HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

ZURICH AUSTRALIAN INSURANCE LTD APPELLANT

AND

METALS & MINERALS INSURANCE PTE LTD & ORS RESPONDENTS

Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd
[2009] HCA 50
2 December 2009
P33/2009

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

J E Maconachie QC with H M O'Sullivan and J S Emmett for the appellant (instructed by SRB Legal)

B W Walker QC with C A Elphick for the first and third respondents (instructed by DLA Phillips Fox)

E M Corboy SC with S F Popperwell for the second respondent (instructed by Pynt & Partners)

CATCHWORDS

Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd

Insurance contracts – Validity of "other insurance" provision – Whether rendered void by s 45 of *Insurance Contracts Act* 1984 (Cth) – Where s 45 rendered void provisions in contracts of general insurance that had effect of limiting or excluding liability of insurer under the contract by reason that the insured had entered into some other contract of insurance – Whether s 45 applied to provision purporting to limit or exclude liability by reason that the insured was named as non-party beneficiary under another contract of insurance – Whether insured had "entered into" that contract within meaning of s 45.

Statutes – Interpretation – Meaning of "provision" in s 45 of *Insurance Contracts Act* 1984 (Cth) – Where "other insurance" clause applied in two different circumstances, only one of which attracted application of s 45 – Whether clause void only to the extent that it had the impugned effect – Whether clause void as a whole – Whether s 45 rendered void words or operation of clause.

Words and phrases – "double insurance", "entered into", "excess insurance", "other insurance", "provision".

Insurance Contracts Act 1984 (Cth), ss 45(1), 48.

FRENCH CJ, GUMMOW AND CRENNAN JJ.

Introduction

1 Section 45 of the *Insurance Contracts Act* 1984 (Cth) ("the Act") renders void so-called "other insurance" provisions of general insurance contracts. Such provisions limit or exclude the liability of the insurer to indemnify the insured against loss because the insured has entered into another contract of insurance in relation to the same risk. The first question in this appeal, brought by Zurich Australian Insurance Ltd ("Zurich"), is whether s 45 applies to provisions which purport to exclude or limit liability where the insured is not a party to the other contract of insurance but is named in it as an insured person. The second question is whether the section renders void an entire clause of an insurance contract which includes a provision to which the section applies notwithstanding that the clause may include other provisions to which it does not apply. The answer to both questions is in the negative. As a result the appeal must be dismissed.

Factual and procedural history

2 On 1 March 1992, Hamersley Iron Pty Ltd ("Hamersley") entered into a contract with Speno Rail Maintenance Australia Pty Ltd ("Speno") for the provision of rail grinding services ("the Speno/Hamersley Contract"). One of its terms required Speno to indemnify Hamersley and insure itself against all claims occurring as a result of anything done in the performance of the contract causing death or injury to any person[1]. It was also a term that Speno's insurance policy be endorsed to include Hamersley as a named insured[2].

3 Pursuant to the Speno/Hamersley Contract, Speno entered into a Combined General Liability Insurance Policy with Zurich on 12 September 1995 ("the Speno Policy"). Although not a party to the policy, Hamersley was included as a named insured under it[3].

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1 Clauses 37 and 38 of the Speno/Hamersley Contract.

2 Clause 38(b)(ii) of the Speno/Hamersley Contract.

3 Under an extended definition of "Insured", read with the endorsement to the Speno Policy: see *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* (2009) 253 ALR 364 at 372 [36] per Beech AJA.

4 Hamersley took out its own contract of insurance with Metals & Minerals Insurance Pte Ltd ("MMI") ("the Hamersley Policy"). That policy contained an "other insurance" clause in the following terms:

> "UNDERLYING INSURANCE
>
> Underwriters acknowledge that it is customary for the Insured to effect, or for other parties (including joint venture partners, contractors and the like) to effect, on behalf of the Insured, insurance coverage specific to a particular project, agreement or risk.
>
> In the event of the Insured being indemnified under such other Insurance effected by or on behalf of the Insured (not being an Insurance specifically effected as Insurance excess of this Policy) in respect of a Claim for which Indemnity is available under this Policy, such other Insurance hereinafter referred to as Underlying Insurance, the Insurance afforded by this Policy shall be Excess Insurance over the applicable Limit of Indemnity of the Underlying Insurance but subject always to the terms and conditions of this Policy.
>
> In the event of cancellation of the Underlying Insurance or reduction or exhaustion of the Limits of Indemnity thereunder, this Policy shall:
>
> (i) in the event of reduction pay the excess of the reduced underlying limit
>
> (ii) in the event of cancellation or exhaustion continue in force as underlying insurance
>
> but subject always to the terms and Conditions of this Policy."

