Territory Insurance Office v Tropicus Orchids Flowers & Foliage Pty Ltd
[1999] NTCA 16

PARTIES:	TERRITORY INSURANCE OFFICE v TROPICUS ORCHIDS FLOWERS AND FOLIAGE PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP15 OF 1998 (9419828)
DELIVERED:	3 March 1999
HEARING DATES:	25 November 1998
JUDGMENT OF:	Martin CJ, Thomas and Bailey JJ

REPRESENTATION:

Counsel:

Appellant:	Quick
Respondent:	Campbell

Solicitors:

Appellant:	Ward Keller
Respondent:	Paul Clough

Judgment category classification:	C
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IN COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Territory Insurance Office v Tropicus Orchids Flowers & Foliage Pty Ltd
[1999] NTCA 16

No. AP 15 OF 1998 (9419828)

BETWEEN:

TERRITORY INSURANCE OFFICE
Appellant

AND:

TROPICUS ORCHIDS FLOWERS AND FOLIAGE PTY LTD
Respondent

CORAM: MARTIN CJ, THOMAS AND BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 March 1999)

THE COURT:

Background

[1] The respondent brought a claim against the appellant insurer for monies due and payable under the terms of a policy of insurance issued by the appellant in favour of the respondent, for monies due under an alleged agreement made between the parties to pay certain fees, for damages for breach of contract, and for interest.

[2] On 1 May 1998, the learned trial judge delivered very extensive reasons for judgment which, aside from dismissing the respondent's claim for monies due under the alleged agreement to pay certain fees, upheld the respondent's claims. Subsequently, on 25 June 1998, the learned trial judge ordered that there be judgment for the respondent in the sum of $618,298.23 made up as follows:

(a)	$428,123.11 – Amount of Indemnity under the policy		
(b)	(i)	Interest on $210,000	$100,986.30
	(ii)	Interest on $90,000	51,208.49
	(iii)	Interest pursuant to section 84 of the *Supreme Court Act*	$37,980.33
			$190,175.12

[3] The appellant was also ordered to pay the respondent's costs of the action.

[4] For present purposes, it is unnecessary to set out a detailed history of the insurance arrangements between the parties. In summary:-

(a) the respondent is a member of the Tropicus group of companies, which also included Tropicus Holdings Pty Ltd and Gardeners World Pty Ltd;

(b) the directors of the companies are Dennis Arthur Hearne and his mother, Lorna Hearne;

(c) Mr Dennis Hearne is an expert in the propagation and farming of orchid plants;

(d) in 1993, the appellant issued a "Commercial Business Insurance Package", a policy of insurance, designed broadly to cover business losses caused by a variety of risks in which the insured is described as Tropicus Holdings Pty Ltd, Gardeners World Pty Ltd and the respondent company;

(e) the period of insurance cover was 23 March 1993 to 23 March 1994;

(f) the policy provided cover, *inter alia*, for "malicious damage to property" and consequential losses caused by interruption or interference with the "Business" following upon damage by, *inter alia*, such malicious damage to property;

(g) on or about 3 June 1993, a person or persons unknown put a quantity of a herbicide known as "Solicam" into a drum of fertilizer known as "Bugmaster" used for the spraying of orchids and other plants forming the respondent's stock;

(h) the herbicide came to be sprayed onto the respondent's nursery plants and despite remedial measures undertaken by the respondent, the respondent's stock of some 30,000 orchids was destroyed over a period of about two years;

(i) the appellant insurer, after some initial hesitation, settled the malicious damage claim under the policy of insurance and a payment was made to the respondent in 1994;

(j) the respondent's action against the appellant under the policy was concerned only with the business interruption claim.

[5] The present appeal, insofar as it relates to the policy of insurance relates only to narrow questions of quantum. The appeal grounds are in the following terms:

> "The Appellant appeals from part of the Judgment of Mildren J given on the 25th day of June 1998 at Darwin namely the construction of the averaging provision of the Business Interruption Policy and the calculation of the indemnity and the assessment of damages and interest to the extent that they were based on that construction.
>
> GROUNDS
>
> 1. That the learned trial judge erred in law, alternatively erred in fact and law, in the construction of the Business Interruption Policy (exh. P19 – section 6 part 1), in finding that the period of time for which "Annual Income", as defined, was to be calculated for the purpose of averaging was 12 months and not 2 years. (Reasons pp 65-67).
>
> 2. That the learned trial judge erred in law and fact in the calculation of damages in accordance with *Hungerfords v Walker* (1990) 171 CLR 125, in that he calculated them from 1 October 1994 which was a date prior to all of the loss being suffered.
>
> 3.That the learned trial judge erred in law and fact in the calculation of interest in accordance with s84 *Supreme Court Act* (NT) in that he calculated it from 1 October 1994 which was a date prior to all of the loss being suffered."

