FEDERAL COURT OF AUSTRALIA

Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd and Others

[2016] FCAFC 150

Allsop CJ, Rares and Besanko JJ

26 May, 8 November 2016

Insurance — Contribution — Claim for contribution between insurers — Where insured covered by one policy in terms and one by operation of s 54 of the Insurance Contracts Act 1984 (Cth) — Whether suspension of cover an inherent limitation on claims — Whether s 54 operates only for benefit of insured — Insurance Contracts Act 1984 (Cth), s 54.

The appellant, a syndicate of marine underwriters, insured a yacht belonging to one Mr Phillips. The insurance policy provided cover within 250 nautical miles off Australia's mainland, but suspended cover where the yacht cleared customs for the purpose of leaving Australian waters until the yacht re-cleared customs and immigration on its return. Mr Phillips sought additional insurance from the respondents to cover the yacht during a race from Fremantle to Bali, having realised that he might not have been covered by the insurance policy issued by the appellant. Returning from the race, the yacht ran aground within 250 nautical miles of Australia's mainland on its way to Darwin to clear customs. There was no dispute that the policy issued by the respondents insured Mr Phillips against the damage to the yacht. However, the respondents sought contribution from the appellant, claiming that s 54 of the *Insurance Contracts Act 1984* (Cth) was engaged. Section 54 provided that an insurer was not permitted to refuse an insurance claim where the only reason for refusing the claim was some act of the insured or of some other person, occurring after the contract of insurance was entered into, which did not cause or contribute to the loss otherwise insured against.

The appellant argued that no issue arose under s 54, as the suspension of cover where the yacht had cleared customs for the purposes of leaving Australian waters and not yet re-cleared customs and immigration, was an inherent limitation on the claims that could be made on the policy, rather than an exclusion based on some act of the insured. Alternatively, the appellant argued that its refusal of the claim was based upon two distinct acts of Mr Phillips: clearing customs for the purpose of leaving Australian waters, and failing to re-clear customs and immigration prior to the yacht running aground. In these circumstances, the appellant said that an act of the insured was not the "only" reason for refusing the claim, and so s 54 did not apply. Finally, the appellant argued that s 54 operated only for the benefit of an insured, and was not available to assist an insurer in a claim for contribution.

Held, dismissing the appeal: (1) The process of understanding what are the restrictions or limitations inherent in an insurance claim requires not only the

construction of the constituent words of the policy, but also the characterisation of the essential character of the policy. [40]

FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd (2001) 204 CLR 641; *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* (2013) 302 ALR 732, applied.

(2) The characterisation of the essential character of a policy will be influenced, but not dictated, by the drafting of the wording of the policy, and will involve the identification of the nature and limits of the risks that are intended to be accepted, paid for, and covered. [41]

FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd (2001) 204 CLR 641, considered.

Obiter: An "act" of the insured, for the purposes of s 54 of the *Insurance Contracts Act*, may include an act in a related set of circumstances. [49]

(3) Section 54 of the *Insurance Contracts Act* may be applied to give effect to a claim for contribution between insurers where, if engaged for the benefit of the insured, the insurer would not be able to refuse to pay the claim. [51], [53]

Appeal against decision of Foster J, (2016) 19 ANZ Insurance Cases 62-090, dismissed.

Cases Cited

Albion Insurance Company Ltd v Government Insurance Office (NSW) (1969) 121 CLR 342.

Allianz Australia Insurance Ltd v Inglis (2016) 307 FLR 132.

Antico v Heath Fielding Australia Pty Ltd (1997) 188 CLR 652.

East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd (1991) 25 NSWLR 400.

FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd (2001) 204 CLR 641.

FAI General Insurance Company Ltd v Perry (1993) 30 NSWLR 89.

Greentree v FAI General Insurance Company Ltd (1998) 44 NSWLR 706.

HIH Claims Support Ltd v Insurance Australia Ltd (2011) 244 CLR 72.

Johnson v Triple C Furniture & Electrical Pty Ltd [2012] 2 Qd R 337.

Maxwell v Highway Hauliers Pty Ltd (2014) 252 CLR 590.

Maxwell v Highway Hauliers Pty Ltd (2013) 45 WAR 297.

Pantaenius Australia Pty Ltd v Watkins Syndicate 0457 at Lloyds (2016) 19 ANZ Insurance Cases 62-090.

Prepaid Services Pty Ltd v Atradius Credit Insurance NV (2013) 302 ALR 732.

Appeal

GJ Nell SC with *I Griscti*, for the appellant.

TD Castle, for the respondents.

8 November 2016

The Court

1 This appeal concerns the operation of s 54 of the *Insurance Contracts Act 1984* (Cth) (the Act) in circumstances where one insurer's policy (without any effect on its operation by s 54) responds fully to a claim by the insured, and that insurer seeks to recover a proportionate share of its liability from another insurer in a contribution action in circumstances where, unaffected in operation

by s 54 if it were to be engaged, the second policy would not respond to the claim were it to be made by the insured, but the policy would respond if a claim were made on it, and s 54 invoked by the insured.

