore, he said, the plaintiff in that case was able to enforce the mortgage against the defendants as the contract was not rendered void either expressly or impliedly by the Act and that considerations of public policy operated, in the circumstances, to make inapplicable the maxim *ex turpi causa non oritur actio*. In short, that principle represents the proposition that the Courts will not recognise a benefit accruing to a criminal from his crime.

28 As mentioned, the term "insurance business" is expressly defined to include re-insurance of any loss of damage, including liability to pay damages or compensation contingent on the happening of a specified event. Section 21 of the Act provided that a body corporate that carries on insurance business without being authorised under the Act to do so is guilty of an offence. A monetary penalty is applicable. It would therefore appear to be an offence for a general insurer to carry on insurance business for which it was not appropriately authorised under the Act. It is contended by the appellants that the general deeds of indemnity required of them as the condition of acceptance of the proposal by HBC Pty Ltd were acts of re-insurance and, there being no authorisation, they were illegal.

29 Under the heading "Contracts Illegal by Legislation" Seddon and Ellinghous in "Cheshire & Fifoot's Law of Contract" 8th Australian ed at par [18.8] begin with the following passage:

> "If making or performing a particular contract is expressly prohibited by legislation, the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless by enforceable. In the absence of such an indication, a contract the

> formation or performance of which is expressly prohibited by legislation is illegal – as where a statute expressly prohibits selling land or goods, contracting without a licence, or some other specified kind of contract.
>
> In deciding whether a contract falls within the ambit of express prohibition, the Court is entitled to look at the substance of the transaction. The Court will not enforce a contract which ostensibly conforms to statutory requirements but in fact attempts to evade them.
>
> Legislation which prohibits the formation or performance of contracts must be distinguished from legislation which precludes the enforcement of specified contracts by legal action or provides that they are illegal or void. Such contracts are not necessarily illegal, and the rules which apply to illegal contracts do not apply to them. The question whether such contracts are 'illegal' is, strictly speaking, otiose. Their operation depends upon what the statute, properly interpreted, prescribes."

30 The authors of that work then consider the case of ***Yango Pastoral Co Pty Ltd & Ors v First Chicago Australia Ltd.*** They said, in consideration of the judgments in that case (at p 844):

> "In interpreting the statute the consequences of implying a prohibition of contracts had to be taken into account. The business of banking involved contractual relations of great variety. Holding that all contracts made by First Chicago were illegal and therefore unenforceable would result in harm to innocent parties (for example, depositors, whose contracts with Yango would be unenforceable, and employees, whose contracts of employment would similarly be affected), while conferring an unmerited windfall to Yango and other borrowers. Moreover, the act provided for a sufficient sanction against breach of section 8 by imposing a substantial penalty."

It is clear from the foregoing and from the judgments in that case that public policy considerations played an important role.

31 In the matter before me it seems that the effect of the general deeds of indemnity was to bring about a circumstance whereby the insurer, in consideration of the payment of a premium by the proposer, granted a policy of insurance in circumstances where, in the event of a claim under that policy, the extent of the insurer's liability to make payment could be

recovered, under the general deeds of indemnity, from persons who were either a director of the proposer or associated with the business undertaken by the proposer. It would appear to me that the transaction involving the general deeds of indemnity can be characterised as re-insurance and that a court being asked to determine questions of illegality and enforceability might well conclude that the public policy considerations which existed in ***Yango Pastoral Co Pty Ltd & Ors v First Chicago Australia Ltd*** are not at all akin to the matter before me. The combination of the policy of insurance and the general deeds of indemnity would mean that the proposer would be required to pay to the insurer a premium for the issue of the policy and that persons associated with the proposer would be, in effect, the re-insurers of the general insurer insofar as its exposure to the risk insured is concerned.

32 An O 14 application is mounted on the ground that the defendants have no defence to the claim. If the defendants satisfy the Court on such an application that, with respect to the claim, there is an issue or question in dispute which ought to be tried, summary judgment should not be granted.

