IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P12 of 2014

BETWEEN

MATTHEW MAXWELL (the authorised nominated representative on behalf of various Lloyds underwriters

Appellant

and

HIGHWAY HAULIERS PTY LTD (ACN 008 863 214)

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication on the Internet

This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

1 Whether an insured must first satisfy a test of "inherent restriction or limitation upon the scope of cover provided by the policy" before s54 of the *Insurance Contracts Act 1984* (Cth) applies to a claim.

2 Whether the respondent failed to satisfy such a test because two of the respondent's drivers had not passed a "PAQS test".

3 Alternatively, whether s54 applies according to its terms to an act or omission of the insured or of some other person, being an act or omission that occurred after the contract was entered into, and that is the only reason for the insurer refusing to pay the claim that has been made by the insured.

4 Whether there was an act or omission to which s54 applied.

Part III: Section 78B of *Judiciary Act 1903*

5 The respondent considers that notice pursuant to s78B of the *Judiciary Act 1903* is not necessary.

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Part IV: Narrative of facts or chronology

6 The appellant's statement of facts is incomplete, contains irrelevant material, and is contested to the extent that it is not consistent with the following.

7 The proposal, exhibit 144, is not relevant to the issues in this appeal. It was dated 7 April 2004. It asked whether "driver selection procedure" included a number of features including a "PaQs test" but it did not require drivers to "undertake a driver test known as the People and Quality Services or PAQS" test.

8 The respondent's position at trial was that it was not clear what PAQS testing did for anyone and whether it had any relevant validity at all for a user: eg. Ts 28, 23 May 2011. It was not a test of a prospective driver's aptitude for long haul driving. There was evidence that asserted that the purpose of the test was to make sure that drivers had "an attitude of safety awareness": TJ [95]. Mr Amaranti of the Broker did not know what it was for and had never heard of it before 2004 when he tried to move the insurance cover from a previous insurer: ts190, 194, 202-203, 24 May 2011. For Mr Amaranti, PAQS testing had not come up since: ts203, 24 May 2011. Whether it was a valid test for testing an attitude or any other purpose was not established.

9 The conclusion that PAQS had no relevant value for driver or operating safety is suggested by the concession made by the appellant at the conclusion of the trial that the fact that the two drivers in the accidents in June 2004 and April 2005 had not been PAQS tested was not reasonably capable of causing or contributing to any loss incurred by the respondent, and the appellant's position at trial that the insurers were not prejudiced by those matters: TJ [59]; CA [11].

10 There was evidence, but no finding, that east-west runs were generally regarded within the insurance industry as "high risk": TJ [95]. There was also evidence to the contrary from Mr Garry Sartori, a director of the respondent, who disagreed with the suggestion that the east-west run was a high risk run: Ts 37, 23 May 2011.

11 There were findings that there was an industry practice, at the time that the policy was made, of requiring PAQS testing for drivers of commercial vehicles where the insured's business involved east-west runs and that this was a matter that was important to SRS and the insurers, but that this did not assist in ascertaining the scope of the policy and identifying "restrictions or limitations that are inherent" in a claim for the purpose of applying s54: TJ [98]-[99]. An industry practice is not relevant to the issues in this appeal.

12 The quotation for insurance cover by facsimile dated 29 April 2004 from Mr Amaranti of the Broker to Nick Hogarth of SRS specified indorsement ANZ 8 and that "The following WARRANTY applies: No drivers under 30 years or without 5 years driving experience on articulated units. PAQS Testing for all drivers doing the East West run": TJ [15]; exhibit 153.

13 In his evidence at trial Mr Amaranti accepted that the respondent's claims history as detailed in a schedule to the proposal "was poor and that it presented difficulties in renewing insurance": TJ [14]. The claims history is not relevant to the issues in this appeal.

14 The bundle of documents sent by the Broker to SRS on 5 May 2004 referred to planned PAQS testing for all drivers to be carried out on 28 May 2004 by David Morley of Power Training Services: TJ [19]; exhibit 159. What was planned about PAQS testing and why it did not occur was not an issue at trial and is not relevant to the issues in this appeal.

