SUPREME COURT OF QUEENSLAND

CITATION:	*Gleeson & Anor v. Suncorp Metway Insurance Ltd* [2004] QSC 196
PARTIES:	**IAN CYRIL GLEESON and SUZANNE BERNICE GLEESON TRADING AS GLEESON'S WAREHOUSE** (plaintiffs) **v.** **SUNCORP METWAY INSURANCE LIMITED ACN 075 695 966** (defendant)
FILE NO:	S10412 of 2001
DIVISION:	Trial
PROCEEDING:	Claim and counter-claim
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	22 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	5, 6, 7 April 2004
JUDGE:	Helman J.
CATCHWORDS:	INSURANCE – FIRE INSURANCE – LOSSES AND CLAIMS – FRAUDULENT CLAIMS – Partnership property destroyed by fire where fire deliberately lit – Connivance of insured in causing loss – Insurer entitled to reject claim.
COUNSEL:	Mr M. Grant-Taylor S.C. for the plaintiffs Mr S.C. Williams Q.C. and Mr R.T. Whiteford for the defendant
SOLICITORS:	Carew Lawyers for the plaintiffs Heiser Bayly & Mortenson Lawyers for the defendant

[1] In the early evening of Sunday 17 October 1999 fire destroyed a building and its contents at 302-304 Ruthven Street, Toowoomba, opposite the Defiance flour mill. The building, known as Gleeson's warehouse, and its contents were the property of the plaintiffs, who are husband and wife. In the building they conducted a business in partnership dealing chiefly in second-hand goods: household furniture and appliances, floor coverings, etc. They had taken out a twelve-month insurance policy, no. BCG08503C, with the defendant as insurer on 11 August 1998. It was a term of the policy that the defendant would indemnify the plaintiffs in respect of damage to their premises occasioned by defined acts, which included fire. On 11 August 1999 the policy was renewed for a further twelve months. On 18 October 1999 the plaintiffs notified the defendant of their loss, and on 22 October 1999 made a claim under the policy. The defendant refuses to indemnify the plaintiffs because, it says, the plaintiffs, or one of them, lit the fire, or, if they did not, they, or one of them, connived in the lighting of the fire by the

person or persons who did so. (It is common ground that it will be sufficient for the defendant's case if one of the plaintiffs lit the fire or connived in its lighting.) In the plaintiffs' amended statement of claim filed on 1 September 2003 they claimed $663,628 under the insurance contract, or alternatively as damages for breach of the contract. At the trial the parties agreed that should the defendant make out its case as to the cause of the fire the plaintiffs must fail, and should the plaintiffs succeed in their claim they should be awarded $418,867 and interest at the rate of 8.59 per cent. per annum from 17 January 2000. The defendant counter-claims declarations that it is and was entitled to refuse to pay the plaintiffs' claim and a declaration that it validly cancelled the contract of insurance.

[2] The plaintiffs purchased the building in July 1998 for $175,000, having been tenants before that. It was approximately one hundred years old. It had been used as a produce warehouse for much of its existence. A photograph of its Ruthven Street frontage before the fire may be seen in a valuation report prepared by Mr John Liley, registered valuer of Peter Snow & Co. In that report the fair market value of the property as at 16 October 1999 was assessed at $185,000: $152,000 for the land, and $33,000 for fixed improvements. The land was sold for $140,000 in late 2000.

[3] It is common ground between the parties that the fire was deliberately lit and that an accelerant was used, but Mr and Mrs Gleeson both gave evidence that they had nothing to do with it. They accounted for their whereabouts on 17 October 1999 and a corroborating witness was produced. Mr Gleeson said he performed some chores (mowing and gardening) at their home at 13 Queen Street, Kingsthorpe, a small village west of Toowoomba, had visited his wife's parents' house at 525 Greenwattle Street, Toowoomba, and, after returning to 13 Queen Street, had talked to a neighbour, Mr Robert Hart of 15 Queen Street for some time – he said one hour approximately – in the late afternoon. Mr Gleeson swore that he first heard of the fire when he was telephoned by an employee of the flour miller. Mr Gleeson drove to the building, arriving there at 7.45 to 8.00 p.m., when the building was well alight. Mr Hart recalled speaking to Mr Gleeson for about half an hour in the late afternoon of 17 October 1999 and then seeing a car drive from the Gleesons' house at 7.20 to 7.30 p.m. He remembered seeing Mr Gleeson the following morning when the latter appeared to be very upset.

