ANY PRINCIPAL — A PRINCIPAL'S ABILITY TO CLAIM INDEMNITY UNDER A CONTRACTOR'S CONTRACT OF INSURANCE

Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd; Zurich Australian Insurance v Hamersley Iron Pty Ltd
Full Court of the Supreme Court of Western Australia
Malcolm CJ, Ipp & Wheeler JJ

David Rodighiero
Carter Newell

The issue of whether cover extended to a principal of contract works under a contractor's policy of insurance was considered in the recent decision of the Full Court of the Supreme Court of Western Australia in the case of *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd; Zurich Australian Insurance v Hamersley Iron Pty Ltd.*

In 1992 Speno Rail Maintenance Australia Pty Ltd ('Speno') contracted ('the contract') with Hamersley Iron Pty Ltd ('Hamersley'), to carry out rail grinding work for Hamersley on its railway. On 24 May 1995, Mr Nolan (an employee of Speno) while travelling on the railway in a HiRail, a Toyota Landcruiser adapted for travel on rails, suffered severe injuries as a result of Hamersley's negligence.

The contract also contained an indemnity from Speno indemnifying Hamersley against liability to Speno's employees for personal injury as a result of the performance of the contract.

Pursuant to the terms of the contract, Speno had taken out two policies of insurance, a General Liability Policy and an Umbrella Policy

THE CLAIM

Mr Nolan claimed damages for negligence from Hamersley. Hamersley, in turn, claimed to be indemnified by Speno pursuant to the terms of the contract and to be indemnified by Spenos' insurer Zurich Australian Insurance Ltd ('Zurich') under either policy.

Further, Zurich contended that if it was liable to indemnify Hamersley, Speno had a co-ordinate liability with Zurich to indemnify Hamersley (i.e. it was entitled to a contribution from Speno one-half of the amount it was liable to pay Hamersley).

The Decision At First Instance

The appeal arose out of the decision of Williams DCJ delivered on 5 August 1999. The learned trial judge held that:

a) Mr Nolan was entitled to damages in negligence from Hamersley;

b) Hamersley was entitled to indemnity from Speno pursuant to the terms of the contract;

c) Hamersley and Speno were entitled to indemnity from Zurich under both policies

d) The employer's liability exclusion in the general liability policy applied to both Hamersley and Speno;

e) Zurich's claim against Speno for contribution was dismissed.

The Insurance Policy

The definition of assured in the General Liability Policy wording provided:

Any principal in respect of his liability arising out of the performance, by the insured designated in definition 5(a) of any contract or agreement for ***the performance of work for such principal*** *to the extent required by such a contract or agreement but subject always to the terms, conditions and exclusions of this policy.* (Emphasis added)

Speno was named in the schedule as assured. Hamersley was named as an assured as a 'principal' in respect of the contract between Hamersley and Speno.

ON APPEAL

Zurich accepted that Hamersley came within the 'any principal' extension to the definition of 'insured', but only in respect of any liability of Hamersley 'arising out of the performance by the insured [Speno] ... of any contract or agreement for the performance of the work'. Zurich submitted that

The significance of this case is that indemnity may extend to other parties not specifically identified in a policy of insurance notwithstanding the fact that the assured's (who is specified in the policy and who took out the insurance cover and paid the premium under the terms) claim is excluded under the terms of the policy.

Hamersley's liability in damages to Mr Nolan did not arise out of the performance of the contract by Speno, with the consequence that it was not a liability insured within the meaning of the clause.

In determining this issue Malcolm CJ referred to the decision of Mason CJ, Wilson, Brennan, Dawson and Toohey JJ in *Dichenson v Motor vehicle Insurance Trust*:

The test posited by the words 'arising out of' is wider than posited by the words 'caused by' and the former, although it involved some causal or consequential relationship ... does not require direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.

The Court unanimously found that the incident giving rise to the liability occurred in the course of Speno's performance of the contract. It followed that Zurich was bound to indemnify Hamersley in respect of its liability to Mr Nolan. A further issue raised by Zurich was that the employer's liability exclusion clause had the effect of excluding liability by Zurich to indemnify Hamersley and Speno in respect of their liability to Nolan.