2 Within that compendious expression of the matter, there were three fundamental issues: (1) Was s 54 engaged in the circumstances? (2) If it was, did its operation mean that the appellant would not have been able to refuse to pay a claim made by the insured? (3) Can the respondent insurer set up putative liability of the appellant to the insured as a basis for a claim for contribution by it?

3 The primary judge answered all these questions in the affirmative: see *Pantaenius Australia Pty Ltd v Watkins Syndicate 0457 at Lloyds* (2016) 19 ANZ Insurance Cases 62-090. In our view, for the reasons that follow, his Honour was correct to do so. The appeal should therefore be dismissed with costs.

The facts

4 Mr Arthur Phillips owned *Froia II*, a fibreglass yacht with a 75 hp motor built in 2006. He had the vessel insured with the appellant, the Watkins Syndicate 0457 (Watkins), which is a syndicate of marine underwriters at Lloyds. The policy was written through an underwriting agency, Nautilus Marine Insurance Agency Pty Ltd (Nautilus). We will refer to this policy as the Nautilus Policy. The Nautilus Policy was issued on 20 November 2012 and provided cover from 4.00 pm on 1 December 2012 to 4.00 pm on 1 December 2013. The sum insured was $250,000 with various excess levels, none more than $2,000. The cover included damage to or loss of hull, mast, spars, rigging, sails, equipment, accessories, tender and motor, as well as legal liability up to $10 million and personal accident cover up to $50,000. The total premium was $1,664.32.

5 On 22 June 2013, the yacht ran aground off Cape Talbot in Western Australia, having returned to Australia from participation in a race from Fremantle to Bali. The significance of this will become evident from the facts below. Briefly put, shortly before the Fremantle to Bali race, Mr Phillips appeared to recognise that the Nautilus Policy did or may not cover the yacht for the race. After obtaining a quotation from Nautilus on behalf of Watkins for an extension to cover the yacht in the race, Mr Phillips approached other insurers (the respondents) for a second policy which directly covered the race. On the voyage returning to Australian waters, the yacht ran aground. The second policy written by the respondents (the Pantaenius Policy) covered the loss in terms. Mr Phillips' claim was paid. The respondents then claimed contribution from the appellant.

6 It is first necessary to examine the facts and, in particular, the terms of the Nautilus Policy in some detail.

7 The yacht was a "pleasure craft", being one used for recreational and sporting activities and owned by an individual. Thus, s 9A of the Act meant that the *Marine Insurance Act 1909* (Cth) (the MI Act) did not apply.

8 The Nautilus Policy was constituted by Mr Phillips' insurance application, a Certificate of Insurance and a Product Disclosure Statement (the PDS).

9 The Certificate of Insurance contained essential details of the policy including a broad coverage clause, a description of the property covered, premium details and excess details. It also contained certain endorsements and conditions referred to below.

10 The PDS was a document that stated its purpose at least to include that it "tells you about this Nautilus Boat insurance to help you decide if the cover is right for you and whether to use our services" (p 2 of the PDS). Thus, at least in part, the PDS was a pre-contractual document. There was no debate about relevant parts of the PDS also being terms of the Nautilus Policy. There was, however, debate as to the ranking of the terms in the PDS compared to the terms of the Certificate of Insurance when it came to evaluating or characterising the essential features of the Nautilus Policy for the purpose of the application of s 54 of the Act.

11 The Certificate of Insurance contained a clause that was essentially a non-specific coverage clause, in the following terms:

> Taking the information provided by you or some other person on your behalf as the basis for this insurance, we agree to cover you, subject to the conditions, exclusions, and endorsements of the policy during the insurance period or any subsequent renewal period provided that the total premium is paid or agreed to be paid for this insurance to become effective.

12 The Certificate of Insurance stated the "Geographic Limits" to be "250 nautical miles off mainland Australia and Tasmania".

13 Immediately after the essential policy details in the Certificate of Insurance that set out the cover, the location of the mooring and storage of the yacht, the maximum boat speed and geographic limits, there appeared the following:

> Endorsements and Conditions applicable to the policy
>
> The following endorsement(s) and/or condition(s) apply to this insurance.
>
> These endorsements may modify the terms, and/or conditions and/or exclusions contained in the Product Disclosure Statement.

14 One of those endorsements and conditions was entitled "145 Sailboat Racing up to 100NM". It provided:

> This policy is extended to cover you for loss or damage to your boat caused by one of the Insured Events while competing in sailboat races, within the geographical limits of the policy, which do not exceed a distance of 100 nautical miles.

15 The PDS was a 30 page document. Under the heading "Protection" on the 3rd page, the following was stated:

> Our Boat insurance is designed to give you simple and easy to understand cover for your boat, to protect you in the event of a crisis such as a collision, sinking, fire, storm or theft. Plus Nautilus gives you added benefits, which may not be covered by other insurers, to help you get back to enjoying your boat sooner.

