HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND HAYNE JJ

MOLTONI CORPORATION PTY LTD APPELLANT

AND

QBE INSURANCE LTD RESPONDENT

Moltoni Corporation Pty Ltd v QBE Insurance Ltd
[2001] HCA 73
13 December 2001
P92/2000

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders of the Full Court of the Supreme Court of Western Australia made on 3 April 2000 and in lieu thereof order that the appeal to that Court be dismissed with costs.*

3. *Respondent to have special leave to cross-appeal. Cross-appeal treated as instituted and heard instanter and dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation:

D F Jackson QC with G R Hancy for the appellant (instructed by Blake Dawson Waldron)

F M Douglas QC with G R Donaldson for the respondent (instructed by Kott Gunning)

CATCHWORDS

Moltoni Corporation Pty Ltd v QBE Insurance Ltd

Insurance – Contract of insurance – Employer indemnified by insurer against liability arising from workplace injuries – Condition of policy required employer to give notice to insurer of personal injury suffered by employee as soon as practicable – Employer failed to inform insurer of employee's injury as soon as practicable – Insurer's liability to be reduced under *Insurance Contracts Act* 1984 (Cth) by amount that fairly represents extent to which insurer's interests prejudiced.

Insurance – Employer indemnified by insurer against liability arising both at common law and under workers' compensation legislation – Employer sought indemnity against its liability to employee at common law – Whether insurance contract entered into for the purposes of a law that related to workers' compensation and therefore exempt from operation of *Insurance Contracts Act* 1984 (Cth).

Words and phrases – "extent to which the insurer's interests were prejudiced" – "for the purposes of".

Insurance Contracts Act 1984 (Cth), ss 9, 54.
Workers' Compensation and Rehabilitation Act 1981 (WA), ss 5, 18, 160.

1 GLEESON CJ, GAUDRON, McHUGH, KIRBY AND HAYNE JJ. Section 54 of the *Insurance Contracts Act* 1984 (Cth) ("the Insurance Contracts Act") provides that, in some circumstances, an insurer may not refuse to pay a claim, even if the contract of insurance would permit that refusal, but that the insurer's liability in respect of the claim is reduced. The liability is to be reduced "by the amount that fairly represents the extent to which the insurer's interests were prejudiced" as a result of the act or omission that would found refusal under the contract. The principal issue in this case concerns the operation of this provision for reduction in the insurer's liability. The respondent seeks special leave to cross-appeal to raise, as a further issue, whether the Insurance Contracts Act applied to the contract of insurance which the respondent made with the appellant.

The contract of insurance and the claim

2 In 1986, the respondent issued a Workers' Compensation Policy of insurance ("the Policy") to a company which, among other things, traded under the name "Mainline Demolition". That Policy was renewed each year and it was in force in November 1992. It was common ground that, at all relevant times, the appellant was insured under the Policy. An employee of the appellant ("the employee") alleged that, in November 1992, he suffered injury in the course of his employment by the appellant in its demolition business. The employee brought an action against the appellant, in the District Court of Western Australia, claiming damages for negligence.

3 The Policy provided that if, during the period of insurance, a disability of any worker of the appellant occurred in its demolition business, and the appellant:

> "is legally liable to make any payment in respect of such disability under the Workers' Compensation and Assistance Act 1981[1] as amended … the [respondent] will indemnify the [appellant] against the payments for which the [appellant] is so liable"

together with certain costs and expenses. The Policy further provided that the respondent would indemnify the appellant:

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1 This Act was later renamed the *Workers' Compensation and Rehabilitation Act* 1981 (WA).

> "against legal liability to pay damages … at Common law for personal injury sustained by any person employed by the [appellant] under a contract of service or apprenticeship if such injury is an injury in respect of which such person is entitled to recover from the [appellant] both compensation under the [Workers' Compensation and Assistance Act] and (subject to Section 92 of the Act) damages independently thereof and if the [appellant] would be entitled to indemnity hereunder in respect of any compensation so recovered".

4 It was a condition of the Policy that the appellant should give notice to the respondent of any personal injury suffered by an employee "as soon as practicable after information as to the happening of such, or of any incapacity arising therefrom, comes to the knowledge" of the appellant or a representative of the appellant. The Policy provided that "due observance and fulfilment" of the conditions of the Policy was a condition precedent to any liability of the respondent.

5 The appellant did not give to the respondent notice of the employee's injury until 6 April 1994 – about 17 months after it happened. The respondent denied that it was liable to indemnify the appellant against the employee's claim. It alleged that the appellant's failure to notify it of the employee's claim as soon as practicable after it became aware of it had prejudiced it in three ways. It alleged, first, that it lost "the opportunity to timeously investigate the accident and the injuries allegedly sustained" by the employee. Secondly, it alleged that the employee had returned to work as a demolition labourer, after the accident which gave rise to the appellant's claim on the Policy, and had then suffered another injury which prevented it properly investigating the injuries sustained in the accident which was the subject of the claim. Thirdly, it alleged that, if it had been notified of the accident in accordance with the Policy, it would have arranged rehabilitation and medical treatment for the employee different from the treatment he was given.