[4] The defendant's case rests upon two main contentions: first, that the plaintiffs had an obvious motive for setting fire to the building; and secondly, Mr Gleeson had evinced an intention to do so in discussions with a witness, Mr Geoffrey Bower, cabinet-maker and joiner and now foreman of a manufacturing firm.

[5] The evidence shows that at the time of the fire the plaintiffs were in considerable financial difficulties, which could have been relieved by a successful claim against the defendant in respect of fire damage to the building and goods stored in it. The cover at the relevant time agreed to by the defendant was $633,000:

Damage to building	$400,000
Damage to contents of building	$20,000
Damage to stock in trade and customers' goods	$115,000
Re-writing of records	$3,000
Damage to computers and electronic equipment	$6,000
Business interruption costs	$65,000
Claim preparation costs	$4,000
Removal of debris	$10,000

Additional costs	$10,000
	$633,000

[6] The extent of the plaintiffs' financial difficulties was elaborated in the evidence. The business had not been very profitable: in the financial years 1994, 1995, 1996, 1997, and 1998 net profits had been $5,326, $20,145, $18,513, $40,896, and $23,594 respectively on sales of $129,218, $154,503, $160,372, $196,828, and $147,449 respectively. A figure for the year ended 30 June 1999 was not before me, but to 19 May 1999 sales were $117,867, indicating a full-year figure of approximately $135,000. That would have been the worst result for the plaintiffs since 1994 when the net profit was, as I have related, only $5,326. The plaintiffs' monthly liabilities at the time of the fire were approximately $4,800: $1,729.05 in respect of money borrowed to purchase the building, $460 on their house loan, $331 on a motor car lease, $465 on a truck lease, $401.45 on a lease of a horse, $600 bank overdraft reduction, $300-$400 for equipment at a shed at North Street to which I shall refer later, and $430 rent on the shed.

[7] Creditors were pressing the plaintiffs in various ways for seven months in 1999 before the fire. In a letter dated 4 March 1999 to Mr Gleeson the Metway Bank demanded payment in full of $2,814.56 overdrawn on a business cheque account because, as the writer asserted, 'previous requests to clear the balance have not been complied with'. In a letter dated 20 April 1999 to both plaintiffs Suncorp-Metway Ltd demanded the payment of arrears of $5,706.95 on a loan account, $854.08 on a lease account, and $2,642.49 on the overdrawn account referred to in the letter of 4 March 1999. In a letter dated 24 May 1999 to Mr Gleeson Suncorp-Metway Ltd demanded payment of arrears of $7,430.95 on the loan account and $2,675.70 on the overdrawn account. On 2 June 1999 Suncorp-Metway Ltd issued to Mr Gleeson a notice of exercise of power of sale alleging default under a bill of mortgage. On 7 July 1999 Circuit Finance Pty Ltd, claiming in reliance on a charge in a chattel lease of a chestnut colt (no. 3812 dated 17 March 1999) securing money owed under the lease, lodged a caveat forbidding registration of instruments affecting land owned by the plaintiffs. By a letter dated 2 July 1999 to the plaintiffs Suncorp-Metway Ltd acknowledged payment of $10,903.15, which it credited to a loan account but demanded payment of $2,744.34 allegedly owing on the cheque account. Suncorp-Metway Ltd served a notice of exercise of power of sale dated 10 August 1999 on Mr Gleeson asserting arrears of repayments on a loan account. Suncorp-Metway served a notice of entry into possession and exercise of power of sale dated 13 September 1999 asserting default under a bill of sale. Also on 13 September 1999 Building Material Supplies Pty Ltd began a claim against the plaintiffs in the Magistrates Court at Toowoomba seeking $3,040.96 for moneys owing for goods sold and delivered to them in March and April 1999. The plaintiffs subsequently agreed to pay $2,500 on or before 20 December 1999 and the claim was settled at that figure. On 1 October 1999 Circuit Finance Pty Ltd, claiming under a charge in another chattel lease, of a bay colt (no. 3813 dated 17 March 1999), securing money owing under that lease, lodged another caveat forbidding registration of instruments affecting land owned by the plaintiffs.

