HIGH COURT OF AUSTRALIA

HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

MATTHEW MAXWELL (THE AUTHORISED, NOMINATED REPRESENTATIVE ON BEHALF OF VARIOUS LLOYDS UNDERWRITERS) APPELLANT

AND

HIGHWAY HAULIERS PTY LTD RESPONDENT

Maxwell v Highway Hauliers Pty Ltd
[2014] HCA 33
10 September 2014
P12/2014

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

B W Walker QC with P Kulevski for the appellant (instructed by Meridian Lawyers)

B W Rayment QC with G R Hancy for the respondent (instructed by WHL Legal Pty Ltd)

CATCHWORDS

Maxwell v Highway Hauliers Pty Ltd

Insurance – Statutory construction – Where contract of insurance covered accidental damage to vehicles – Where contract of insurance required drivers to obtain satisfactory driver test score – Where drivers of vehicles involved in accidents had not completed driver tests – Where failure to complete driver test did not cause or contribute to accidents – Whether s 54(1) of *Insurance Contracts Act* 1984 (Cth) requires insurer to indemnify insured for loss caused by accidents.

Words and phrases – "act", "claim", "contract of insurance", "indemnity", "scope of cover".

Insurance Contracts Act 1984 (Cth), s 54.

1 HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ. This appeal, from a decision of the Court of Appeal of the Supreme Court of Western Australia, turns on the construction of s 54(1) of the *Insurance Contracts Act* 1984 (Cth) ("the Act").

2 Highway Hauliers Pty Ltd ("the Insured") owned a fleet of vehicles which it used to operate an interstate freight transport business. The vehicles included prime movers and trailers able to be linked together in double combinations known as "B Doubles".

3 The Insured entered into a contract of insurance with certain Lloyd's Underwriters ("the Insurers"). Under the contract, the Insurers indemnified the Insured against specified loss, damage or liability occurring to or in respect of the vehicles during the period 29 April 2004 to 30 April 2005 ("the Period of Insurance").

4 The contract of insurance was constituted in part by a nominated policy of an agent of the Insurers ("the Policy"). Referring to the Insured as "You" and the Insurers as "We", the Policy provided:

> "After You have paid or agreed to pay the premium ... We will Insure You against loss, damage or liability as described herein, occurring within the Commonwealth of Australia, during the Period of Insurance, subject to the terms and conditions of the [P]olicy ..."

5 Section 1 of the Policy provided in part:

> "If during the Period of Insurance Your Vehicle:
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> - Incurs Accidental Damage [defined as a happening or event, not otherwise excluded, which is unexpected and unintended], or damage caused by fire, hail, flood, storm or earthquake;
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> - Is lost by theft and not found; or
>
> - Incurs malicious damage;
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> We will at Our option:
>
> - Pay the reasonable cost of repairing or replacing Your Vehicle;
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> - Repair or replace Your Vehicle; or

- Pay the lesser of the Sum Insured or Market Value of Your Vehicle, less any applicable Excess."

6 Section 2 of the Policy provided in part:

"Your policy protects You for Your legal liability for damage to someone else's property as a result of an accident during the Period of Insurance arising out of the use of Your Vehicle.

We will in the event of a claim under this Section ...

- Pay an amount sufficient to meet such liability.

- Pay legal costs incurred with Our written consent."

7 The Policy also relevantly provided that any "Endorsement" formed part of the contract and was "always to be considered together" with the Policy. Endorsements to the Policy included one in the following terms:

"No indemnity is provided under this policy of Insurance when Your Vehicle/s are being operated by drivers of B Doubles ... unless the driver:

- Is at least 28 years of age and has a minimum of 3 years proven continuous recent experience in B Double[s] ... and,

- Has a PAQS driver profile score of at least 36, or an equivalent program approved by Us and,

- Does not have diabetes ... and,

- Has been approved in writing by Us to drive Your Vehicle."