33 In his judgment on the application brought by the plaintiff for summary judgment Deputy Registrar Harman, having quoted s 34 of the former *Insurance Act 1973*, noted that the plaintiff was content, while not conceding that s 34 of the Act applied, that the application be determined on the basis that it did. He then expressed the opinion that there was nothing in the language of that section which would indicate an intention on the part of Parliament to do more than regulate the circumstances in which a party could engage with the particular market. He said:

> "It is patent that it does not purport to prohibit recovery under an instrument that had not been approved by the Commissioner."

Deputy Registrar Harman then considered whether the hearing of such an application was an appropriate context to assess parliamentary intention, accepting that in most instances such a question, on an application for summary judgment, would be one to be determined at trial. He then, however, said: "In this case the proposition that section 34 would prescribe recovery is clearly without any foundation." Having expressed that view he indicated that the issue of illegality and enforceability would not be an impediment to the granting of summary judgment.

34 The learned Deputy Registrar made no reference in his judgment to s 34A of the *Insurance Act 1973* at the relevant time. That section defined the phrase "re-insurance agreement" to mean an agreement:

> "(a) to which a body corporate authorised under this Act to carry on insurance business is a party; and
>
> (b) that sets out arrangements for the re-insurance of liabilities of the body corporate in respect of risks against which persons are, or are to be, insured by the body corporate in the course of its carrying on that business."

35 Section 34A(1) provides that it applies if a body corporate authorised under the Act to carry on insurance business enters into, or has at any time entered into, a re-insurance agreement. The section obliges a body corporate in those circumstances to comply with certain requirements and provides in sub-section (10) that a body corporate that intentionally or recklessly contravenes the section is guilty of an offence punishable upon conviction by a fine.

36 The appellants contend that the clear regulatory aim of the *Insurance Act 1973* was that an authorised insurer would have regular re-insurance arrangements with recognised and conventional re-insurers under conventional re-insurance contracts. Section 34A clearly evidences a concern to a monitor and approve arrangements for re-insurance and re-insurance agreements. It is concerned with a particular area of insurance business called re-insurance. It is an offence to carry on insurance business without being authorised under the Act to do so. A body corporate authorised to carry on insurance business is obliged to have arrangements, being arrangements approved by APRA on application by the body corporate, for re-insurance of liabilities. The regime imposed by s 34A is to be complied with and in the event that it is not, either intentionally or recklessly, an offence is committed. Given that s 34A deals specifically with re-insurance and stipulates a regulatory regime in that regard and given that a failure to comply with that regulatory regime is an offence punishable by a fine and that the carrying on of insurance business without authorisation to do so is itself an offence it does seem to me that it could well be argued that it is implicit in the legislation (as it was at the time) that re-insurance without authorisation and falling outside the regulatory regime stipulated is illegal and unenforceable. The public policy considerations are, as already mentioned, significantly different from those which governed the High Court's interpretation of the *Banking Act 1959* and, the impact of s 8 of

that Act in ***Yango Pastoral Co Pty Ltd & Ors v First Chicago Australia Ltd.***

37 With great respect I disagree with the conclusion reached by the learned Deputy Registrar. I do consider that there is, in the circumstances of this case, a triable issue as to the illegality and enforceability of the general deeds of indemnity required by the plaintiff of the defendants. That issue alone should have, in my view, been sufficient to defeat the plaintiff's application for summary judgment. The general rule is that the defendant should have unconditional leave to defend if there is a fair issue to be tried (***Jacob v Booth's Distillery*** Co (1901) 85 LT 262 at 263). I am inclined to the view that the general rule should in this case be applied. I will, however, hear counsel in that regard. I rule therefore that the appeal should be allowed and that the plaintiff's summary judgment application should be dismissed. The defendants will have leave to amend. I will hear counsel as to the terms of that leave.

I certify that this and the preceding....13..... pages comprise the reasons for judgement of his Honour Judge....EATON.....
.19/06/2007... Associate

Della Maddalena