16 Under the heading "Peace of mind" on the 4th page, the following was stated:

> With this insurance your boat is protected against accidental loss or damage, including the following major events:
>
> - Theft;
> - Impact;
> - Sinking;
> - Fire;
> - Storm;
> - Malicious Damage;
> - Transit Damage;

- Pollution claims.

You also have the option to add:

- Extended racing cover for sailboats;
- Liability cover for waterskiing and/or aquaplaning activities;
- Lay up cover.

17 Under the heading "Additional benefits" on the 4th page, the following was stated:

Depending on the cover selected by you we may also include cover for

- Full sailboat racing cover up to 100 nautical miles;
- Fishing, diving and waterskiing/aquaplaning equipment;
- Personal effects;
- Your legal liability if you need to pay compensation to another party;
- Emergency land transit for your boat;
- Salvage charges;
- Personal accident cover;
- Your boat while being used for:
  - Voluntary rescue work;
  - Time trials.
- Lost Keys
- Repatriation costs
- Tournament Coverage and Fee Reimbursement

18 From the Certificate of Insurance and the two parts of the PDS reproduced at [16] and [17], it can be seen that, in putting in place the Nautilus Policy, Mr Phillips chose certain additional benefits including sailboat racing cover up to 100 nautical miles, legal liability, and personal accident cover.

19 Under the heading "Applying for cover" on the 4th page, the following was stated:

The Certificate of Insurance will contain important information relevant to your insurance including the period of insurance, your premium, details of your insured property, the excess(es) that will apply to you and others and whether any standard terms have been varied by way of endorsement.

All of these make up the "policy" with us. You need to keep these documents in a safe place together with receipts and other evidence of ownership and value of items you insure.

20 Under the heading "Geographic limits and period of insurance" on the 11th page, the following was stated:

Cover is only provided under the policy in relation to events causing loss damage or liability which occur:

- within the geographic limits specified on your Certificate of Insurance. All cover provided by the policy will be automatically suspended when your boat clears Australian Customs and Immigration for the purpose of leaving Australian waters and *will recommence when it clears Australian Customs and Immigration on return*; and
- during the period of insurance.

However we will provide cover in the following circumstances:

- if your boat goes beyond the geographic limits to reasonably respond to an unforeseen emergency;
- if your boat goes beyond the geographic limits because of circumstances beyond the reasonable control of the person in charge or control of your boat;

> • if you advise us you will go beyond the geographic limits and we agree to extend cover in writing.

(Emphasis added.)

21 The first bullet point in this extract is crucial. It was the foundation of the argument by the appellant that the essence of the policy was one for domestic or intra-national voyages, not for international voyages.

22 Under the heading "Optional benefits" on the 17th page the "Extended Sailboat Racing Cover option" was described as follows:

> This optional benefit extends cover under the policy for loss or damage caused by the Insured Events detailed on Page 12, while you are competing in a sailboat race of more than 100 nautical miles in your boat.

This extension (not sought by Mr Phillips) may well have been subject to what can be described as the customs to customs suspension of cover referred to on the 11th page of the PDS and set out above.

23 Under the heading of "General exclusions" on the 21st page of the PDS, the following was stated:

> *Like most insurance policies, there are general exclusions that apply to all covers.*
>
> *You are not covered for any loss or damage caused by or resulting from, or the costs incurred from or of:*
>
> • your boat while competing in a sailboat race of more than 100 nautical miles unless the optional benefit for Extended Sailboat racing Cover has been selected by you and has been noted on your Certificate of Insurance.

24 The balance of the other general exclusions included subject matters such as the failure to maintain the boat in good order and repair; wear and tear; inherent defects or faulty workmanship or design; use of the boat for hire; illegal action; the boat being under the control of an unlicensed person when a licence is necessary, or someone under the influence of alcohol or drugs; and various other matters.

25 Sometime before the Bali race, Mr Phillips sought an extension of cover from Nautilus. For whatever reason, Mr Phillips approached Pantaenius Australia Pty Ltd (an insurance broker and agent) which provided to Mr Phillips the Pantaenius Policy on behalf of the respondents. The policy was also for a duration of 12 months, from 4.00 pm (EST) on 4 May 2013 to 4.00 pm (EST) on 4 May 2014.

26 The Policy Schedule of the Pantaenius Policy disclosed that the policy was for hull and property insurance over the yacht, including inventory, equipment, engine and tenders to a value of $275,000 with various deductibles; personal liability and personal accident cover.

27 The navigational limits were described as follows:

> Navigational Limits
>
> Central Asia: Waters between 90°E up to 160°E and 20°N up to 15°S. The South China Sea and the Strait of Malacca are excluded.
>
> Australia: Australian coastal waters up to 200 nm off the coast, including the Tasman Sea. Territorial waters of Indonesia and Papua New Guinea are excluded.

28 Optional cover selected by Mr Phillips was as follows:

> In addition to the Cruising Area nominated this quote offer covers participation in the Fremantle, WA to Bali Race or Rally and the return voyage from Bali to WA,

> and includes pre-arranged and notified cruising in convoy to return to Australian waters. All boats must have returned to Australian Territorial waters by 30th June, 2013.