5 The present litigation was preceded by an action brought in the District Court of Western Australia by two employees of Speno carrying out work under the Speno/Hamersley Contract who were injured as a result of the negligence of Hamersley. The proceedings led to judgment in favour of one of the employees against Hamersley in the amount of $1,110,186.35 and a settlement of $25,000 in favour of the other. Zurich and Speno were ordered to indemnify Hamersley in respect of the judgment sum[4]. Zurich paid the damages under the judgment and the settlement.

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4 *Nolan v Hamersley Iron Pty Ltd* (1999) 22 SR (WA) 205; varied on appeal *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291.

6 The present appeal arises out of contribution proceedings brought subsequently by Zurich against MMI in the Supreme Court of Western Australia in relation to MMI's liability to indemnify Hamersley under the Hamersley Policy. MMI argued that it had no coordinate liability with Zurich which would ground an equity of contribution. It relied upon the Underlying Insurance clause to reduce the extent of its liability to Hamersley to the provision of the excess insurance within the meaning of the clause. Zurich contended that s 45(1) of the Act rendered the Underlying Insurance clause void. Zurich's contention was accepted at first instance in the Supreme Court of Western Australia[5], but was rejected in the Court of Appeal[6]. Zurich was granted special leave to appeal to this Court on 31 July 2009[7].

7 Section 45 provides:

> "(1) Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a State or Territory, the provision is void.
>
> (2) Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance that is specified in the first-mentioned contract."

8 The primary judge held that s 45(1) does not avoid an "other insurance" provision in an insurance policy where such provision relates to another contract of insurance to which the insured is not a party but in which it is named as a non-party beneficiary[8]. Her Honour nevertheless held that the Underlying Insurance clause in the Hamersley Policy was void as a whole because of that element of it which was caught by s 45(1)[9]. Her Honour made a declaration that Hamersley

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5 *Zurich Australian Insurance Ltd v Metals and Minerals Insurance Pte Ltd* (2007) 209 FLR 247.

6 *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* (2009) 253 ALR 364.

7 [2009] HCATrans 167.

8 (2007) 209 FLR 247 at 278-279 [139]-[142].

9 (2007) 209 FLR 247 at 279-280 [143].

was doubly insured by Zurich and MMI in respect of its liability to the two injured employees and gave judgment in favour of Zurich against MMI in the sum of $869,357.

9 The Court of Appeal held that the primary judge had erred in finding that s 45(1) applied to avoid the Underlying Insurance clause in its entirety[10]. It set aside the judgment and ordered that the Zurich contribution action be dismissed. The view taken by the primary judge of the construction of s 45(1), in its application to non-party beneficiaries under general insurance contracts, was not challenged in the Court of Appeal[11].

The grounds of appeal

10 The grounds of appeal, amended by leave at the hearing of the appeal to include ground number 4, were as follows:

> "2. The Court of Appeal erred in failing to find that section 45(1) of the *Insurance Contracts Act* 1984, on its true construction, renders void the whole of the relevant provision of the First Respondent's policy of insurance and not just the offending element of it.
>
> 3. The Court of Appeal held that the 'other insurance' or 'underlying insurance' provision in the First Respondent's policy of insurance was capable of being, and should be, read distributively so as to sever elements from that provision and thereby misconstrued, or alternatively misapplied, section 45(1) of the *Insurance Contracts Act* 1984.
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> 4. The Appeal should be upheld on the ground that section 45(1) of the *Insurance Contracts Act* 1984 operates such that the phrase '*the insured has entered into some other contract of insurance*' applies to the situation where a person has the benefit of a contract of insurance even though not a party to that contract of insurance himself or herself."

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10 (2009) 253 ALR 364 at 367-368 [12] per Martin CJ, 370 [27] per McLure JA, 383 [110]-[111] per Beech AJA.

11 (2009) 253 ALR 364 at 366 [3] per Martin CJ, 369 [19] per McLure JA, 375 [63] per Beech AJA.