[8] The plaintiffs failed to pay the $2,500 under the settlement with Building Material Supplies Pty Ltd, and on 19 January 2000 judgment was entered against them by consent for the sum originally claimed and costs and interest. In a sworn statement of financial position dated 27 April 2000 Mr Gleeson failed to disclose a number of assets, about some of which there was satisfactory evidence and about others there was not: the plaintiffs' real estate (their house and the warehouse), and shares and

an art collection he claims to have owned. In spite of the evidence of the plaintiffs' difficulties with creditors in 1999 Mr Gleeson claimed the plaintiffs were not in financial difficulties and believed the business was better in 1999. Capital injections were made, he said, 'from punting sometimes, from sale of shares'. The reference to punting is perhaps significant, although no details of it were sought or given. The objective evidence of the performance of the plaintiffs' business to 19 May 1999 taken with evidence of the difficulties with creditors – despite, or arguably because of, the relatively small sums of default - shows on my assessment of the facts that the plaintiffs were indeed in substantial difficulty by October 1999. Notwithstanding his disclaimers, Mr Gleeson was probably deeply anxious about the state of the plaintiffs' finances. Those conclusions are confirmed by something he is recorded as saying to his doctor on 7 October 1999: that he was suffering from 'stress ++ at work', which I interpret as signifying that Mr Gleeson said he was in a state of severe stress brought on by business worries. In opening the plaintiffs' case, Mr Grant-Taylor said that Mr Gleeson would concede that 'he may not have been the world's most organized businessman and that there may have been occasions where exigencies threw up cash-flow problems which may have meant that a cheque may have been dishonoured from time to time'. That description makes too light of the plaintiffs' predicament, in my view.

[9] From about August 1998 to April 1999 Mr Bower had a loose business relationship with Mr Gleeson. Mr Bower had before that been in business – successfully – on his own account in Toowoomba for four or five years making furniture under the name Rose Gully Furniture. He ceased trading, however, after his building was broken into and machinery vandalized. At that time he and Mr Gleeson discussed Mr Gleeson's financing a new furniture factory to be managed by Mr Bower. Mr Gleeson paid Mr Bower about $10 an hour for advice about the acquisition of machinery and timber, the premises for the proposed factory, and for other odd jobs such as driving, repairs to the plaintiffs' building, etc. A shed at 103 North Street was eventually chosen as the place for the factory.

[10] While those things were being done Mr Bower was dealing with the insurer of his former premises, endeavouring to settle his claim arising from the damage done when they were broken into. He mentioned to Mr Gleeson the difficulties he was having and added that it would have been better if the building had been burnt down. Mr Gleeson, who had told Mr Bower that he wanted to redevelop the site on which the plaintiffs' building stood to include a real estate agent's office and flats, said - apparently joking - that he wished it would burn down. Mr Gleeson told Mr Bower that it was quite old and possibly listed as a heritage site.

[11] Later Mr Gleeson returned to the subject of burning the plaintiffs' building down and talked of 'different ways in which it could be sort of burnt down or destroyed', Mr Bower said in evidence. In the last conversation between the two on that topic, Mr Gleeson outlined, Mr Bower said, 'quite a detailed plan of how we would go to Brisbane, representing new clients so to speak, where we would source clientele and on our way back we'd stop at Gatton, we'd join the RSL club there. He would stay there and I would drive back to Toowoomba and light the fire. That was – would already be pre-set'. The purpose of the visit to Brisbane and of joining the club at Gatton was to provide an alibi. Asked what was discussed in relation to pre-setting the fire, Mr Bower said 'Ian had described that he would use a can of fuel, breaking in one of the top windows in an office there so it would fly in, soak the floor with fuel, and have a flammable liquid underneath the – or some rags or straw or something like that underneath the building which would just have to be lit because

of the fuel already soaked onto it'. Mr Bower said that he asked Mr Gleeson what he would get for doing his part and Mr Gleeson responded that that would depend on how well the fire burnt. No figure was mentioned but there was a 'generalisation of a couple of thousand dollars or so'. Mr Bower said that although Mr Gleeson had appeared to be joking when the subject of burning down the building was first mentioned, 'as the discussions deepened and became more detailed', it appeared Mr Gleeson was no longer joking.

[12] In the course of the discussions between Mr Bower and Mr Gleeson, Mr Gleeson told Mr Bower that he had insurance cover for the building – a 'full package' including 'down time insurance'.

[13] Mr Bower gave evidence that one day shortly before he ceased working for Mr Gleeson they met at the Ruthven Street building at about 6.00 or 6.30 a.m. and Mr Gleeson mentioned he had ' to do so something at the back'. Mr Bower followed him and saw Mr Gleeson throw a bottle with a rag in it into some washing machines. Mr Bower did not see if it was alight or not. There was nothing flammable in the area into which the bottle was thrown. The two then left Ruthven Street to go to the North Street premises and returned to Ruthven Street whereupon Mr Gleeson telephoned the police to report the throwing of a Molotov cocktail at the rear of the premises. Records of the Toowoomba police show Mr Gleeson's complaint to have been made on 17 March 1999.