15 On 27 May 2004, the day before the date of the planned PAQS testing for drivers, SRS issued a memorandum of insurance for a period of insurance commencing on 29 April 2004: TJ [24]; exhibit 172. The insurers accepted the risk and agreed cover for the retrospective period of about 1 month knowing that no driver had been tested during that period.

16 A letter dated 12 July 2004 from SRS to the respondent care of the Broker (TJ [25]; exhibit 184) enclosed an amended schedule to the memorandum of insurance that stated that it was agreed that the policy was indorsed to note "No cover under the policy for drivers doing east-west/west-east cartage who not have a PAQS driver profile score of at least 36".

17 The contention in the appellant's submissions that the respondent made a false representation to secure insurance was not an allegation, issue, or finding at trial. The reason why the planned PAQS testing did not take place was not relevant to the issues at trial and is not relevant to the issues in this appeal.

18 The effect of the insurance contract was that it provided cover for:

18.1 Accidental damage to insured vehicles, section 1.0;

18.2 Liability to third parties arising from the operation of the insured vehicles, including legal costs, section 2.0;

18.3 Legal costs incurred in defending claims, section 2.0:

CA [22]-[24], [42], [78] per McLure P; [114]-[115] per Pullin JA; [143]; TJ [80], [92], [101] per Murphy JA; exhibit 172.

19 The insured vehicles were identified in a schedule attached to the Policy Schedule: TJ [101] CA [29], [35]; exhibit 172.

20 The respondent incurred and made claims for accidental damage, liability to a third party and legal costs. The claims correspondence is at TJ [46]-[49] and exhibits 177, 270, 271, 299, 306, 320, 321, and 357.

21 By letter dated 16 May 2006 from CLS Lawyers the insurers denied liability to indemnify for each claim because the vehicle had been driven by a driver who had not been PAQS tested: TJ [49]; exhibit 357.

22 At trial, by the second further re-amended statement of claim, the elements of the pleaded claim against the insurers were:

22.1 A contract between the insurers and the respondent insured the respondent against:

22.1.1 Accidental damage occurring during the period of insurance to an insured vehicle;

22.1.2 Legal liability for damage to a third party's property as a result of an accident occurring during the period of insurance and arising out of the use of an insured vehicle;

22.2 Damage to insured vehicles occurred during the policy period on 16 June 2004 and on 2 April 2005;

22.3 The respondent incurred liability to a third party for damage caused by an insured vehicle on 16 June 2004;

22.4 The respondent incurred losses from damage caused to the insured vehicles and liability to a third party from the first accident.

23 The amounts sought were for repair costs, value of damaged trucks and trailers, sums paid and legal costs incurred in defending third party liability claims. Apart from loss of profits, the amounts for which the respondent was entitled to be indemnified under the policy, if its claims succeeded, were agreed at trial: TJ [50], [104].

24 The claims that were made, and pleaded, did not refer to PAQS testing as a limitation or requirement to be satisfied.

25 The appellant did not plead that the vehicles were not identified as insured vehicles under the contract, there was no accidental damage to vehicles, no liability, or no losses, or that a loss or liability was incurred outside the period of insurance: Further re-amended defence and counterclaim. The appellant relied on conduct that occurred after the insurance contract was entered into.

26 On 5 July 2013 the Court of Appeal ordered that the appellant pay the respondent's costs of the appeal to that Court to be taxed but so that, except in so far as they are an unreasonable amount or were unreasonably incurred, the respondent will be completely indemnified by the appellant for the respondent's costs of the appeal from 4 September 2011: see ***Matthew Maxwell v Highway Hauliers Pty Ltd*** [2013] WASCA 115(S); Order of Court of Appeal made on 5 July 2013.

Part V: Applicable statutory provision

27 The appellant's statement of the applicable statutory provision is accepted.

Part VI: Respondent's argument

28 The claims of the respondent were for indemnity under an occurrence based policy, arising from damage to property and liability to a third party that occurred during the period of insurance.