The legislative history of s 45

11 Prior to the enactment of the Act insurance contracts were subject to what the Australian Law Reform Commission ("the ALRC") described in its 1982 Report on Insurance Contracts as a "bewildering variety of laws"[12]. These laws included the common law and Imperial[13], State and Commonwealth statutes. The Act, which gave effect to recommendations made by the ALRC, repealed the Imperial Acts applicable to contracts of insurance covered by the new Act in their application to insurance contracts and in so far as they were part of the law of the Commonwealth[14].

12 A particular cause of concern expressed in the ALRC Report was the operation of terms of insurance contracts dealing with double insurance or "other insurance" taken out by the insured. Double insurance was described in *Albion Insurance Co Ltd v Government Insurance Office (NSW)*[15] thus:

> "There is double insurance when an assured is insured against the same risk with two independent insurers. To insure doubly is lawful but the assured cannot recover more than the loss suffered and for which there is indemnity under each of the policies. The insured may claim indemnity from either insurer. However, as both insurers are liable, the doctrine of contribution between insurers has been evolved."

13 The phenomenon of double insurance led to the incorporation of "other insurance" provisions in insurance policies. There were two broad classes of such provisions in contracts governed by the common law. The first class required the insured to give written notice to its insurer of other insurance which covered the same subject matter and the same risk, effected at the time the policy was issued or which might come into existence subsequently. Under this class of provision, the second insurance would only be allowed by endorsement on the first policy. It was intended to "detect possible fraud and to facilitate

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12 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 8 [16].

13 For example, the *Life Assurance Act* 1774 (14 Geo 3 c 48); the *Fires Prevention (Metropolis) Act* 1774 (14 Geo 3 c 78); and the *Marine Insurance Act* 1788 (28 Geo 3 c 56).

14 The Act, s 3(1).

15 (1969) 121 CLR 342 at 345 per Barwick CJ, McTiernan and Menzies JJ; [1969] HCA 55.

contribution between insurers."[16] The second class of provision excluded the liability of the first insurer or limited it to an excess insurance cover[17]. Not uncommonly both policies contained "other insurance" provisions. This led to difficulties in their construction and application.

14 After reviewing case law in the United Kingdom, Australia, New Zealand and the United States, the ALRC stated[18]:

> "The Commission is concerned with the effect of 'other insurance' clauses on the interests of the insured. Insureds are detrimentally affected by uncertainty over the effects of individual provisions and combinations of different provisions. More important is the fact that some 'other insurance' clauses have the effect of limiting the insurer's liability to its insured. In such a case, the insured's protection may be compromised or lost. While they affect the interests of insureds in this manner, 'other insurance' clauses have little independent value for insurers. To the extent that they are intended as a protection against fraud, they are ineffective. At most, such a clause might operate as a disincentive to claiming the same loss twice under different policies. The same effect could be achieved by a clear warning to the insured that he is entitled to claim, under the policy concerned and under any other insurance, no more than his actual loss. To the extent that 'other insurance' clauses are designed to ensure that an insurer becomes aware of the existence of other insurance so that it may claim contribution in the event of a loss, the same aim could be achieved by asking appropriate questions in the proposal and claim forms."

The ALRC then concluded[19]:

> "There is no substantial justification for any of the various types of 'other insurance' clause. As they may cause the insured's reasonable expectations to be defeated, all forms of 'other insurance' provisions should be rendered ineffective. If more than one insurance is in effect in

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16 Sutton, *Insurance Law in Australia*, 3rd ed (1999) at 972 [12.9].

17 Sutton, *Insurance Law in Australia*, 3rd ed (1999) at 972 [12.9].

18 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 177 [289].

19 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 177-178 [289].

> respect of the same risk, the insured should be entitled to recover the whole of his loss from any one of the insurers, which should then be entitled to obtain contribution from the others."

In the draft Insurance Contracts Bill which formed Appendix A to the Report, there was included a cl 46[20] identical in terms to what became s 45 of the Act.

15 The Explanatory Memorandum to the Insurance Contracts Bill set out the substance of the proposed s 45 in broad terms[21]:

> "A provision in a contract of general insurance (other than a contract providing insurance cover in respect of loss not covered by another specified contract – clause 45(2)) limiting or excluding the insurer's liability because of other insurance will be void. Insurers, however, will be able to limit or exclude liability which is also covered by a contract which the insured is obliged to enter into under another law (clause 45(1))."

The stated rationale for the new section referred to uncertainties in the judicial interpretation of "other insurance" provisions. As the law stood, it was said, an insured might recover nothing or only part of the loss – a fact not balanced by any gains to the insurer[22]. Double insurance would still give rise to a contribution claim from one insurer against the other in respect of the loss[23].