The course of proceedings below

6 At trial, the employee succeeded in his claim against the appellant and obtained judgment for $349,837 and costs. The appellant succeeded in its claim against the respondent and an order was made that the respondent indemnify the appellant against its liability under the judgment to the employee, together with the reasonable costs and expenses it incurred in relation to the proceedings. (Although the order is in peremptory terms – that the respondent "indemnify" the appellant – it is, presumably, an order intended to operate as a declaration of right rather than an order for payment of an unascertained sum of money.)

7 The respondent appealed to the Full Court of the Supreme Court of Western Australia against the order for indemnity. By majority (Ipp and Wallwork JJ; Murray J dissenting), the Full Court ordered that the appeal be allowed and that "the question of indemnity in [the order of the District Court] be referred back to the District Court for retrial"[2].

8 At trial, the respondent relied principally upon evidence given by Mr Robert Mitchelson, one of its former employees. He had been its major claims controller between 1987 and 1993 and had acted as its claims manager from time to time. Mr Mitchelson gave evidence of what the respondent would have done if the appellant had given it notice of the employee's injury soon after it happened. In particular, he said that, ordinarily, within three months of injury, an injured worker would be referred to a rehabilitation provider, particularly when, as was the case with the appellant's employee, the worker had been certified fit only for light duties. He could, however, refer to no example of this having been done. In addition, although the question of referring a worker to a medical specialist was within the discretion of the person who dealt with a particular file on behalf of the respondent, the respondent's policy was to refer a worker to a specialist of its choice within three months of receipt of a claim.

9 Nevertheless, the trial judge concluded that:

> "[I]n circumstances where Mr Mitchelson's opinion was formed with the benefit of hindsight, and given his inability to refer to comparable cases … I simply do not feel persuaded to the requisite standard that any broad policy or aim of the [respondent] was applied consistently, or that had the [respondent] then received a claim the [employee] would have been referred to either rehabilitation or to a medical specialist prior to the worsening of his symptoms in November 1993."

The trial judge also rejected the respondent's contentions that it had lost the opportunity to attempt an early settlement of the claim and had incurred additional legal or medical expenses.

10 In the Full Court, Wallwork J concluded that the trial judge did not deal sufficiently in his reasons with the evidence of Mr Mitchelson and that "[e]rror is

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2 *QBE Insurance Ltd v Moltoni Corporation Pty Ltd* (2000) 22 WAR 148.

therefore demonstrated"[3]. His Honour therefore found it unnecessary to deal with the contentions made in the Full Court that, because the respondent had received late notice of the claim, it had lost a chance to investigate the claim, that the chance had some value and that there was, therefore, some prejudice to it[4]. By contrast, Ipp J, the other member of the majority, accepted these contentions[5] and it was on that basis that Ipp J allowed the respondent's appeal.

11 By special leave the appellant now appeals to this Court.

The statutory provision

12 It is as well to set out s 54(1) of the Insurance Contracts Act. It provides:

> "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."

13 Several features of the provisions are to be noted. First, the reference to the insurer being entitled to refuse to pay a claim "by reason of some act" must be understood in the light of s 54(6) which provides that a reference to an "act" includes a reference to an omission.

14 Secondly, the act (or omission) may be "of the insured or of some other person". It follows that the act or omission may, but need not, constitute a breach of contract by the insured.

15 Thirdly, the expression "the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent" of prejudice to the insurer assumes that the consequences of the act or omission can be expressed in

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3 (2000) 22 WAR 148 at 162 [72].

4 (2000) 22 WAR 148 at 162-163 [73].

5 (2000) 22 WAR 148 at 154 [22].

a money sum. It is only by expressing the consequences in monetary terms that the liability can be reduced.

16 Fourthly, the relevant sum is to be quantified as the amount that "fairly represents the extent to which the insurer's interests were prejudiced as a result of that act". The reference to "the extent to which the insurer's interests were prejudiced" invites attention to, and requires identification of, the amount of damage which the insurer suffered as a result of the act or omission in question. Because the act or omission may not always constitute a breach of the contract of insurance by the insured, that damage will not always be identifiable as the amount that would be allowed as compensatory damages on a claim by the insurer for breach of contract. Nonetheless, like an amount allowed for compensatory damages for breach of contract, the amount of which s 54(1) speaks, as fairly representing the extent to which the insured's interests were prejudiced, will be the actual financial damage that has been or will be sustained as a result of the relevant act or omission.