29 At the trial, concerning both the fact that the drivers involved in the accidents were non-declared drivers and the fact that they had not undertaken a PAQS test and, therefore, had not obtained a driver profile score under that test of 36:

29.1 At the close of the evidence the appellant conceded that neither of those facts could reasonably have been regarded as being capable of causing or contributing to a loss in respect of which insurance cover was provided by the contract (with the consequence that the case did not fall within s54(2));

29.2 The appellant made no case that the insurers were prejudiced by either of those matters (with the consequence that the appellant did not rely upon any matter of prejudice as referred to in s.54(1) and considered by this Court in ***Moltoni Corporation Pty Limited v QBE Insurance Limited*** [2001] HCA 73; [2001] 205 CLR 149). Moreover, any such prejudice could only sound in a measurable monetary sum to be deducted from the amount payable by the insurer (***Moltoni*** at [16]) and (apart from consequential losses) the amount recoverable under the policy was agreed at trial (TJ [4]).

30 Those positions were adhered to before the Court of Appeal, and the circumstance that the drivers were non-declared was no longer relied upon by the appellant (McLure P at [11], [14]).

31 The questions arising under s54 were therefore, what was the claim, did it arise from an act (or omission) of the insured or some other person after the contract was entered into, and was the effect of the contract of insurance, but for the section, that the insurer may refuse to pay the claim by reason of the relevant act or omission. If so, it followed from the position taken by the appellant at trial that the matter that was relied on by the insurers in order to defeat the claim was a matter by which it was not prejudiced and that was incapable of contributing to the loss in respect of which insurance cover was provided by the contract.

32 The starting point for the argument of the appellant both below and in this Court is a statement made not in the section itself but in the reasons for judgment of McHugh Gummow and Hayne JJ in this Court in ***FAI General Insurance Limited v Australian Hospital Care Pty Limited*** [2001] HCA 38; (2001) 204 CLR 641 at [42]. In that case, which concerned a claims made policy, it was submitted that if a wide meaning were given to the word "omission" such policies might be rendered ineffective: see the remarks of the plurality at [28] and of Kirby J at [71]. The plurality explained at [42] and [43] why s54 did not achieve that result. The present being a case concerning an occurrence based policy, where the relevant event occurred during the policy period, there was no departure in the judgment below from what was declared in paragraphs [42] and [43] of the reasons of the plurality.

33 The appellant seeks to use the words of paragraph [42] to suggest that restrictions or stipulations arising from the scope of cover are outside s54. On the contrary, the plurality in ***FAI v Australian Hospital Care*** at [33] held that there was no distinction for the purposes of s54 between a stipulation or requirement embodied in the scope of cover and one arising from an exemption clause or condition. See also ***Antico v Heath Fielding Australia Pty Ltd*** [1997] HCA 35; [1997] 188 CLR 652.

34 In the present case, but for the fact that the drivers had not undertaken the PAQS test, the policy would have responded to the claim.

35 The reasoning and decision of the Court of Appeal were correct:

35.1 The "scope of cover" under the policy was for accidental property damage to an insured vehicle, or liability arising from use of an insured vehicle, that occurred during the period of insurance;

35.2 Each claim was made within the "scope of cover";

35.3 In any event the clause relied on by the appellant was an exclusion clause rather than "scope of cover";

35.4 Section 54 must be interpreted and applied according to its language and not by reference to a test not found in the Act;

35.5 The respondent did not fail to satisfy a test of "inherent restriction or limitation upon the scope of cover provided by the policy" on the basis contended by the appellant that the two drivers had not passed a PAQS test;

35.6 Section 54 was engaged in each case. It applied to the act of operating an insured vehicle with a driver who had not completed the PAQS test, being an act that occurred after the insurance contract was entered into.

Section 54

36 Section 54 is directed at conduct that is not capable of causing, or has not caused, prejudice to an insurer, rather than conduct that is "irrelevant to the risk insured". It is intended to restrict an insurer's entitlement to rely upon a provision (whether express obligation, warranty, exclusion, or definition of cover), that operates on conduct occurring after the contract was entered into, to the extent of any prejudice suffered by the insurer: Australian Law Reform Commission, Report No 20, [228]-[229], [241] and App A, cl 54, notes 3 and 4; *Insurance Contracts Bill 1984 Explanatory Memorandum* [182]; CA [45]-[48]; ***Prepaid Services Pty Ltd v Atradius Credit Insurance NV*** [2013] NSWCA 252 [140].