The Policy defined "PAQS" to refer to People and Quality Solutions Pty Ltd, a company which undertook psychological testing of drivers' attitudes towards safety.

8 Vehicles of the Insured, each comprising a prime mover linked with two trailers as a B Double, were damaged in separate accidents on 16 June 2004 and 2 April 2005. Each was being driven at the time of the accident by a driver who had not undertaken a PAQS test or an equivalent program approved by the Insurers.

9 Following each accident, the Insured made a claim on the Insurers. It did so using a claim form of an agent of the Insurers. Each claim form identified the claim as one for indemnity under the Policy arising out of the occurrence of the accident which it described. Subsequent correspondence clarified that each claim was for accidental damage to the Insured's vehicles, liability to a third party and legal costs.

10 The Insurers refused to pay each claim for the stated reason that the effect of the relevant endorsement to the Policy was that there was "an absence of relevant cover ... by virtue of the fact that the vehicle was being driven by an untested driver".

11 The Insured commenced proceedings against the Insurers in the Supreme Court of Western Australia, seeking indemnity under the Policy together with consequential damages for breach of that contract. The Insured was successful at first instance[1], and on appeal by the Insurers to the Court of Appeal[2].

Issue

12 Section 54(1) of the Act 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 Section 54(2) provides:

> "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."

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1 *Highway Hauliers Pty Ltd v Maxwell* (2012) 17 ANZ Insurance Cases ¶61-925.

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

Sub-sections (3)-(5) are of no present relevance. Section 54(6) defines a reference in s 54 to an "act" to include a reference to "an omission" and "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".

14 The Insurers conceded at trial that the fact that each vehicle was being operated by an untested driver could not reasonably be regarded as being capable of causing or contributing to any loss incurred by the Insured as a result of each accident. It followed that s 54(2) had no application.

15 The Insurers also conceded at trial that their interests were not prejudiced to any extent as a result of each vehicle being operated at the time of the accident by an untested driver. It followed that, if s 54(1) was engaged, the Insurers were prevented from refusing to pay either claim for the sole reason they had stated.

16 The only issue on liability in the Supreme Court was, and the only issue in the appeal by special leave to this Court remains, whether s 54(1) was engaged. Would the effect of the contract of insurance be that, but for s 54, the Insurers "may refuse to pay a claim ... by reason of some act of the [I]nsured or of some other person, being an act that occurred after the contract was entered into"?

17 The argument of the Insurers focussed on the contractual effect of the relevant endorsement being that no indemnity was provided under the Policy in respect of an accident which occurred when a vehicle was being operated by an untested driver. The substantive effect of the Policy, as the Insurers put it, was that the claims for indemnity which the Insured made were for damage to vehicles whose drivers had a characteristic that removed the accidents from the scope of cover. Their argument reduced to the proposition that the "claim" to which s 54(1) refers is limited to a claim for an insured risk.

18 For that proposition the Insurers sought to rely on reasoning of the plurality in this Court in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*[3], as interpreted and applied in the Court of Appeal of the Supreme Court of Queensland in *Johnson v Triple C Furniture & Electrical Pty Ltd*[4]. The Court of Appeal of the Supreme Court of Western Australia declined to follow *Johnson* in the decision under appeal, as more recently did the Court of Appeal

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3 (2001) 204 CLR 641; [2001] HCA 38.

4 [2012] 2 Qd R 337.

of the Supreme Court of New South Wales in *Prepaid Services Pty Ltd v Atradius Credit Insurance NV*[5].

Section 54

19 The Act is described in its long title as an Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds, and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly.