[6] Appeal Ground Nos. 2 and 3 were added, by leave, on the day of the hearing of the appeal.

[7] The respondent has cross-appealed on the basis of the following grounds:

> "1. That the learned trial judge erred in law and in fact by failing to apply the *contra proferentum* rule where the words of the insurance policy were ambiguous.
>
> 2. That the learned trial judge erred in law and in fact by failing to find that the Respondent suffered damage caused by lost opportunity relating to the sale of plants, by, or the joint venture between the Respondent and Hearne's Floriculture Pty Ltd."

The Appeal

The Averaging Provision

[8] The main ground (appeal ground No. 1) concerns the effect of an averaging provision which formed part of the policy of insurance between the parties.

[9] The rationale and operation of an averaging clause has been described in Sutton's *Insurance Law in Australia* (2nd Ed. 1991) as follows (para. 15.115 at p.873):

> "An average clause is a stipulation which provides that, if *at the time of the loss* the sum for which the subject matter of the insurance is covered is less than its true value, the assured is deemed to be his own insurer for the difference in value and must bear a rateable proportion of the loss accordingly. A typical clause in a fire or householder's insurance policy provides that in the event of loss or damage to the property insured the insurer will be liable for no greater proportion of such loss or damage than the sum insured bears to the value of the property at the time of such loss or damage, but in no case will the insurer be liable for more than the sum insured. Thus, if a house is valued at $60,000 but is insured against fire for on $40,000 on the theory that with efficient fire services the dwelling

will never be totally destroyed by fire, and damage is subsequently caused by fire to the tune of $18,000, the assured is covered in respect of that loss in the rate of 40:60 or 2:3 and is deemed to be his own insurer for the balance. He will thus recover only $12,000 from the insurer, that is, two-thirds of the loss of $18,000 and will have to meet the remaining $6,000 out of his own pocket.

In the case of total loss the assured will obtain a full indemnity subject only to the maximum cover provided for in the policy, but in the case of a partial loss only, the average clause comes into its own and the assured's indemnity is computed on the following basis:

$$\frac{\text{Policy value}}{\text{Value of the subject matter}} \times \frac{\text{Amount of loss}}{1}\text{"}$$

[10] In the case of the policy of insurance between the appellant and the respondent, the business interruption section of the policy (section 6) provided cover for "Insured Gross Income" in the sum of $600,000 with a (maximum) specified indemnity period of 24 months.

[11] Section 6 of the policy, insofar as it is relevant for present purposes, provides:

"THIS SECTION INSURES

Part A

Consequential loss as a result of interruption of or interference with the Business described on the Schedule following upon Damage as defined below.

The amount payable as indemnity shall be:

Insured Gross Income

1.in respect of insured Gross income

(a) the amount by which the Insured Gross Income earned during the indemnity Period shall in consequence of the Damage fall short of the Standard income

(b) additional expenditure necessarily and reasonably incurred with out approval for the sole purpose of avoiding or diminishing the reduction in the Insured Gross Income of the Business which but for the expenditure would have resulted during the Indemnity Period in consequence of the Damage, but not exceeding the reduction in Insured Gross Income thereby avoided

Less any sum saved during the Indemnity Period in respect of any expenses of the Business payable out of Insured Gross Income which cease or are reduced in consequence of the Damage

Provided that if the Sum Insured on Insured Gross Income is less than the Annual Income, the amount payable shall be proportionally reduced.

Department Clause

Provided the Business be conducted in departments the independent trading results of which are ascertainable the provisions of Clauses (a) and (b) of item No. 1 shall apply separately to each department affected by Damage except that if the sum insured for any item is less than the aggregate of the sums produced by applying the Insured Gross Income for each department of the Business (whether affected by an event referred to in this Policy or not) to the relevant Annual Income thereof, the amount payable shall be proportionately reduced."