The statutory framework

16 A number of provisions of the Act provide part of the context in which s 45 is to be construed. The application of the Act to insurance contracts is not stated comprehensively. However, it extends to contracts whose proper law is that of a State or Territory in which the Act applies or to which it extends[24] and,

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20 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 264.

21 Australia, House of Representatives, Insurance Contracts Bill 1984, Explanatory Memorandum at [146].

22 Australia, House of Representatives, Insurance Contracts Bill 1984, Explanatory Memorandum at [147].

23 Australia, House of Representatives, Insurance Contracts Bill 1984, Explanatory Memorandum at [148].

24 The Act, s 8.

as explained in *Akai Pty Ltd v People's Insurance Co Ltd*[25], the effect of s 8(2) is that where, but for an express provision to the contrary, the proper law would be as provided by s 8(1), the contrary provision is to be disregarded.

17 There are a number of express exclusions from the application of the Act. It does not apply in relation to contracts of insurance "entered into" before the date of its commencement[26]. Various classes of insurance contract are excluded from its application in s 9. These include insurance contracts "entered into" by specified classes of organisation or for specified purposes or in the course of State or Northern Territory insurance[27].

18 The term "entered into", which is critical to the first constructional question in this appeal, is defined non-exhaustively in s 11(9) in the following terms:

> "Subject to subsection (10), a reference in this Act to the entering into of a contract of insurance includes a reference to:
>
> (a) in the case of a contract of life insurance – the making of an agreement by the parties to the contract to extend or vary the contract;
>
> (b) in the case of any other contract of insurance – the making of an agreement by the parties to the contract to renew, extend or vary the contract; or
>
> (c) the reinstatement of any previous contract of insurance."

The draft Insurance Contracts Bill proposed by the ALRC included no definition of "entered into" and no equivalent of s 11(9). Nor did the Bill as introduced into the Senate[28]. The sub-section was introduced by amendment in the Senate. Its rationale, as set out in the relevant Explanatory Memorandum, was as follows[29]:

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25 (1996) 188 CLR 418 at 424 per Dawson and McHugh JJ, 433 per Toohey, Gaudron and Gummow JJ; [1996] HCA 39.

26 The Act, s 4(1).

27 The Act, ss 9(1) and 9(2).

28 Insurance Contracts Bill 1983 (Cth).

29 Australia, Senate, Insurance Contracts Bill 1983 (Amendments and new clause to be moved on behalf of the Government), Explanatory Memorandum at [21].

> "The effect of the amendment will be to make it clear that any obligations which the Bill imposes on the insurer and insured 'before the contract is entered into' will apply where they renew, extend, vary or reinstate an existing contract and thereby make a new contract."

Section 11(10) is not material for present purposes.

19 Section 11(11) also illuminates the sense in which the words "entered into" are used in the Act:

> "Where a provision of this Act requires anything to be done before a particular contract is entered into, it is sufficient compliance with that provision if that thing is done at the time when the contract is entered into."

20 Where a person who is not a party to a contract of general insurance is specified or referred to in the contract as a person to whom the insurance cover extends, that person has a right, conferred by s 48, to recover the amount of the person's loss from the insurer in accordance with the contract. Section 48(3) provides:

> "The insurer has the same defences to an action under this section as the insurer would have in an action by the insured."

Section 48, like s 45, was recommended for inclusion in the Act by the ALRC in its 1982 Report[30]. The decision of the Privy Council in *Vandepitte v Preferred Accident Insurance Corporation of New York*[31] was long-standing authority for the proposition that the insured party to a contract of insurance had no insurable interest in the liability of a non-party insured. In the case of third party motor vehicle insurance, the effect of the decision had been overcome by legislation in the various Australian jurisdictions when the ALRC published its Report[32]. This

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30 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 75 [124] and 265.

31 [1933] AC 70 at 77-78 per Lord Wright.

32 See Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 74 [122].

did not prevent insurers taking the same point outside the areas of statutory protection[33]. The ALRC concluded[34]:

> "Every person who properly falls within a policy's description of the persons entitled to indemnity should be entitled to make a claim for loss covered by the policy. The fact that that person is neither a beneficiary under a trust nor a principal under a contract of agency should be irrelevant."