37 The remedial effect of s54 cannot be circumvented by drafting a term of an insurance contract as part of the definition of "cover" or by categorising it as an element of "scope of cover": Australian Law Reform Commission, Report 20, *Insurance Contracts*, [229] and Appendix A, pp 289-290; TJ [62]. See also ***Antico v Heath Fielding Australia Pty Ltd*** (1997) 188 CLR 652, 672-673.

38 Section 54 does not permit or require the reformulation of the claim which the insured has made. It operates to prevent an insurer relying on certain acts or omissions to refuse to pay that particular claim: ***FAI v Australian Hospital Care*** [2001] HCA 38; (2001) 204 CLR 641, 659 [41]; TJ [67(e)].

39 The statutory test is whether "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". An act includes an omission: s54(6).

40 A key requirement for the application of s54(1) is that the entitlement to refuse to pay a claim must be "by reason of some act of the insured or some other person" under s54(1): ***East End Real Estate Pty Ltd v C E Heath Casualty*** at (1991) 25 NSWLR 400, 407; ***Antico*** 673.

41 Where the test is satisfied "the insurer may not refuse to pay the claim by reason only of that act".

42 The practical effect of the statutory command is that the insurer may not rely on the contractual provision that operates on the "act". It does not alter other provisions of the insurance contract, or change any facts, that must be relied on to prove that a claim falls within a policy. The insurer may, if its interests have been prejudiced, reduce its liability "by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act". It must prove that prejudice and its value in monetary terms: ***Moltoni Corporation Pty Ltd v QBE Insurance*** [2001] HCA 73 [16]; (2001) 205 CLR 149.

43 Whether s54(1) applies in a particular case is answered by applying the language of the statute. Close attention must be given to its elements:

43.1 The effect of the contract of insurance between the parties;

43.2 The "claim" which the insured has made; and

43.3 The reason for the insurer's refusal to pay that claim:

FAI v Australian Hospital Care 658, [39]; TJ [67(c)].

44 As to these elements in the present case:

44.1 The effect of the insurance contract was that it provided cover for:

44.1.1 Accidental damage to insured vehicles, section 1.0;

44.1.2 Liability to third parties arising from the operation of the insured vehicles, including legal costs, section 2.0;

44.1.3 Legal costs incurred in defending claims, section 2.0;

44.2 The respondent incurred, and made claims for, accidental damage, liability to third parties and legal costs;

44.3 The reason relied on, or that could be relied on, to refuse to pay the claims was that the vehicles were driven by drivers who were not PAQS tested: TJ [77]-[79], [84]; CA [36]; [117] per McLure P, [121] per Pullin JA; [145] per Murphy JA; exhibit 357.

45 Section 54 was engaged because:

45.1 The claims were for losses from property damage and liability occurring during the period of insurance;

45.2 But for s54 the insurer would have been entitled to refuse to pay the claims only by reason of an act of the respondent or each driver;

45.3 Each act occurred after the contract was entered into;

45.4 Neither act could reasonably be regarded as being capable of causing or contributing to loss in respect of which insurance cover was provided by the contract: TJ [59]; and

45.5 The insurers' interests were not prejudiced as a result of any act: TJ [59].

46 In ***FAI v Australian Hospital Care*** the plurality said that s54 did not operate to relieve the insured of restrictions or limitations that were inherent in the claim that was made. The restrictions that were inherent in a claim vary according to the type on insurance in issue and under an "occurrence" based contract no claim can be made unless the event insured against takes place during the period of cover. Under a claims made policy a claim must be made during the policy period: p659 [41]-[42].

47 The basis for the decision in ***FAI v Australian Hospital Care*** was that the insurer could refuse to pay the claim by reason only of the fact that the insured did not give notice of the occurrence to it, and not that there was in that case some inherent restriction or limitation on the claim that was made: see p660 [46].