[12] Section 6 also provides a number of definitions of terms used in the above provisions, as follows:

"'Damage' – Loss or damage by any peril insured under sections 1,2 and 4 of this Policy or by explosion of any boiler or economiser on the Premises to property insured under this Policy for which liability is admitted.

> 'Insured Gross Income' – The money paid or payable to the Insured for goods sold, rent and/or for services rendered in the course of the Business less the items specified in the schedule as being uninsured.
>
> 'Standard Income' – The Insured Gross Income during that period corresponding with the Indemnity Period in the twelve months immediately before the date of the Damage, to which adjustment shall be made to reflect the trend in the Business and any other variables in order to arrive at the same result that could have been obtained had the Damage not occurred.
>
> 'Annual Income' – The Insured Gross Income during the twelve months immediately before the date of Damage, to which adjustment shall be made to reflect the trend in the Business and any other variables in order to arrive at the same result that would have been obtained had the Damage not occurred.
>
> 'Indemnity Period' – The period beginning with the occurrence of the Damage and ending not later than the number of months stated on the Schedule during which the results of the Business shall be affected in consequence of the Damage.
>
> 'Business' – Shall mean and be limited to that Business described in the Schedule carried on by the Insured at or from the Premises stated in the Schedule.
>
> 'Limit of Indemnity' - Our liability under this Policy in any one Period of Insurance shall not exceed the Sum insured stated against each item in the Schedule."

[13] It is not a matter of dispute between the parties that the respondent's business was conducted as a 'department' of the Tropicus group of companies. Similarly, it is not a matter of dispute that, as the learned trial judge found, the averaging provision appearing in the Department Clause (set out above) was applicable to the respondent. Further, neither party disputes the construction of the Department Clause adopted by the learned trial judge. The difference between the parties is a narrow one – albeit one

with substantial financial implications for the quantum of the respondent's claim.

[14] In applying the averaging provision in the Department Clause, the learned trial judge calculated the relevant "Annual Income" for a period of twelve months only. The appellant contends (appeal ground No.1) that "Annual Income" for the purpose of the policy of insurance here meant twenty four months, i.e. the period during which the respondent's business was interrupted in consequence of the malicious damage and (coincidentally) the maximum period for which the appellant insurer was bound to provide indemnity for losses as a result of that interruption.

[15] On behalf of the appellant, Mr Quick, correctly in our view, stressed that the purpose of an averaging provision is to require the insured to bear a rateable proportion of a partial loss if there is under insurance (i.e. where the sum for which the subject matter of the insurance is covered is less than its true value). It is apparent from the detailed and extensive reasons of the learned trial judge that the averaging provision in the Department Clause was poorly drafted to achieve this purpose. However, the appellant and the respondent do not challenge the construction adopted by His Honour in relation to the averaging provision or section 6 of the policy generally, except for the appellant's submission that the learned trial judge erred in finding that the period for which "Annual Income" was to be calculated for the purposes of averaging was twelve months rather than twenty-four months.

[16] In broad terms (and at the risk of over simplification) the learned trial judge found that the respondent was entitled to be paid (as indemnity under section 6 of the policy) the difference between what the business had "actually" earnt during the Indemnity Period (Insured Gross Income) and what the business could have obtained if the event giving rise to the loss ("the damage") had not occurred ("Standard Income"). Such a figure was required to be calculated for the length of the period during which the loss occurred – in the present case this being the maximum term of the Indemnity Period, i.e. twenty-four months. The policy also required this figure to be adjusted for additional or reduced expenditure arising as a consequence of the damage.