29 The net premium was $5,162.21.

30 Mr Phillips took the yacht on the Fremantle to Bali race. The boat cleared customs on the outward voyage. The yacht returned to Australian waters prior to 22 June 2013, and when heading for Darwin (where the yacht was to clear customs on the inward voyage) the yacht ran aground.

31 There was no dispute about the fact that the Pantaenius Policy responded to the loss.

The first issue: the engagement or not of s 54

32 Ultimately there was a significant degree of agreement on the approach to resolving this question. That agreement reflected the gradual distillation of the jurisprudence on s 54 over nearly 20 years of litigation: see, in particular, *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400; *FAI General Insurance Company Ltd v Perry* (1993) 30 NSWLR 89; *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *Johnson v Triple C Furniture & Electrical Pty Ltd* [2012] 2 Qd R 337; *Maxwell v Highway Hauliers Pty Ltd* (2013) 45 WAR 297; *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* (2013) 302 ALR 732; *Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590. It is first necessary, however, to have regard to the section, which is in the following terms:

> 54 Insurer may not refuse to pay claims in certain circumstances
>
> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
>
> (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.
>
> (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.
>
> (5) Where:
>
> (a) the act was necessary to protect the safety of a person or to preserve property; or
>
> (b) it was not reasonably possible for the insured or other person not to do the act;
>
> the insurer may not refuse to pay the claim by reason only of the act.
>
> (6) A reference in this section to an act includes a reference to:
>
> (a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

33 As is made clear by the plurality (McHugh, Gummow and Hayne JJ) in *Australian Hospital Care* at [39]:

> … Close attention must be given to the elements with which s 54 deals: the effect of the contract of insurance between the parties; the "claim" which the insured has made; and the reason for the insurer's refusal to pay that claim.

34 The difficulty over the years has been the reconciliation of what was seen as the proper nature of the scope of cover and qualifications on that by exclusions or conditions. The difficulty of maintaining that distinction as the operative one to decide on the engagement of s 54 is that it would place the engagement and operation of a key protection for the insured in the hands of the drafter of the policy. Any exclusion from, or condition of, cover can be redrafted as a question of the limit of cover.

35 But it cannot be that s 54 operates on any refusal of a claim for some act or omission of an insured. The plurality in *Australian Hospital Care* directed attention to this difficulty at [40]-[42] saying the following:

> [40] Section 54 directs attention to the effect of the contract of insurance on the claim on the insurer which the insured has *in fact* made. It is not concerned with some other claim which the insured might have made at some other time or in respect of some other event or circumstance. It requires the precise identification of the event or circumstance in respect of which the insured claims payment or indemnity from the insurer. For example, in *Greentree* the insured claimed indemnity against liability for a claim which the third party had first made on it outside the period of cover. (To distinguish between the claim which a third party makes on the insured, and the claim which the insured makes on the insurer, it is convenient to refer to the former as the "demand" by the third party.) The insured's claim necessarily incorporated a temporal dimension. The contract of insurance applied only if the third party's demand on the insured was made within the period of cover. The insured's claim on the insurer therefore had to identify when the demand was made. That being so, the claim could not properly be described without that temporal element.
>
> [41] Even if the fact that the third party made no demand on the insured within the period of cover were said to be an "omission" it is, nevertheless, of the first importance to recognise that the claim to which s 54 refers is the claim by the insured on the insurer that was actually made. It is not a claim for indemnity against some other demand (such, for example, as a demand assumed to have been made during the period of cover). Section 54 does not permit, let alone require, the reformulation of the claim which the insured has made. It operates to prevent an insurer relying on certain acts or omissions to refuse to pay that particular claim. In other words, the actual claim made by the insured is one of the premises from which consideration of the application of s 54 must proceed. The section does not operate to relieve the insured of restrictions or limitations that are inherent in that claim.
>
> [42] The restrictions that are inherent within a claim vary according to the type of insurance in issue. Under an "occurrence" based contract, no claim can be made under the contract unless the event insured against takes place during the period of cover. Under a "claims made and notified" policy, if

> no demand is made by a third party upon the insured during the period of insurance, any claim that may subsequently be made by the insured on the insurer (that is, the claim to which s 54 refers) would necessarily acknowledge that indemnity is sought in relation to a demand not of a type covered by the policy (because not within the temporal limits that identify those demands in relation to which indemnity must be given).

(Emphasis in original.)

36 The meaning and significance of this approach has been discussed in two recent judgments: the judgment of Meagher JA (in which Macfarlan and Emmett JJA agreed) in the New South Wales Court of Appeal in *Prepaid*; and the judgment of the High Court (Hayne, Crennan, Kiefel, Bell and Gageler JJ) in *Maxwell*.

37 At the time Meagher JA delivered his reasons in *Prepaid* (8 August 2013), there was an apparent disagreement between the Western Australian and Queensland Courts of Appeal in *Maxwell* and *Johnson v Triple C*.