48 Accordingly, s54(1) may not apply where the insured event has not occurred because, for example, accidental damage to insured property (identified by description rather than by reference to the conduct of a person) or liability to a third party has not occurred during the period of insurance: cf CA [107]-[111]. The present is not a case of that kind. There was accidental damage to insured property identified in a schedule and liability to a third party.

49 In any event ANZ 3 was not an inherent restriction or limitation on the respondent's claims - that drivers of damaged insured vehicles on the specified routes must have satisfactorily completed the PAQS test: McLure P CA [76]; Murphy JA [143]. ANZ 3 did not define the scope of cover: McLure P [42], [78]; Pullin JA [114]. It was an exclusion clause: McLure P [78]; Pullin JA [115].

Johnson v Triple C Furniture and Electrical Pty Ltd

50 The reasoning in ***Johnson v Triple C Furniture and Electrical Pty Ltd*** [2010] QCA 282; [2010] 2 Qd R 337 should be rejected, and in any event that case is distinguishable from in the present case:

50.1 The insured in ***Johnson v Triple C*** was insured against, and was able to claim for, "all sums for with [it] become(s) legally liable to pay ... in respect of ... accidental bodily injury ... to passengers whilst ... on board ... the aircraft: p343.08-11 [19]. The elements of the claim did not depend on the deceased Mr Johnson having satisfactorily completed an aeroplane flight review within a period of 2 years immediately before the day of the proposed flight;

50.2 The insured's claim was for indemnity for liability to pay damages for personal injuries: p339 [4]-[5], 354.17-19 [77];

50.3 Chesterman JA erroneously categorised the claim as one for "loss caused by a pilot who had not completed a flight review": p354.29-30 [78];

50.4 The conduct of the insured or Mr Johnson was not an "omission" that was "relied on to give rise to a claim that the insured could not otherwise make" (cf p355.23-25 [83] per Chesterman JA);

50.5 The test (at 354.42-45 [80]) that "for the purposes of s54 an act or omission is the performance, or non-performance, of some activity which the contract of insurance requires, allows or contemplates and which may affect its operation" is not in, and does not arise from the language of, s54: cf CA [85];

50.6 An omission by the insured or some other person, for the purposes of s54, is the obverse of an act of that person. It is the absence of an act. An act is something done by a person: cf *The Macquarie Dictionary 3rd edition.* In the context of conduct of a person, an omission is something not done by the person;

50.7 The concept of an omission does not incorporate the notion that the act not done is beyond the capacity of the person. Chesterman JA was wrong in holding (352.48-50 [70]) that a person cannot omit do something where the act in question is beyond that person's capacity. Lack of capacity to perform may be the reason for the omission. The provision of consent in ***Antico*** was outside the control of the insured: CA [81];

50.8 Contrary to the finding of Chesterman JA (353.07 [72]) there was an omission. Mr Johnson omitted to satisfactorily complete a flight review;

50.9 There was an act, rather than an omission, of the insured or Mr Johnson in operating the aircraft when, in breach of the *Civil Aviation Regulations 1988* (Cth), Mr Johnson had not satisfactorily completed the required flight review within the relevant time period;

50.10 The insurer's entitlement to refuse indemnity for the claim that was made for a liability arose by reason of that act of the insured or Mr Johnson;

50.11 That act of the insured or Mr Johnson engaged an exclusion that the policy did not apply when the aircraft was operated in breach of the *Civil Aviation Regulations* (p343.12-35 [19]-[22]);

50.12 There can be a relevant act that is associated with an omission: see eg ***Antico***;

50.13 That act of the insured or Mr Johnson could reasonably be regarded as capable of causing or contributing to a loss in respect of which cover was provided by the policy (p355.30-358.42), and hence s54(2) of the *Insurance Contracts Act 1984* applied;

50.14 In contrast in the present case:

50.14.1 Section 54(2) did not apply. The appellant accepted at trial and on appeal that a driver not having a PAQS driver profile score of 36 could not reasonably be regarded as being capable of causing or contributing to any losses suffered by the respondent and that the insurers were not prejudiced by those matters: CA [11]; TJ [59];

50.14.2 In addition the appellant has accepted that the evidence at trial established that the failures of the insured that were given as reasons for denying indemnity did not cause or contribute to the losses the subject of the claims: CA [3]-[4]; Appellant's written submissions dated 22 April 2014 [14].