[17] There is no appeal against the finding of the learned trial judge that the Insured Gross Income (i.e. the "actual" income of the respondent) for the indemnity period (3 June 1993 to 2 June 1995) was $495,170. Similarly, there is no appeal against the findings of the learned trial judge that the Standard Income of the respondent was $1,290,000 and that $70,094 had been saved in respect of expenses in consequence of the damage. In accordance with the definition in clause 6 of the policy, the figure of $1,290,000 was calculated by reference to the trading figures of the respondent from 3 June 1992 to 2 June 1993, but adjusted and extrapolated to produce the gross income that could have been obtained over the period from 3 June 1993 to 2 June 1995. Accordingly, the learned trial judge calculated the respondent's loss as follows:

Standard Income of the Respondent	$1,290,000
Less Insure Gross Income of the Respondent	$495,000
	$794,830
Add Additional Expenditure	(Nil)
Less sums saved	$70,094
	$724,736

[18] The averaging provision of the Department Clause in section 6 requires this figure to be proportionately reduced "if the sum insured …. is less than the aggregate of the sums produced by applying the Insured Gross Income for each department of the Business (whether affected by an event referred to in this policy or not) to the relevant Annual Income thereof". The sum insured here was $600,000. The learned trial judge's approach to calculating "Annual Income" was to take the respondent's gross income during the twelve months immediately before the date of the damage and after adjusting that figure to reflect the trend in the business and other variables arrive at a figure for a prospective 12 months commencing from the date of the damage. His Honour arrived at a figure of $1,025,606. Accordingly, the averaging provision required a reduction in the respondent's claimed loss ($724,736) of 41.5% {[(1,025,606 – 600,000) x 100] ÷ 1,0265,606} resulting in an amount of $423,971 as the indemnity payable by the appellant.

[19] The appellant submitted that the approach of the learned trial judge was in error by calculating the respondent's Annual Income for the purpose of the averaging provision on the basis of twelve months rather than twenty-four months. Mr Quick stressed that the losses incurred by the respondent were spread over the two year indemnity period provided for by the policy of insurance. The appellant was 'at risk' for a two year period and accordingly, in Mr Quick's submission, any proportionate reduction required by the averaging provision must necessarily be calculated on a basis of two years. In short, the appellant had agreed to provide indemnity, subject to the averaging provision, for a loss of up to $600,000 extending over a period up to twenty four months. It follows that the calculation of any under insurance could only be measured against the respondent's prospective income for the full period for which the appellant was potentially liable to indemnify the respondent. It would also follow from Mr Quick's submissions that, set against the respondent's prospective income for the two years following the damage, the level of the respondent's under-insurance was not 41.5% but rather 70.75% {([(1,025,606 x 2) – 600,000]x100)÷(1,025,606x2)}.

[20] The logic of Mr Quick's submission on behalf of the appellant has validity, as indeed the learned trial judge recognised (AP1303):

> "If one returns to the purpose and object of an average clause, the potential period of the loss is twenty-four months, and therefore this would suggest that the sum insured, if under insurance is to be penalised, ought to reflect the possibility that there could be a loss

> extending for twenty four months regardless of whether the effects of the damage lasted six weeks or eighteen months."

[21] In effect, Mr Quick submitted that "Annual Income" (which it is to be noted is a term used and defined only for the purposes of the averaging provisions in section 6 of the policy) should be construed in a similar manner to "Standard Income", i.e. the respondent's gross income "during the period corresponding with the Indemnity Period …". Such an approach would result in the assessment of the insurer's risk (and premium) being made on the same basis as that applicable to the assessment of loss (and payment) or as Mr Quick put it in the course of submissions before this Court: the insured has the benefit of a two year indemnity period and so should have a corresponding burden of having the averaging provision apply to a similar two year period to establish the level of under insurance.

[22] In support of his submissions, Mr Quick referred to authorities which support the proposition that an insurance contract must be construed as a whole and in its commercial setting so as to fulfil its commercial purpose. For example, Kirby P in *MGICA Ltd. v United City Merchants (Australia) Ltd. & Anor* (1986) 4 ANZIC 60 – 729 at 74,349 held:

> "A number of rules provide guidance to the approach that should be taken to the construction of the policy term, with the benefit of the knowledge of the background negotiations which preceded it and upon which both parties relied. First, the policy, like any written contract must be read as a whole. Words and phrases in it must not be picked at random as they tend to favour this argument or that. The policy must be read in its commercial setting in such a way as to fulfil and not restrain its commercial purpose. Recourse to extrinsic evidence might be had in order that the Court should know the

> commercial purpose of the contract and its origin, context and the market in which the parties were operating. *Reardon Smith Line v Hansen-Tangen* (1976) 1 W.L.R. 989 at pp. 995-996. But the object of scrutinising the conduct of the parties is not to determine their private intention in a subjective way. It is to determine, according to an objective standard, what their presumed intention must be taken, in law, to have been *Codelfa Constructions Pty Ltd v State Rail Authority of N.S.W.* (1981-1982) 149 CLR 337 at 347."