17 Lastly, as was said in the joint reasons of this Court in *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd*[6]:

> "The prejudice [to which s 54(1) refers] will consist in the existence of a liability which, in whole or in part, would not have been borne by the insurer if the act had not been done or the omission had not been made or in the non-receipt of an additional premium to which the insurer would have been entitled by reason of the doing of the act or the making of the omission."

But as was also said in those reasons[7]:

> "[T]he liability imposed by s 54(1) on an insurer is not itself the prejudice to be taken into account. If it were, s 54(1) would be self-destructive."

Thus, although relevant prejudice may be found to consist in the existence of a liability which would not have been borne if there had not been the relevant act or omission, the quantification of the amount representing the *extent* of the

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6 (1993) 176 CLR 332 at 342 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

7 (1993) 176 CLR 332 at 342 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

insured's prejudice as a result of the act requires the identification of what are the financial consequences that, in fact, have been, or will be, caused by that act or omission.

18 If, as was the case in *Ferrcom*, it can be shown that, had the relevant act or omission not occurred, the insurer would have gone off risk altogether, the amount that fairly represents the prejudice suffered is the whole of the amount claimed. By contrast, if the insurer would not have gone off risk (as was the case in the present matter) the relevant prejudice suffered is to be measured by reference to what *would* have happened (as distinct from what *could* or *might* have happened) if the act or omission had not occurred.

19 In the former kind of case, in which the insurer would have gone off risk, it is entirely accurate to speak of the insurer having lost, or having been deprived of, the opportunity to do so[8]. In the latter kind of case, the language of lost opportunity may be equally accurate, but its use may distract attention from the need to identify what would have happened if the act or omission had not occurred. In particular it may suggest, wrongly, that it is enough to point to some right that the insurer *might* have exercised, without inquiring whether the right *would have been* exercised.

20 Yet it is only if, first, the right would have been exercised, but was not, *and* secondly the insurer has suffered resulting prejudice that can be represented in monetary terms that the provision of s 54(1) allowing reduction in the insurer's liability is engaged. If the right would not have been exercised, the insurer has not suffered prejudice, let alone prejudice that can be measured in monetary terms. And in the setting of a trial, this last proposition amounts to saying that if the insurer does not prove, on the balance of probabilities, that it would have exercised the right in question, it fails to demonstrate that its liability for the claim should be reduced.

The application of s 54

21 In the present case, the respondent had sought to establish prejudice in the three forms noted earlier: "the opportunity to timeously investigate the accident and the [employee's] injuries", the intervening accident suffered by the employee on his return to work, and the lack of provision of different rehabilitation and

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8 (1993) 176 CLR 332 at 342 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

medical treatment. In this Court, and in the reasons of the majority in the Full Court, chief attention was directed to the third of these allegations because it was argued that the provision of different rehabilitation and medical treatment would have followed from earlier investigation of the injuries and would have avoided or ameliorated the consequences of the return to work.

22 At trial the respondent had sought to prove, through the evidence of Mr Mitchelson, what it would have done. The trial judge was not persuaded by this evidence. He concluded that it was affected by hindsight. Given the inability of the respondent to point, at trial, to a case similar to that of the employee in which the action which Mr Mitchelson said would have been taken in such a case was taken, it was well open to the judge to form the view he did.

23 The reasons for the trial judge reaching this view did not admit of lengthy elaboration. On this issue the central question was whether the trial judge accepted Mr Mitchelson's evidence as an accurate account of what would have been done. To a significant degree that was a matter of impression. But the trial judge did not rely only on that. He pointed, in his reasons, to the absence of evidence of comparable cases. The reasons of the trial judge were not deficient.

24 Further, the trial judge was right to conclude that the respondent had not demonstrated that it had suffered prejudice that had caused or would cause it damage. No doubt, as Ipp J pointed out[9], the respondent had lost the opportunity to exercise, at an earlier date than it did, its undoubted rights under the Policy to investigate the claim, to have the employee examined by a doctor of its choosing, and to have him undergo different treatment. That is, it lost an *opportunity* to reduce its liability[10]. But for the reasons given earlier, the amount that fairly represented the extent to which the respondent's interests were prejudiced was not established by pointing to what *might* have been done; in this case, it was necessary to prove, to the requisite standard of proof, what *would* have been done. The trial judge was not persuaded that the respondent would probably have done what Mr Mitchelson said it would have done. In those circumstances, the respondent did not establish that its liability to the appellant should be reduced by any amount.

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9 (2000) 22 WAR 148 at 154 [22].

10 (2000) 22 WAR 148 at 151 [7].