20 The more specific objects of s 54 of the Act were explained in the report of the Australian Law Reform Commission which recommended its introduction[6]. Those objects included striking a fair balance between the interests of an insurer and an insured with respect to a contractual term designed to protect the insurer from an increase in risk during the period of insurance cover[7]. That balance was to be struck irrespective of the form of that contractual term. In particular, no difference was to be drawn between a term framed: as an obligation of the insured (eg "the insured is under an obligation to keep the motor vehicle in a roadworthy condition"); as a continuing warranty of the insured (eg "the insured warrants he will keep the motor vehicle in a roadworthy condition"); as a temporal exclusion from cover (eg "this cover will not apply while the motor vehicle is unroadworthy"); or as a limitation on the defined risk (eg "this contract provides cover for the motor vehicle while it is roadworthy")[8].

21 *Antico v Heath Fielding Australia Pty Ltd*[9] established, conformably with those objects, that s 54 takes as its starting point nothing more than the existence

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5 (2013) 302 ALR 732.

6 Law Reform Commission, *Insurance Contracts*, Report No 20, (1982). See also Australia, House of Representatives, Insurance Contracts Bill 1984, Explanatory Memorandum at 78-80.

7 Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at xxxi-xxxii, 132-140.

8 Law Reform Commission, *Insurance Contracts*, Report No 20, (1982) at 140, 289-290.

9 (1997) 188 CLR 652; [1997] HCA 35.

of a claim and of a contract the effect of which is that the insurer may refuse to pay that claim by reason of some act which the insured (or someone else) has done or omitted to do after the contract was entered into; it does not postulate a liability of the insurer to pay the claim that has been made. In terms consistent with the reasoning of the majority[10], Brennan CJ there said that s 54(1)[11]:

> "focuses not on the legal character of a reason which entitles an insurer to refuse to pay a claim – falling outside a covered risk, coming within an exclusion or non-compliance with a condition – but on the actual conduct of the insured, that is, on some act which the insured does or omits to do. ... It is engaged when the doing of an act or the making of an omission would excuse the insurer from an obligation to pay a claim for a loss actually suffered by the insured."

22 The *Antico* construction of s 54(1) is inconsistent with the Insurers' proposition that the "claim" to which the section refers is limited to a claim for an insured risk. That construction is reinforced by the reasoning in *FAI*. The plurality there emphasised both that s 54(1) "directs attention to the effect of the contract of insurance on the claim on the insurer which the insured has *in fact* made"[12] and that "[n]o distinction can be made", for the purposes of the section, "between provisions of a contract which define the scope of cover, and those provisions which are conditions affecting an entitlement to claim"[13].

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"[14]. 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

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10 (1997) 188 CLR 652 at 669-670, 673.

11 (1997) 188 CLR 652 at 660-661.

12 (2001) 204 CLR 641 at 659 [40] (emphasis in original).

13 (2001) 204 CLR 641 at 656 [33].

14 (2001) 204 CLR 641 at 659 [41].

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[15]. 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[16].

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.

28 It remains finally to refer to *Johnson*. That case concerned an occurrence based contract of insurance under which the insured was indemnified for amounts for which it became liable in respect of accidental injuries to passengers whilst on board an aircraft subject to a temporal exclusion expressed in terms that

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15 (2001) 204 CLR 641 at 659 [42].

16 (2001) 204 CLR 641 at 659-660 [43].

"this policy does NOT apply whilst the aircraft ... is operated in breach of [air safety regulations]". The Court of Appeal of the Supreme Court of Queensland accepted an argument that s 54(1) was not engaged in circumstances where the insurer, relying on the temporal exclusion, refused to pay a claim in fact made by the insured by reason of the operation of the aircraft in breach of air safety regulations[17]. To that extent it erred, and its decision on this point should not be followed. The operation of the aircraft in breach of air safety regulations was an "act" which occurred after the contract was entered into. The temporal exclusion did not qualify the "claim" that was made.

Orders

29 The appeal is to be dismissed. As a condition of the grant of special leave to appeal, the Insurers undertook to pay the Insured's reasonable costs of the appeal. That undertaking makes an order for costs unnecessary.

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17 [2012] 2 Qd R 337 at 354-355 [78]-[83].