[23] The same emphasis on interpreting an insurance contract within its commercial setting was repeated by Kirby P in *Transport Industries Insurance Co. Ltd. v NSW Medical Defence Union Ltd* (1986) 4 ANZIC 60-736. However, His Honour also cautioned that (at 74,410):

> "I do not for a moment consider.... that the words of the policy could be twisted and bent to suit some preconceived notion by the Court of a fair commercial outcome as between the parties. But where the words of a commercial document are ambiguous, it is appropriate to assign to them the meaning, which the Court is permitted to infer, that those words hold as derived from the presumed expectation of the parties that the contract would operate in a commercial and realistic way".

[24] For the respondent, Mr Campbell submitted, correctly in our view, that when interpreting terms found in an insurance contract the following general principles apply:

(a) the same rules of construction apply to policies of insurance as to other documents (*Australia Casualty Co. Ltd. v Federico* (1985-86) 160 CLR 513 at 520);

(b) full effect must be given to every provision contained in the policy;

(c) words and phrases should be given their ordinary natural meaning unless the surrounding circumstances or technical meanings militate against this (*Australian Broadcasting Commission v Australasian Performing Right Association Ltd.* (1972-73) 129 CLR 99 at 114-115).

[25] Mr Campbell submitted that the learned trial judge adopted these principles in arriving at his conclusion that Annual Income was to be calculated over a period of twelve months for the purpose of the averaging provision. In rejecting a submission by Mr Barr (who appeared for the appellant at trial but not before this court) that under the policy there was no difference between Standard Income and Annual Income, the learned trial judge (AP 1295) referred with approval to the following passage from Sutton's *Insurance Law in Australia*, 2nd Ed., (1981) The Law Book Company Ltd., at p 541:

> "It is no part of the province of the court to make a reasonable contract for the parties; its duty is merely to construe the agreement that has been made, however unreasonable the terms may be, and for it to interpolate qualifying words into the agreement would be to make a new contract for the parties which is impossible in law. Hence, if a policy is framed in language so precise, express and strong as to admit of one construction only, this construction must be adopted however unreasonable it is, since the court will not spell out a reasonable contract for the parties."

[26] In the High Court, this approach was adopted by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd.* (1973) 129 CLR 99 at 107 in the following terms:

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust."

[27] In our view, this passage is particularly relevant in the present context. The averaging provision here requires a comparison between the sum insured and Annual Income. The latter term is defined in unambiguous terms as the respondents gross income "during the twelve months immediately before the date of Damage" (subject to adjustments to reflect that trend in the Business and other variables to arrive at the same result that would have been obtained had the Damage not occurred). We consider that, despite the persuasive logic of the submissions made on behalf of the appellant, adoption of a twenty-four month period (rather than the twelve months referred to in the definition) for calculating Annual Income would be "to make a new contract for the parties". There is nothing in the definition of Annual Income which equates to the requirement in the definition of Standard Income to make calculations on the basis of a period corresponding to the length of the Indemnity Period. Similarly, there is nothing in the averaging provision itself which requires Annual Income to be assessed on such a basis.

[28] We recognise that the construction of the averaging provision adopted by the learned trial judge (and with which we agree) is capable of producing inconsistent outcomes. The present case favours the respondent insured, since the proportionate reduction of the indemnity is fixed by reference to a single year of income while the appellant insurer carries the risk of indemnifying the insured for a period of two years. A similarly unreasonable result in the **insurer's** favour would flow from a policy of insurance in the present terms which set an indemnity period of less than 12 months. Notwithstanding the harshness of the outcome for the appellant insurer, we are of the view that the absence of any ambiguity in the definition of Annual Income and the use to which that term is put in the averaging provision necessarily leads to the conclusion which the learned trial judge considered that he was "driven to" (AP 1303) by the terms of the policy.