21 Section 56(1) is concerned with fraudulent claims and provides:

> "Where a claim under a contract of insurance, or a claim made *under this Act* against an insurer by a person *who is not the insured under a contract of insurance*, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim." (emphasis added)

22 Finally, s 76 should be noted which preserves a right of contribution between insurers "liable under separate contracts of general insurance to the same insured in respect of the same loss"[35].

The construction of s 45

23 The "other insurance" provisions to which s 45 is directed are concerned with contracts of insurance "entered into" by the insured. The first constructional question is whether the words "entered into" limit the application of s 45 to "other insurance" provisions affecting contracts of insurance to which the insured is a party. The ordinary, relevant meaning of "enter into" is "take upon oneself (a commitment, duty, relationship, etc); bind oneself by, subscribe to, (an agreement)"[36]. That usage is reflected in the definition in s 11(9) of the Act which refers, albeit non-exhaustively, to "the making of an agreement by the parties to the contract". It is also reflected in the other sections of the Act referred to below.

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33 *Jovanovic v Broers* (1979) 25 ACTR 39 at 41 per Connor J.

34 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 75 [124].

35 The Act, s 76(1).

36 *Shorter Oxford English Dictionary*, 6th ed (2007) at 840-841.

24 Section 48 confers a statutory right of recovery upon a non-party referred to or specified in a general contract of insurance as a person insured or to whom cover extends. It does so directly. Its enactment predated the extension, by the decision of this Court in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[37], of common law rights of recovery for non-party insured persons under an insurance policy. Section 48 does not deem such a person to be a party to the insurance contract thus attracting the rights conferred on a party. It does not purport to confer contractual or equitable rights upon such a person. There is therefore no basis in s 48 for assimilating the position of a non-party insured to that of a person who has "entered into" a contract of insurance within the meaning of s 45(1).

25 Section 56(1), dealing with fraudulent claims, distinguishes between such claims made "under a contract of insurance" and claims made "under this Act … by a person who is not the insured under a contract of insurance". Section 76, which is to be read with s 45, confers an entitlement upon an insured to proceed against two or more insurers who "are liable under separate contracts of general insurance to the same insured in respect of the same loss". The condition of entitlement is the liability of the insurer, which may arise as a matter of contract or pursuant to s 48.

26 Zurich submitted that s 45(1) should be construed as if the text read:

> "Where a provision … has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured [*including a person entitled under s 48*] has entered into [*an arrangement giving it cover under*] some other contract of insurance … the provision is void."

That submission should not be accepted. The text of the provisions of the Act with which s 45 must be read points inexorably to the conclusion that s 45 is only concerned with "other insurance" provisions affecting double insurance where the insured is a party to the relevant contracts of insurance. It does not allow room for a construction which would include a non-party insured among the ranks of those who have "entered into" the relevant contract. The inclusion of persons not parties to the relevant contract would be inconsistent with the ordinary or any plausibly extended meaning of "entered into" in relation to contracts. In so saying, it must be acknowledged that the purpose of s 45 as appears from the ALRC Report and the relevant Explanatory Memorandum is not so confined as to indicate such a construction. There is no distinction made in the Report or the Explanatory Memorandum between "other insurance"

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37 (1988) 165 CLR 107; [1988] HCA 44.

provisions purporting to affect double insurance which includes non-party insurance, and double insurance where the insured is a party to the relevant contract. The most that can be said is that the Report seems to have proceeded upon the assumption that the problem of "other insurance" clauses arose in cases in which the insured was a party to both contracts. However, notwithstanding the generality of the mischief to which s 45 was directed, the words "entered into" are not capable of encompassing a non-party insured.

27 The preceding construction was that adopted by the primary judge[38]. Her Honour's conclusion was not challenged in the Court of Appeal[39]. What was challenged was her application of s 45(1) to render void the whole of the Underlying Insurance clause.

28 Notwithstanding the want of any challenge to the primary judge's construction, its correctness is a question of law central to the determination of this appeal. Upon that question being raised by the Court on the hearing of the appeal, counsel for Zurich applied for and was granted leave to amend the grounds of appeal to challenge her Honour's construction[40]. For the reasons set out above, that challenge fails.

