

# HIGH COURT OF AUSTRALIA

FRENCH CJ

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## **Matter No S417/2011**

CERTAIN LLOYD'S UNDERWRITERS  
SUBSCRIBING TO CONTRACT NO IH00AAQS APPELLANT

AND

JOHN CROSS RESPONDENT

## **Matter No S418/2011**

CERTAIN LLOYD'S UNDERWRITERS  
SUBSCRIBING TO CONTRACT NO IH00AAQS APPELLANT

AND

MARK GEORGE THELANDER RESPONDENT

## **Matter No S419/2011**

CERTAIN LLOYD'S UNDERWRITERS  
SUBSCRIBING TO CONTRACT NO IH00AAQS APPELLANT

AND

JILL MARIA THELANDER RESPONDENT

*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v  
Cross*

*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v  
Thelander*

*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v  
Thelander*

[2015] HCA 52

17 December 2015

S417/2011 to S419/2011



**ORDER**

*In each application, application is dismissed with costs.*

On appeal from the Supreme Court of New South Wales

**Representation**

M J Stevens for the appellant in each matter (instructed by Riley Gray-Spencer Lawyers)

R T McKeand SC for the respondent in each matter (instructed by G H Healey & Co)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

**Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross**

**Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander**

**Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander**

Slip rule – Costs order – Special leave undertaking that insurer bear costs of application and appeal to High Court – Insurer successful in appeal – Whether costs order in orders of court appealed from should have been set aside.

Words and phrases – "accidental slip or omission", "test case".

High Court Rules 2004 (Cth), r 3.01.2.



1 FRENCH CJ. On 12 December 2012, this Court<sup>1</sup> allowed three appeals by Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS ("the insurer") against decisions of the Court of Appeal of New South Wales<sup>2</sup>. A provision of the *Legal Profession Act* 1987 (NSW) ("the Act") limited the costs that a court could order a party to pay to another if the amount recovered on a claim for personal injury damages did not exceed a specified sum<sup>3</sup>. The Court of Appeal decided, adversely to the insurer, that the respondents' claims for damages in respect of assaults perpetrated on them were not claims for "personal injury damages" within the meaning of the cost limiting provision.

2 A judge of the District Court of New South Wales had decided in favour of the insurer that the cost limiting provision did apply. The order of the District Court in each case had been:

"1. The Defendant [insurer] is to pay the Plaintiff's legal costs from 12 July 2005. Those legal costs are subject to s 198D of the Legal Profession Act 1987.

2. Judgment reserved on the costs previously reserved."

3 On appeal, the Court of Appeal ordered that, in respect of each of the respondents (who were applicants for leave to appeal in that Court):

"1. Grant the applicants an extension of time to 24 September 2010 to file applications for leave to appeal.

2. In respect of each, grant leave to appeal.

3. Direct that the applicants file within 14 days notices of appeal in accordance with the draft notices contained in the Court file.

4. Set aside the second order made by the District Court on 22 April 2010 declaring that the legal costs are subject to s 198D of the Legal Profession Act 1987.

5. Declare that the legal costs incurred by the plaintiffs to be paid by the defendants in accordance with order 1 made by the District Court on 22 April 2010 are not subject to s 198D of the Legal

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1 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56.

2 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

3 Act, s 198D.

2.

Profession Act 1987, nor subject to s 338 of the Legal Profession Act 2004.

6. Order that [the] respondents (sic) [ie the insurer] pay the applicants' costs in this Court.
7. If not disqualified pursuant to s 6(7) of the Suitors' Fund Act 1951 (NSW), grant the respondents (sic) [ie the insurer] a certificate under that Act in respect of the costs of the appeals."

4 This Court granted special leave to appeal to the insurer in each case in the following terms:

"UPON AN UNDERTAKING:

1. By the Applicant that it will pay the Respondent's costs of the application and appeal in any event.

THE COURT ORDERS THAT:

1. Special leave be granted to the Applicant to appeal to this Court from the whole of the judgment and order of the New South Wales Court of Appeal given and made on 1 June 2011 in proceeding no CA 2009 [followed by each proceeding number]."

The undertaking upon which special leave was granted was in terms sought by the respondents in their written submissions in the special leave applications. The insurer agreed to that undertaking at the special leave hearing<sup>4</sup>.

5 In each notice of appeal to this Court, the insurer sought an order that:

"orders (4) to (7) made on 1 June 2011 by the Court of Appeal of the Supreme Court of New South Wales be set aside and in lieu thereof an order that the appeal to the Court of Appeal of the Supreme Court of New South Wales be dismissed with costs."