[14] When Mr Bower told Mr Gleeson he was terminating his employment with Mr Gleeson, he also told Mr Gleeson that he had told the police about Mr Gleeson's plans to burn down the building. That evoked the response 'Oh, it's all right, I was only joking'.

[15] Mr Gleeson reported to the Toowoomba police four unauthorized entries of the warehouse before it was destroyed by fire: in October 1995, January 1996, May 1996, and March 1997. In addition, on 1 May 1999 Mr Gleeson reported the breaking of the window of a truck parked behind the warehouse, and on 23 August 1999 the breaking of a window of the warehouse. There is no evidence that those reports were false, but his complaint recorded in March 1999 was, I conclude, so. I see no reason to doubt the truth of Mr Bower's evidence on that or on any other subject about which he spoke. Mr Gleeson denied Mr Bower's accounts of the Molotov cocktail incident and of the discussions about burning the warehouse down, but Mr Gleeson is not in my assessment a witness upon whose word reliance may be placed with confidence where it is not corroborated by other, credible, evidence. His account of his assessment of the state of the plaintiffs' business in 1999 before the fire and his readiness to misrepresent his financial position in the statement sworn to on 27 April 2000, lead me to conclude that his evidence on the central issues in this case cannot be regarded as reliable. I should add that no attack was made on Mr Bower's character, and I am unable to accept that on the evidence it could be thought that he had any motive for concocting his evidence.

[16] Mr Gleeson had a strong motive to succumb to the temptation to escape his financial difficulties by means of a fraudulent insurance claim. He clearly enough had the opportunity to set the fire himself – perhaps not on the day of the fire, but before. He claimed to have left the warehouse at 1.30 p.m. on the day before the fire and to have checked the back door, but it is possible that he returned on the Sunday. There is no reason to doubt Mr Hart's evidence that Mr Gleeson was at home in the late afternoon of the Sunday, but it is possible that he did return to the

warehouse earlier that day for, as I have said, I am persuaded he was not a reliable witness. As to Mrs Gleeson, I am unable to say: she may have been truthful in her evidence or she may not. She disclaimed any knowledge of the financial affairs of the partnership although she too had sworn a statement of financial affairs – demonstrably false it should be noted - on 27 April 2000. Mr Gleeson gave evidence that the back door of the building was locked when he checked it at 1.30 p.m. on the Saturday. The lock on the door was a deadlock for which a key was required from the outside but not on the inside. One of the first firemen on the scene, Mr Gregory Long, found the door to be closed but unlocked. But of course that does not necessarily show that Mr Gleeson had returned after 1.30 p.m. on the Saturday - if indeed he ensured that the door was locked then.

[17] On behalf of the plaintiffs Mr Grant-Taylor submitted that Mr Bower's account of the discussions he had with Mr Gleeson was unlikely to be true because on Mr Gleeson's evidence he had many other, closer friends and acquaintances he could have approached to help him engage in a fraudulent enterprise had he been so minded. On the defendant's case he may well have done just that after Mr Bower rejected his overtures, but it is not inherently improbable I think that one in Mr Gleeson's financial predicament could have taken Mr Bower's comment about the course his claim took to evince an antipathy to insurers which would result in his lending a receptive ear to a plot to retaliate against one of their number.

[18] It was also submitted on behalf of the plaintiffs that even if Mr Bower's evidence is accepted the plaintiffs would have been unlikely to proceed with any fraudulent design once Mr Bower had told Mr Gleeson that he had reported Mr Gleeson's plans to the police. As Mr Williams, for the defendant, pointed out, however, there was no evidence that Mr Gleeson had ever been interviewed about Mr Bower's account. It would follow then that by October 1999 Mr Gleeson could have thought that he could safely proceed with his fraudulent design provided he ensured that he could account for his movements on the day of the fire.

[19] The defendant bears a heavy onus in establishing its allegation against the plaintiffs since what is alleged is the commission of a crime, but I conclude that it has discharged that onus against Mr Gleeson. It could be thought to be just a coincidence that following his discussion with Mr Bower the warehouse burnt down, but I am persuaded that it was not, and that Mr Gleeson proceeded with his plan – or some variation of it not material to the issues in this case - once he thought he could get away with implementing it. He either set fire to the warehouse himself or connived in its destruction. Although Mrs Gleeson's asserted profound ignorance of the financial affairs of the partnership seems improbable and I have doubts about her veracity on the central issues before me, I am not satisfied that the defendant's case against her has been made out.

[20] It follows then that the plaintiffs' claim will be dismissed and there will be judgment for the defendant on claim and counter-claim. I shall invite further submissions on the form of the orders to be made, and costs.