29 The second constructional question, which was embedded in a discussion about "severance" at first instance and in the Court of Appeal, relates to the term "provision" in s 45(1). The primary judge held that although the Underlying Insurance clause applied to two different circumstances only one of which attracted the application of s 45(1), the clause was a "provision" within the meaning of the section and was therefore void as a whole. In so holding, the primary judge adopted the approach to a similarly worded clause taken by Robin DCJ in the District Court of Queensland in *Austress-PSC Pty Ltd v Zurich Australian Insurance Ltd*[41]. His Honour's reasoning in that case did not extend beyond the proposition that he could not detect any legislative intention in s 45(1) "that the provision be saved so far as it may have other effects."[42] That approach, with respect, begged the question about the proper construction of the word "provision" in s 45(1).

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38 (2007) 209 FLR 247 at 279 [142].

39 See fn 11 above.

40 [2009] HCATrans 269 at 39-41.

41 Unreported, 1 May 1992.

42 Unreported, 1 May 1992 at 9.

30 In the Court of Appeal, Martin CJ held that s 45(1) was to be construed on the basis that it was the objective of the legislature to avoid only those provisions in insurance contracts which have the effect to which s 45(1) is directed. His Honour said[43]:

> "Against that context, it seems to me to be clear that the word 'provision' in s 45(1), means that part of the terms of a contract of insurance which would have the stipulated effect unless avoided. It would be inconsistent with the assumed objective of the legislature, and therefore contrary to established principles of statutory construction, to give the section any wider ambit of operation."

Beech AJA held that s 45(1) was not to be read as "excluding severance"[44]. The literal reading adopted in *Austress-PSC* could be avoided in either of two ways. The first was to construe the word "provision" as a reference to the substance and effect of one or more clauses of the contract, rather than to the clause itself. The second was to read the section as saying that the provision, to the extent that it had the stipulated effect, was void. After referring to the similar operation of other provisions of the Act[45] and to authorities relating to the operation of s 68(1) of the *Trade Practices Act* 1974 (Cth)[46], his Honour said that[47]:

> "the purpose of s 45 is achieved by rendering a provision void to the extent and only to the extent that it has the effect stipulated in s 45(1)."

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43 (2009) 253 ALR 364 at 367 [8].

44 (2009) 253 ALR 364 at 381 [97].

45 (2009) 253 ALR 364 at 381 [99], referring to the Act, ss 38, 43, 52 and 53.

46 (2009) 253 ALR 364 at 381-382 [100]-[102], referring to *Ruaro v Ferrari* [2007] FCA 2022 at [52] and [85]; *Renehan v Leeuwin Ocean Adventure Foundation Ltd* (2006) 17 NTLR 83 at 99-100 [81]; *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43; [1996] HCA 12.

47 (2009) 253 ALR 364 at 382 [104].

He concluded that the language of s 45 did not reveal "an intention to exclude severance"[48]. McLure JA dealt separately with this question, and in substance agreed with the Chief Justice[49].

31 This question requires attention to be given to the meaning of "provision" in s 45(1). The word "provision" has been described rightly as "a word of diverse meanings which slide easily into each other." As Lord Simonds, who made that comment, observed[50]:

> "It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it."

It is clear enough that "provision" in s 45(1) is used in the former sense. The relevant definition in the *Oxford English Dictionary* is[51]:

> "Each of the clauses or divisions of a legal or formal statement, or such a statement itself, providing for some particular matter; also, a clause in such a statement which makes an express stipulation or condition; a proviso."

The important element of that definition is that a provision provides "for some particular matter". The fact that there may be more than one provision for a particular matter in one numbered clause of a contract is an accident of drafting. The inclusion in one clause of two statements of rights or liabilities in the form "if X, then Z" and "if Y, then Z" has the same effect as the inclusion of those statements in two separate numbered clauses. Each statement is a provision of the contract. There is no requirement to construe s 45(1) so that its operation depends upon accidents of paragraphing or numbering in contracts of insurance. The Underlying Insurance clause contains two statements each specifying a circumstance in which the Hamersley Policy will be reduced to an Excess Insurance policy. Each is properly regarded as a "provision" of that insurance contract. The question whether a clause of an insurance contract may contain a "provision", within the meaning of s 45(1), with different elements so intertwined

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48 (2009) 253 ALR 364 at 382 [105].

49 (2009) 253 ALR 364 at 370 [27].

50 *Berkeley v Berkeley* [1946] AC 555 at 580; see also *Saunders v Inland Revenue Commissioners* [1956] Ch 283 at 288-289 per Wynn-Parry J.

51 *The Oxford English Dictionary*, 2nd ed (1989), vol 12 at 719.

that neither can be regarded as a distinct "provision", does not arise in this case. In the result, s 45(1) operates only to render void that part of the Underlying Insurance clause in the Hamersley Policy which relates to double insurance to which the insured is a party.