The applicability of the Insurance Contracts Act

25 The appellant sought indemnity against its liability to the employee at common law, not against any liability under the *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Workers' Compensation Act"). Section 9(1) of the Insurance Contracts Act provides that:

> "Except as otherwise provided by this Act, this Act does not apply to or in relation to contracts and proposed contracts:
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> …
>
> (e) entered into or proposed to be entered into for the purposes of a law (including a law of a State or Territory) that relates to:
>
> (i) workers' compensation".

The Workers' Compensation Act provides in Pt III for a scheme by which employers are liable to pay compensation to workers who suffer disability by (among other things) personal injury by accident arising out of, or in the course of, employment[11]. Subject to some qualifications that need not be noticed, s 160 of the Workers' Compensation Act obliges every employer to obtain from an approved insurance office "a policy of insurance for the full amount of his liability to pay compensation under this Act to any worker employed by him". Unlike the workers' compensation legislation in some other jurisdictions, which requires insurance against all forms of an employer's liability for personal injury to a worker[12], the Workers' Compensation Act does not require an employer to insure against liability at common law.

26 The respondent sought special leave to cross-appeal to this Court to argue that the Insurance Contracts Act, and in particular s 54, did not apply to this contract of insurance. The respondent did agitate this issue in the Full Court although the trial judge noted, in his reasons, that at trial it had been conceded

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11 *Workers' Compensation and Rehabilitation Act* 1981 (WA), s 5, definition of "disability" and s 18.

12 *Workers Compensation Act* 1987 (NSW), s 155; *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic), s 7; *WorkCover Queensland Act* 1996 (Q), s 52; *Workers Rehabilitation and Compensation Act* 1988 (Tas), s 97; *Work Health Act* (NT), s 126; *Workers' Compensation Act* 1951 (ACT), s 17B.

that "the operation of the … Act, and in particular s 54, could not be avoided merely because the same contract of insurance included workers' compensation cover, so that another part of the contract was entered into for the purposes of a law that related to workers' compensation".

27 The appellant, in this Court, opposed the grant of special leave on grounds that included a contention that the way in which the argument is now sought to be put by the respondent in support of its cross-appeal had not been advanced below. It was accepted, however, that what was said to be the novel form of the argument was not such as would make it likely that further evidence would have been adduced at trial if it had been put forward at that time. It is not necessary to consider whether the appellant is right to say that the argument advanced in this Court differs from what was put below. The respondent should have the special leave it seeks, but its cross-appeal should be dismissed.

28 Section 9(1) of the Insurance Contracts Act deals with certain contracts and proposed contracts. Some (for example, those dealt with in s 9(1)(b) and (c)) are contracts of insurance and it may therefore be that, in those cases, it is necessary to refer to s 10 of that Act and its provisions about what a reference in the Act to a contract of insurance is to include. But s 9(1)(e)(i), which is said to be the provision relevant to this case, does not speak of contracts *of insurance*. It speaks of contracts "entered into or proposed to be entered into for the purposes of a law … that relates to" an identified subject matter – workers' compensation. Where, as here, a contract between the insured and insurer is entered into for the purposes of such a law, but the parties undertake other rights and duties for the purposes of obtaining and providing insurance against another kind of risk – an employer's liability to an employee at common law – how is the reference in s 9(1) to "contracts and proposed contracts" to be understood?

29 We do not accept that the criterion for operation of s 9(1)(e) is the form in which particular arrangements between parties are recorded. Thus, the fact that there is a single policy document which records the arrangements between the appellant and the respondent does not determine whether s 9(1)(e)(i) is engaged. Account must be taken of the fact that there were, in this case, distinct insurances that were reflected in the two different insuring clauses that are set out earlier in these reasons. That both concerned an employer's liability to provide compensation to workers, one form of liability arising under a statutory scheme and the other stemming from the common law, is not to the point. What is important is that one form of insurance was undertaken for the purposes of a relevant law; the other was not. The exception for which s 9(1)(e)(i) provides is identified by reference to a contract being entered into for the purposes of a law

relating to a particular subject matter. The exception is not identified by reference to the way in which the risk which is insured can be described.

30 In these circumstances, s 9(1)(e)(i) should be understood as excepting from the application of the Insurance Contracts Act only those aspects of the contract between the appellant and the respondent that were made pursuant to the obligation imposed on the appellant by the Workers' Compensation Act to have insurance against liability under that Act. It is only the stipulations that relate to *that* cover which constitute a contract entered into for the purposes of the Workers' Compensation Act. Section 9(1)(e)(i) does not operate to except from the application of the Act those provisions of the contract that were engaged in the circumstances of this case. Accordingly, s 54(1) of the Insurance Contracts Act applied.

Orders

31 The appeal should be allowed with costs, the orders of the Full Court of the Supreme Court of Western Australia made on 3 April 2000 set aside and in lieu it be ordered that the appeal to that Court be dismissed with costs. The respondent should have special leave to cross-appeal. The cross-appeal should be treated as instituted and heard instanter but dismissed with costs.