The exclusion clause provided:

[Zurich] shall not be liable for claims in respect, of:

(1) EMPLOYER'S LIABILITY

Personal injury to any person:

(a) arising out of or in the course of the employment of such person in the service of the insured.

The Court (with Malcom CJ dissenting) determined that Zurich was not liable to indemnify Speno as the employer's liability exclusion clause applied.

In determining this issue with respect to Hamersley the court considered the effect of the cross liability clause in the policy which provided each party comprising the assured shall be considered a separate legal entity and the word 'insured' applies to each party as if a separate policy had been issued to each party. The court unanimously agreed that that the clause be given its natural meaning in relation to each clause of the contract, except where the context required otherwise.

The Court held that the exclusion clause was intended to apply to an employer's liability and therefore Zurich was liable to indemnify Hamersley in respect of its liability to Mr Nolan.

The significance of this case is that indemnity may extend to other parties not specifically identified in a policy of insurance notwithstanding the fact that the assured's (who is specified in the policy and who took out the insurance cover and paid the premium under the terms) claim is excluded under the terms of the policy.

Zurich's Entitlement To Contribution From Speno

It was accepted by Senior Counsel for Zurich that its right to contribution from Speno in respect of indemnity, which Zurich was required to provide to Hamersley, was dependent on whether the liabilities of Speno and Zurich to Hamersley were 'co-ordinate'. The Court found that the liabilities of Speno and Zurich were not co-ordinate, as the liability of Zurich arose out of the contract of insurance and Speno's arose from the indemnity clause in the contract. However the court did note that there may be circumstances where the liability is co-ordinate. This will depend on the terms of the particular indemnity clause.

Zurich's Liability To Indemnify Speno

At first instance the trial judge ordered Zurich to indemnify Speno under the Umbrella Policy. Although Speno did not claim such

relief at trial, this was cured by amendment allowed at the hearing of the appeal.

Speno claimed that via its insurance broker it had informed Zurich in writing that Speno's contracts almost always required Speno to indemnify and hold harmless the principal and waive rights of subrogation. Both policies did not contain such indemnities.

Speno contested that Zurich's denial to indemnify Speno in respect of its contractual obligation to Hamersley constituted a breach of good faith.

The court found that the omission from cover of the specific indemnity sought by Speno was a fact known to Zurich. It was, however, a fact which Speno or its broker were capable of discovering by perusing the policy with care.

Malcolm CJ considered that there was 'a duty to speak' on the part of Zurich to inform Speno that the policies which it was providing did not extend to Speno the cover it had specifically requested. His Honour found that there had been a breach of the duty of good faith on the part of Zurich. Unfortunately, for Speno, damages were not available for a breach of the duty of utmost good faith, its only remedy being to rescind the contract of insurance and obtain a refund of the premium.

CONCLUSION

It is clear that all subcontractors are included within the definition of 'subcontractors' in their principal's or superior contractor's contract works policy. The issue is not so clear whether a head contractor or superior contractor is included with the 'any principal' extension of assured. Although, the court did not consider what is meant by the term 'any principal', it appears that the words 'any principal' as opposed to 'principal' may apply to the head contractor and all superior contractors to a subcontract, subject to liability arising out of the performance of the subject contract.

The further significance of this case is that indemnity may extend to third parties not specifically identified in a policy of insurance notwithstanding the fact that the assured's (who is specified in the policy and who took our the insurance cover and paid the premium under the terms) claim is excluded under the terms of the policy. However, in this case this was determined as a result of the courts interpretation of the cross-liability clause within the particular policy wording.

An insurer is not entitled to the benefit of a contractual indemnity provided to its assured unless the clause imposes liability on a party which is co-ordinate with the liability imposed under the contract of insurance. That is the indemnity pursuant to the contract is of the same nature and extent as the liability imposed on the insurer under the contract of insurance.

However, the extent of any liability that may be the subject of indemnity will be dependant on the interpretation of the contract of insurance and the works contract construed together.

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