Conclusion

32 For the preceding reasons the appeal should be dismissed with costs.

33 HAYNE AND HEYDON JJ. The facts and circumstances giving rise to this appeal are set out in the joint reasons of French CJ, Gummow and Crennan JJ.

34 As is explained in those reasons, the contract of insurance relevant to this matter ("the MMI contract") made by Hamersley Iron Pty Ltd ("Hamersley") with Metals & Minerals Insurance Pte Ltd ("MMI") contained a clause in which underwriters acknowledged:

> "that it is customary for the Insured [Hamersley] to effect, or for other parties (including joint venture partners, contractors and the like) to effect, on behalf of the Insured, insurance coverage specific to a particular project, agreement or risk".

The MMI contract went on to provide that, in the event of Hamersley being indemnified "under such other Insurance effected by or on behalf of [Hamersley] ... in respect of a Claim for which Indemnity is available under this Policy", the insurance afforded by the MMI contract was limited. These provisions of the MMI contract were headed "Underlying Insurance", and it is convenient to refer to them as the "Underlying Insurance Terms".

35 In the present case, Speno Rail Maintenance Australia Pty Ltd ("Speno"), a contractor to Hamersley, effected insurance coverage by the appellant (Zurich Australian Insurance Ltd – "Zurich") "specific to a particular project, agreement or risk". Hamersley was not a party to that insurance contract ("the Zurich contract"). But, by operation of s 48(1) of the *Insurance Contracts Act* 1984 (Cth) ("the Act"), Hamersley (as a person "specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends") had "a right to recover the amount of [its] loss from the insurer in accordance with the contract notwithstanding that [it was] not a party to the contract".

36 It follows that, in respect of a claim for which indemnity was available under the Zurich contract, the Underlying Insurance Terms of the MMI contract, on their face, applied. The Zurich contract was insurance effected *on behalf of* (but not *by*) Hamersley in respect of a claim for which indemnity was available under the MMI contract. Because Hamersley could be indemnified under the Zurich contract, the Underlying Insurance Terms, on their face, had the effect of limiting MMI's liability, in effect, to excess insurance.

37 The central question in this appeal is: was s 45(1) of the Act engaged? That sub-section provides that a provision included in a contract of general insurance is void where it has the effect described in the sub-section. Subject to a qualification not relevant in this matter (about insurance required to be effected by law) the effect specified in s 45(1) is "the effect of limiting or excluding the

liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance".

38 The limitation on MMI's liability provided by the Underlying Insurance Terms could apply in two different circumstances. First, the limitation could apply where Hamersley itself effected insurance coverage specific to a particular project, agreement or risk. Secondly, it could apply where another party effected insurance coverage on behalf of Hamersley. In respect of the claim now in question, the second operation of the Underlying Insurance Terms applied.

39 The second operation of the Underlying Insurance Terms was not a limitation of MMI's liability for the reason identified in s 45(1) of the Act. It was not a limitation "by reason that [Hamersley] has entered into some other contract of insurance". Hamersley had not entered any contract of insurance with Zurich. Speno, not Hamersley, had made the Zurich contract. And as the joint reasons explain, nothing in other provisions of the Act, or in the history of the Act, provides any footing for reading the relevant expression in s 45(1) – "the insured has entered into some other contract of insurance" – otherwise than in accordance with its ordinary meaning.

40 Section 45(1) would be engaged in respect of the operation of the Underlying Insurance Terms where Hamersley itself entered a contract of insurance, but that was not this case. Section 45(1) did not engage with the operation of the Underlying Insurance Terms that applied in the circumstances of this case.

41 The extent of the avoidance worked by s 45(1) does not depend upon the way in which the particular insurance contract is drafted[52]. What s 45(1) makes void is a provision included in a contract of general insurance where it has the effect described in the sub-section. The Act's reference to a provision having a particular effect is not to be read as reference to a discrete collocation of words. Section 45(1) directs attention to a particular operation which the contract would have according to its terms. It renders that operation of the contract void.

42 It follows that no question of severance arises. However the insurance contract may be drafted, the contract cannot be given an operation of the kind that is identified in s 45(1). That operation of the contract, which is to say, the provision made by the contract to that effect, is void. But no other operation of the contract is avoided.

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52 cf *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 12 [32]; [2003] HCA 59.

43 The appeal should be dismissed with costs.