38 The analysis of Meagher JA of the working-through of what the plurality had said in *Australian Hospital Care* at [40]-[42] and the importance of that for the reconciliation of the different views in *Maxwell* in the Court of Appeal and *Johnson v Triple C* was set out by his Honour in *Prepaid* at [130]-[140]. It should be set out in full. With one additional important comment, we would respectfully adopt all that his Honour said, as a clear analysis of what has been a difficult area for practitioners and judges:

> [130] The effect of the contract of insurance must be determined as a matter of construction, unconstrained by distinctions between provisions which define the scope of cover and conditions or exclusions which affect the entitlement of an insured to claim. It is not controversial that s 54 is concerned with the effect of the contract as a matter of substance: *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400 at 403-4 (*East End*) per Gleeson CJ, cited with approval in *Antico* at CLR 660 and 668-9; ALR 389 and 395-6 and *Australian Hospital Care* at [35] and [50]. It is necessary to consider the effect of the contract in the way in which it responds to the claim actually made by the insured. It is at this point that difficulties may arise in applying s 54(1) in circumstances where it is said by the insured that the act or omission is the reason why the insured's claim is not with respect to a risk or event covered by the policy.
>
> [131] The facts in *East End* and in *Greentree v FAI General Insurance Co Ltd* (1998) 44 NSWLR 706; 158 ALR 592 (*Greentree*) provide examples of such circumstances. In *East End* the third party demand was made but not notified in the policy period. The effect of the insurance was that a third party demand was covered if made and notified in that period. The insured's claim was not covered because that the demand was not notified. That was an omission. The insurer's entitlement to refuse arose by reason only of that omission: *East End* per Mahoney JA at 407. However, as the plurality point out in *Australian Hospital Care*, it does not follow that s 54 prevents the insurer from refusing to pay a claim which is not in respect of the risk insured by the policy.
>
> [132] An argument to that effect was advanced by the insured in *Greentree* where the third party demand was not made (or notified) in the policy period. The relevant omission was said to be that of the third party in not making a demand in the relevant period. It was argued that had the omission not occurred the insured's claim would have been within the terms of cover. The flaw in that argument is addressed by the plurality in

the paragraphs set out above. Section 54 provides that the insurer may not refuse to pay the claim "by reason only of" the relevant act or omission. That was the position in *East End*, where the claim was in respect of an event of the kind insured (a third party demand made in the policy period): *Australian Hospital Care* at [45]. However, s 54 does not permit or require the reformulation of the insured's claim so that it includes elements or characteristics which it is said would have been present but for the relevant act or omission. If that claim is not, as was the position in *Greentree*, in respect of an insured event, s 54(1) does not apply. The reason the insurer could refuse the claim was that the policy did not respond to a third party demand not made in the policy period: at [44].

[133] The respects in which the insured's claim does not have the characteristics of the event of the kind insured are referred to by the plurality in *Australian Hospital Care* as "restrictions or limitations" inherent in that claim. Section 54 does not "relieve" the insured of those restrictions or limitations: at [41]. The plurality (at [41] and [42]) describe that event as "the event insured against" and as "an event of the type contemplated by the contract" and note that it will vary according to "the type of insurance in issue".

[134] That event may be an accident which results in personal injury or property damage; or the happening of that injury or damage; or the making of a demand against the insured by a third party; or the happening of an occurrence or circumstance which may give rise to such a demand; or the insured's becoming aware of such an occurrence or circumstance. These descriptions of themselves are not sufficiently specific to define the event covered by a particular type of policy. The accident will have to be of a particular kind, or arise out of or in the course of a specified activity. The injury or damage will usually have to happen in the course of or in connection with a particular activity. The third party demand is usually described as arising out of or in connection with the conduct of a particular business or professional activity. The same may be said of an occurrence or circumstance which may give rise to a claim.

[135] The way in which the provisions of the policy describe and define that event or risk will vary between different types of policy, and sometimes between policies which provide the same type of cover. It is here that matters of form are not to dictate the outcome when considering the effect of the contract: *East End* at 403-4. It nevertheless remains necessary, in addressing that effect, to have regard to the nature of the risk and subject matter insured as well as the commercial or other context in which the insurance is written, to the extent that evidence of that kind is admissible on that question of construction.

[136] In *Australian Hospital Care*, the significant point of difference between the plurality and Gleeson CJ was in the characterisation of the effect of the contract and the identification of the event insured. Gleeson CJ considered that the effect of the contract was to indemnify against third party claims made, or potential claims notified, during the policy period: at [11]. The plurality considered that the effect of the contract, particularly by reason of condition 3, was to indemnify against any claim, or occurrence likely to give rise to a claim, of which the insured became aware during the policy period, and irrespective of whether that occurrence was notified during that period: at [23] and [43]. Kirby J also considered that to be the effect of the contract: at [59] and [60]. The actual claim made by the insured was for an indemnity against liability for an occurrence of which the insured first became aware during the period of cover. If the effect of the contract was as Gleeson CJ considered it to be, the claim made by the insured did

not involve an insured event because no third party claim had been made or potential claim notified during the policy period. The reason for refusal of the insured's claim would not have been an act or omission of the insured and s 54(1) would not have applied. The effect of the contract as characterised by the plurality led to the opposite conclusion: at [46].