The Cross-Appeal

Contra Preferentum Rule

[29] In view of our conclusion that there is no ambiguity in either the approach to be adopted for calculation of Annual Income, or the construction of the averaging provision generally, it is convenient at this point to deal with the first ground of the respondent's cross appeal. That ground of appeal seeks to invoke the *contra proferentum* rule in the respondent's favour. The rule, requiring an insurance policy to be strictly construed against the party

responsible for its drafting, arises for consideration only where there is real ambiguity in the construction of the policy (*Carr v Guardian Assurance Co. Ltd and Cracknell and Crimp* [1928] NZLR 108 at 112). The rule is only used as a matter of last resort (*The Western Australian Bank v The Royal Insurance Co* (1908) 5 CLR 533; *MGICA Ltd v United City Merchants (Australia) Ltd (supra)* at 60-729).

[30] In view of our conclusion that there is no genuine ambiguity as to the interpretation and application of the averaging provision in section 6 of the policy, there is no scope for operation of the *contra proferentum* rule.

The Appeal

Date from which interest to run

[31] Appeal ground Nos. 2 and 3 are concerned with the date from which the learned trial judge ordered that interest be calculated for the purpose of section 84 of the *Supreme Court Act* and, with respect to damages for the loss of the use of money, in accordance with *Hungerfords v Walker* (supra). The learned trial judge held that the appellant was in breach of an implied term of the policy of insurance to pay the indemnity due under section 6 of the policy within a reasonable time. His Honour considered that, having regard to the available information known to the appellant and allowing time to settle the claim, a reasonable time within which the indemnity should have been paid was by 30 September 1994. Accordingly, His Honour

ordered that interest and damages for the loss of the use of money should run from 1 October 1994.

[32] For the appellant, Mr Quick submitted that the insurer was liable to pay the indemnity for a period of two years from the date of the event giving rise to the respondent's claim under the policy. That event occurred on 3 June 1993 and accordingly losses were sustained over the next two years, i.e. from 3 June 1993 to 3 June 1995. Mr Quick submitted that since the indemnity period had not expired as at 1 October 1994 (and in consequence not all the insured loss had been sustained by the respondent) the Learned trial judge was in error in allowing interest and damages to run from 1 October 1994 without some adjustment to eliminate interest for moneys due in respect of future losses (i.e. those occurring after 1 October 1994) and to recognise the fact the appellant could not be said to have lost the use of any moneys before losses were incurred by the respondent.

[33] In our view, the seemingly attractive logic of Mr Quick's submissions are premised on a false assumption, i.e. that the appellant was liable to pay the indemnity under section 6 of the policy only at the expiration of the indemnity period. There is no appeal against the finding of the learned trial judge that the appellant was in breach of an implied term to pay the indemnity within a reasonable time. Similarly, there is no appeal against the finding of the learned trial judge that the appellant breached this implied term on 1 October 1994. In the circumstances, it follows that the respondent is entitled to interest pursuant to section 84 of the *Supreme Court Act* and

damages on the basis of *Hungerfords v Walker* (supra), from that date. The fact that the sum which the learned trial judge found should have been paid by 1 October 1994 is in part referrable to losses which would have occurred after that date is simply not relevant once it is accepted that the appellant was entitled to payment by no later than 1 October 1994.

The Cross-Appeal

Joint venture and lost opportunity

[34] The final matter which needs to be addressed is ground no. 2 in the respondent's cross appeal. Mr Campbell submitted that the learned trial judge erred in failing to find that the respondent suffered damage caused by lost opportunity relating to a sale of plants by, or a joint venture between, the respondent and Hearne's Floraculture Pty Ltd. For present purposes, it is unnecessary to record the details of the joint venture (or more accurately proposed joint venture) which entailed the establishment of Hearne's Floraculture Pty Ltd of which 60% of the share capital would be held by the respondent.

[35] The learned trial judge found (AP 1349) that by 1 October 1994 the "joint venture was already over". Accordingly, his Honour did not consider that it was appropriate to assess damages due to the respondent by reference to any loss of business opportunity connected with the joint venture. Mr Campbell for the respondent has not been able to identify anything in the evidence before the learned trial judge to suggest that the joint venture was still on foot at the date (1 October 1994) by which the appellant should have paid the indemnity under the policy. In the circumstances, we are of the view that there is no merit in the second ground of the respondent's cross-appeal.

Conclusion

[36] For the above reasons, we consider that both the appeal and cross-appeal should be dismissed and that appellant should pay the respondent's costs of the appeal.

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