An order in those terms would have set aside the costs order in favour of the respondents in the Court of Appeal set out in par 6 of that Court's orders.

6 There were no submissions as to the costs generally nor the costs in the Court of Appeal on the hearing of the appeal to this Court. In delivering judgment in favour of the insurer, this Court made the following orders in each appeal:

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4 [2011] HCATrans 340.



3.

- "1. Appeal allowed.
2. Set aside paragraphs 4 and 5 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 1 June 2011, and, in their place, order that the appeal to that Court be dismissed.
3. Appellants to pay the respondent's costs of the appeal to this Court."

As appears from the above, this Court did not set aside par 6 of the orders of the Court of Appeal in each case and therefore did not disturb the costs orders made in favour of the respondents by that Court.

7 By summonses filed on 6 October 2015, the insurer sought, inter alia, orders that pars 4, 5 and 6 of the orders of the Court of Appeal be set aside and that the respondents pay the insurer's costs of each appeal to that Court. Alternatively, the insurer sought an order that there be no order as to costs in the Court of Appeal with the intent that each party bear its own costs of each appeal to that Court.

8 In each case the application on the summons is made pursuant to r 3.01.2 of the High Court Rules 2004 (Cth). That rule provides:

"The Court or a Justice may, at any time, correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission."

Relevant to the application of that rule are observations which were made in *Burrell v The Queen*<sup>5</sup> which were quoted more recently in *Achurch v The Queen*<sup>6</sup>. In the latter judgment reference was made to the slip rule as an aspect of the inherent or implied powers allowing for limited correction of an order after its final entry<sup>7</sup>, as explained in *Burrell*<sup>8</sup>:

"The power to correct the record so that it truly does represent what the court pronounced or intended to pronounce as its order provides no substantial qualification to that rule. The power to correct an error arising

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5 (2008) 238 CLR 218; [2008] HCA 34.

6 (2014) 253 CLR 141; [2014] HCA 10.

7 (2014) 253 CLR 141 at 154 [18] per French CJ, Crennan, Kiefel and Bell JJ.

8 (2008) 238 CLR 218 at 224-225 [21] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ.

from accidental slip or omission, whether under a specific rule of court or otherwise, directs attention to what the court whose record is to be corrected did or intended to do. It does not permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded." (footnote omitted)

The power has been described in this Court as "one to be exercised sparingly, lest it encourage carelessness by a party's legal representatives and expose to risk the public interest in finality of litigation"<sup>9</sup>.

9 The insurer submitted that the principle that the costs of a successful party should be paid by the unsuccessful party should not have been disturbed in relation to the costs of the proceedings in the Court of Appeal. The general issue of the application of that principle is not in issue. However, in test cases, as the present cases were, it is not unusual to find special leave to appeal granted on the basis that the applicant will not seek to disturb the orders as to costs already made in the court appealed from, or orders made to that effect<sup>10</sup>. No such undertaking was proffered in these cases. However, given the character of the appeals to this Court as test cases, the absence of an order setting aside the costs orders in the Court of Appeal was not, on its face, the result of an error of the kind suggested by the insurer as attracting the application of r 3.01.2.

10 Another aspect of the insurer's submissions was that no argument about the costs in the Court of Appeal was put to this Court. To the extent that that is a complaint about the orders ultimately made in this Court, it does not establish the existence of an error or omission of the kind referred to in r 3.01.2.

11 In the present case it would have been appropriate for the insurer to have moved promptly to correct the allegedly erroneous failure to set aside the costs orders in the Court of Appeal. That there has been a long history of disputation between the parties in relation to the costs in that Court subsequently does not explain the insurer's failure to seek early correction of what it characterises as an error arising from an accidental slip or omission in the orders made pursuant to the judgment of this Court.

12 In my opinion, the absence of an order setting aside the costs orders in the Court of Appeal cannot be judged, at this remove in time, as an error of the kind covered by r 3.01.2. In the event, each summons will be dismissed with costs. I

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9 *Achurch v The Queen* (2014) 253 CLR 141 at 154 [18] per French CJ, Crennan, Kiefel and Bell JJ quoting *Gould v Vaggelas* (1985) 157 CLR 215 at 275; [1985] HCA 75.

10 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 34–36 [78]–[81] per Gleeson CJ, Gummow and Heydon JJ; [2005] HCA 64.

5.

do not accede to the respondents' application that there be an order for indemnity costs on the summonses.