[137] The principles enunciated in *Australian Hospital Care* have been considered by the Queensland Court of Appeal (Chesterman JA, Holmes and White JJA agreeing) in *Johnson v Triple C Furniture & Electrical Pty Ltd* [2012] 2 Qd R 337; [2010] QCA 282 (*Triple C*) and by the Western Australian Court of Appeal (McLure P, Pullin and Murphy JJA) in *Maxwell v Highway Hauliers Pty Ltd* (2013) 298 ALR 700; [2013] WASCA 115 (*Maxwell*). Each of these decisions addresses, as a step in the process of applying s 54, the need to identify any "restrictions or limitations" inherent in the actual claim to an indemnity, by reference to the characteristics of the event or circumstance to which the policy responds: *Triple C* at [77]-[79]; *Maxwell* at [71], [73] and [75] per McLure P, at [114] per Pullin JA and [131] per Murphy JA.

[138] In *Maxwell* the policy insured property damage to nominated trucks and trailers of the insured, occurring during the period of insurance. The insurer relied upon an exclusion in respect of damage caused while the vehicle was being driven by a person who did not hold a particular driver test qualification. It argued that the effect of the contract was only to insure vehicles driven by qualified drivers. That argument was rejected. McLure P considered at [73] that the description of the event covered "arguably [extended] to, but no further than, the occurrence of the type of event itself (being property damage to an insured vehicle) within the period of insurance". Murphy JA also considered at [143] that having regard to the essential character of the risk or type of cover provided for, as a matter of substance, the event or risk insured did not include as part of its description that at the time of any accident the driver had to hold the relevant test qualification. Pullin JA reached the same conclusion at [114] and [115].

[139] In *Triple C* the policy indemnified the owner of an aircraft against legal liability for accidental bodily injury to passengers while they were on board the aircraft. An exclusion provided that the policy did not apply while the aircraft was, to the knowledge of the insured, being operated in breach of Civil Aviation Safety Authority regulations. The insurer alleged that at the time of the accident the aircraft was being flown by a pilot who had not completed a necessary aeroplane flight review which was required under reg 5.81 of the Civil Aviation Regulations 1988 (Cth). The insurer argued that s 54(1) did not apply because the fact that the pilot had not satisfactorily completed that review was not a relevant "omission". Chesterman JA upheld that argument: at [72]. His Honour also considered whether s 54 would otherwise have applied. He concluded that the effect of the contract was only to insure the aircraft while it was operated by a pilot with the necessary qualification: especially at [72], [82] and [83]. In other words, the description of the insured event included that it was being operated by a pilot with that qualification. For that reason he held that s 54(1) did not apply because the insurer's refusal of the claim was not by reason of any act or omission.

[140] In so describing the insured event, Chesterman JA took into account the operation of an exclusion which had the effect of suspending cover during the existence of a state of affairs resulting from the failure of a third party, the pilot, to obtain or maintain a qualification. In my respectful opinion, in doing so his Honour proceeded other than in accordance with the

> principles and approach stated in *Australian Hospital Care* and applied in *Maxwell*. Taking the operation of such an exclusion into account when identifying the risk insured would mean that s 54 would not address unsatisfactory aspects of the common law which it was intended to reform. Reference to Report No 20 and the explanatory memorandum shows that s 54 was intended to prevent reliance upon temporal exclusions, such as those considered in these two cases, as well as other provisions which operated, because of an act or omission occurring after the insurance was entered into, to suspend cover or entitle the insurer to deny a claim irrespective of whether the insurer had suffered any prejudice as a result: Law Reform Commission Report No 20, especially at [217], [229] and App A, cl 54, notes 3 and 4; and explanatory memorandum, at [177]-[182].

39 The conclusion reached by Meagher JA as to the correctness of *Maxwell* in the Court of Appeal was vindicated in the High Court appeal in *Maxwell*. Though the High Court in the *Maxwell* appeal referred to *Prepaid*, it did not expressly comment on Meagher JA's reasons. Nevertheless, in somewhat shorter terms, essentially the same approach to the question of the engagement of s 54 was taken. This can be seen at 252 CLR 590 at [23]-[27] as follows:

> [23] The Insurers sought support for their argument from a statement of the plurality in *FAI* that the section "does not operate to relieve the insured of restrictions or limitations that are inherent in [the] claim". They misapply that statement in equating its reference to restrictions or limitations that are inherent in a claim with any restriction or limitation on the scope of the cover that is provided under the contract. A restriction or limitation that is inherent in the claim which an insured has in fact made, in the sense in which the plurality in *FAI* used that terminology, is a restriction or limitation which must necessarily be acknowledged in the making of a claim, having regard to the type of insurance contract under which that claim is made.
>
> [24] Thus, as explained in *FAI*, the making of a claim under a "claims made and notified" contract necessarily acknowledges that the indemnity sought can only be in relation to a demand made on the insured by a third party during the period of cover. The section does not operate to permit indemnity to be sought in relation to a demand which the third party omitted to make on the insured during the period of cover but made after that period expired. Similarly, the making of a claim under a "discovery" contract, of the type in issue in *FAI* itself, necessarily acknowledges that the indemnity sought can only be in relation to an occurrence of which the insured became aware during the period of cover.
>
> [25] The making of a claim under an "occurrence based" contract, the type of insurance contract in the present case, necessarily acknowledges that the indemnity sought can only be in relation to an event which occurred during the period of cover. That restriction or limitation is inherent in a claim which is made under such a policy. But it is of no moment in the present case.
>
> [26] Here the fact that each vehicle was being operated at the time of the accident by an untested driver is properly characterised as having been by reason of an "act" that occurred after the contract of insurance was entered into. There was an omission of the Insured to ensure that each vehicle was operated by a driver who had undertaken a PAQS test or an equivalent program approved by the Insurers. That omission occurred during the Period of Insurance.
>
> [27] The Insured having made claims seeking indemnity under the Policy in

> relation to accidents which occurred during the Period of Insurance, it is sufficient to engage s 54(1) that the effect of the Policy is that the Insurers may refuse to pay those claims by reason only of acts which occurred after the contract was entered into. Precisely how the Policy produced that effect is not to the point. The conclusion of the Court of Appeal in the present case was correct.

40 These paragraphs lead to our additional comment to the analysis of Meagher JA in *Prepaid*. The process of understanding what are the restrictions or limitations that are inherent in the claim is one that involves the construction of the policy, not merely as to what its constituent words mean, but in a broad sense so as to characterise as a matter of substance what is the essential character of the policy. Once that essential character is decided upon, the restrictions or limitations that necessarily inhere in any claim under such a policy (to which s 54 does not apply) and the restrictions or limitations that do not necessarily inhere in any claim under such a policy (to which s 54 may apply) can be ascertained.

41 The process of characterisation or construction in the broad sense will, to a significant degree, be influenced by the expression of the parties of the terms of the insurance. Thus, if the underwriter of the Nautilus Policy wished to propound and price a policy that provided only for voyages that were domestic in character that could be expressed with some essential clarity. Perhaps assuming that such a wish conformed with a recognisable body of risk, practically or conceptually distinct from coverage that included international voyages, such clarity of expression may suffice to impose a restriction inherent in a claim under such a policy that the voyage be domestic and not international. The respondent accepted as much in argument. The process of characterisation and the judgment as to what is the essential character of the policy in a given case will be influenced, but not dictated, by the drafting of the wording of the policy, and will involve the identification of the nature and limits of the risks that are intended to be accepted, paid for, and covered. Thus the essential character of the claims made and notified policy such as in *Australian Hospital Care* included the making of a claim on the insured within the policy period. So, the making of the claim against the insured within the period was a limitation or restriction that necessarily inhered in a claim under such a policy; but the notification of the claim by the insured to the insurer within the period was not part of the essential character of the policy and so was not a restriction or limitation that necessarily inhered in a claim under such a policy. In an occurrence based policy, the occurrence of the impugned event within the policy period was part of the essential character of the policy and so was a restriction or limitation that inhered in any claim under such a policy.

42 Here, the parties agreed that this was the correct approach; they disagreed, however, on the proper conclusion to draw from the construction in the broad sense, ie from the characterisation of the Nautilus Policy.

43 Under the Nautilus Policy the Certificate of Insurance provided a broad and clear cover: "we agree to cover you, subject to the conditions, exclusion, and endorsements of the policy" (see p 1 of the Certificate of Insurance). That cover was for occurrences affecting identified property within the 250 nautical mile limit (and legal liability and personal accident cover). The provision on page 11 of the PDS concerned with the period between customs clearance was a *suspension* of cover. Such a provision was a temporal or suspensory limitation

of a well-known kind discussed by the Australian Law Reform Commission (ALRC) in *Insurance Contracts*, Report No 20 (1982) at [217] and [229]. Such a temporal or suspensory limitation is more easily seen to be a qualification upon the essential cover, as collateral to the policy's essential character, than the geographic limits as stated in the Certificate of Insurance. The latter delineates the essential geographic risk; the former qualifies cover in certain circumstances. This can be illustrated by comparing the circumstances of Mr Phillips' claim and another claim that can be posited hypothetically: Where a yacht departed Australian waters and sailed more than 250 nautical miles from Australia with the purpose of leaving Australian waters, but without clearing customs, and which then returned and grounded on the same reef, there would be no impediment to recovery from the provision on page 11.

44 Neither the words of the policy, nor any objective evidence directed analysis of the essential character of the policy, or of the risks undertaken, to a more subtle essential character that was propounded by the appellant: cover within 250 nautical miles, as long *as the yacht had not cleared customs for the purpose of leaving Australian waters and not re-cleared customs and immigration on return.*

45 The essential attributes of the policy find a reflection in the policy as a time policy (though not governed by the MI Act). Time policies insure risk independently of the voyage, although it will be common for there to be warranted exceptions of type of voyage, or geographic limits: see, generally, Mustill MJ and Gilman JCB, *Arnould's Law of Marine Insurance and Average* (Vol 1, 16th ed, Stevens & Sons, 1981) pp 356-357 [511]-[512]. The distinction between time and voyage policies is important because certain principles concerned with risk do not apply to time policies as they do to voyage policies, including deviation, change of voyage and delay: see Gilman J, Merkin R, Blanchard C and Templeman M, *Arnould: Law of Marine Insurers and Average* (18th ed, Sweet & Maxwell, 2008) pp 459-460 [13-02].

46 The Nautilus Policy provided cover where, as here, the yacht suffered a casualty within its stated geographic limits of 250 nautical miles off mainland Australia and Tasmania. But for the operation of the suspension of cover after the insured's act of causing the yacht to clear Australian Customs for the purpose of leaving Australian waters and the insured's omission to clear Australian Customs after the yacht had re-entered the geographic limits on the return voyage, the Nautilus Policy would have responded to the casualty. The act of clearing Australian Customs and the omission (as yet at the time of the casualty) on the yacht's return to clear Australian Customs, can each be seen to be an act or omission of the insured that occurred after the inception of the Nautilus Policy, during its period of cover and within its geographic limits. That was sufficient to engage s 54(1) because the effect of the suspension of cover in those circumstances entitled Nautilus to refuse to pay the insured's claim: *Maxwell* 252 CLR 590 at [26]-[27].

47 Here the insured's claim necessarily incorporated a physical dimension that was part of the essential character of the policy — that the yacht was within 250 nautical miles of Australia. The contract of insurance only applied if that were the case. That was the restriction or limitation that must inhere in the claim.

The second issue: does s 54 prevent refusal in paying the claim?

48 This being so, why can the insurer refuse to pay the claim (subject to the operation of s 54)? The answer is, because of the suspension of cover brought

about by the act of the insured in clearing customs for the purpose of leaving Australian waters, and the failure as yet to re-clear customs and immigration on return. The appellant said that this dual aspect (clearing on leaving — the "act" — and not clearing on returning) meant that a requirement of sole causality of the act (by the word "only" in s 54(1)) was not satisfied. This submission reads too much into the word "only" in s 54(1) and is overly technical with the facts. The word "only" is used in the section because there may be an independent basis for refusal to pay, unrelated to the act. Here the act of clearing customs and the omission or circumstance of not yet re-clearing are related. They are not to be treated separately. The act of clearing customs at Fremantle with the relevant purpose suspended cover. The claim was denied because cover was suspended. Cover was suspended because of the act of the insured. The suspension had not been ended by the reinstatement of cover because re-clearing of customs and immigration had not occurred. Put another way, the suspension of the cover was in place because of the act of clearance, in circumstances where there had been no re-clearance. So analysed, s 54 was satisfied. The primary judge analysed "act" in this way and we agree with his Honour's analysis.

49 Another way of looking at the "act" of clearing customs prior to leaving Australian waters and its consequences is that, in the context or circumstances of not yet re-clearing customs and immigration on return, one is examining the "conduct of the insured". This was the phrase and concept to which the ALRC was directing itself in the Report at [219] and [228] (cf *Maxwell* 252 CLR 590 at [26]) and to which the language of s 54 is directed. At least in the context of the facts here, an act in a related set of circumstances should not be translated into something different linguistically, into a so-called "state of affairs": cf *Allianz Australia Insurance Ltd v Inglis* (2016) 307 FLR 132 at [33]-[44].

The third issue: contribution

50 The appellant's argument was that s 54 was only for the benefit of the insured, and was not available to an insurer for the application of the principle of contribution. This argument was founded in significant respect in a textual fashion on the word "claim" in s 54 — that is, a claim *by the insured*.

51 If, however, s 54 were to be engaged for the benefit of the insured, the insurer would not be able to refuse to pay the claim. Subject to questions of prejudice (not relevant here) the insurance policy would respond, through its language, in the statutory context.

52 Contribution between insurers is founded in equitable principle as explained in *Albion Insurance Company Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 352. It is the existence of co-ordinate liabilities of two parties that gives the right of contribution. The payment under one policy relieves the other policy of what would be a liability were a claim to be made on it. There is no requirement for a right of contribution to arise for the creditor to make a claim on both parties co-ordinately liable. The creditor can choose one; and that one has a claim in contribution against the other. Natural justice and equality underpin the right. So, no overly technical approach should be taken. The separate obligations may have different sources (here contract, and contract modified in operation by statute). The question is whether the obligations can be characterised as of the same nature and to the same extent: see *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72 at [39].

53 Here the obligations of the two insurers should be characterised in nature,

extent and function as the same. By way of example, could there be any doubt that contribution would lie between two insurers, to both of whose policies s 54 applied in circumstances where neither policy in its strict terms responded and the insured made a claim on one, but not the other, policy?

54 For these reasons the appeal should be dismissed with costs.

Orders accordingly

Solicitors for the appellant: *GTR Lawyers*.

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FIONA CAMERON