50.15 The reasoning of Chesterman JA was rejected expressly by McLure P in the Court of Appeal and implicitly if not expressly by the New South Wales Court of Appeal in ***Prepaid Services Pty Ltd v Atradius Credit Insurance NV*** [2013] NSWCA 252 [140];

50.16 In the present case there was an act or omission by the respondent or its drivers:

50.16.1 An act in operating, or giving permission to operate, the vehicles with drivers who had not satisfactorily completed the PAQS test CA [121] per Pullin JA; [145] per Murphy JA;

50.16.2 An omission by the respondent in failing to use PAQS satisfactorily tested drivers [82] per McLure P; [145] per Murphy JA, and

50.16.3 An omission by the drivers to satisfactorily complete the test before driving the vehicles: [82] per McLure P; [121] per Pullin JA;

50.17 In any event the act of the respondent, or acts of the drivers, identified by the learned trial judge constituted "performance ... of some activity which the contract of insurance requires, allows or contemplates and which may affect its alteration" within the formulation by Chesterman JA in ***Johnson v Triple C*** ([80]) : cf CA [122], [150]. The activity was operating a vehicle by a driver who had not been PAQS tested and approved by the insurer.

Particular responses to appellant's submissions

51 Appellant's submissions [28] – The respondent's business operation was not found to be a "notoriously hazardous activity";

52 Appellant's submissions [33] – Section 54 is not concerned with the vague terms "population of risks" or "valid claim". The focus is on the claim that has been made and conduct occurring after the insurance contract was entered into that is not capable of causing, or has not caused, prejudice to an insurer;

53 Appellant's submissions [34] –

53.1 The insured trucks and trailers were insured against property damage when they were stationary.

53.2 PAQS testing was not shown to establish "the quality of the driver". The quality of a driver was not the subject of the terms of the policy.

53.3 The risk insured was not operation of vehicles by PAQS tested drivers. The relevant insured "risks" were property damage (including when a vehicle was not being operated) or liability to third parties. Cover was reduced in ambit by numerous loss, rather than driver, exclusions. They included loss where a vehicle of a particular class was operated by a driver who was not PAQS tested (TJ [34]), but also loss where (TJ [33]):

53.3.1 The vehicle was operated by a driver for whom a driver declaration had not been received and approved by the insurers;

53.3.2 The driver was under the influence of drugs or alcohol;

53.3.3 The driver was unlicensed;

53.3.4 The vehicle was overloaded or driven without a correct permit for excess mass or over-dimension;

53.3.5 The vehicle was unroadworthy or unregistered;

53.3.6 The vehicle was used in a motor sports event, for hire or for an illegal purpose.

On the appellant's argument the insured "risk" that was beyond the reach of s54 was multidimensional and had all of the features of those exclusions.

53.4 The appellant's argument (using the language of the appellant's submissions) is a "clarion call" for form to "triumph" over substance;

53.5 The operation of s54 is not circumvented by the manner of specification of what is "central to the risk insured". What is "central to the risk insured" is a combination of the elements of the insuring clause and other contract terms, including exclusions. Conduct of a person that is relevant to the operation the insuring clause or other term, and occurs after the insurance contract was entered into, may bring the case within the ambit of s54. Whether it does so is determined by the operation of the terms of s54 and not by the application of a notion of what is "central to the risk insured".

53.6 Using the appellant's air travel reference, one might well ask whether Qantas would only insure its planes when they had a pilot at the controls and would Qantas be concerned about absence of PAQS testing.

54 Appellant's submissions [35] – The ambit of application of s54 is not determined by "the substantive promise", the "true scope of the risk insured", or whether there is "expansion of cover". It applies according to its terms. If s54 would otherwise prevent an insurer from relying on an act or omission to deny indemnity for a claim but there is no remaining foundation for an entitlement to indemnity, for example because no loss or liability occurred during the period of insurance, then the claim as made must fail.

55 Appellant's submissions [36] – The appellant has conceded that there was no relevant causal connection between the losses and liabilities that were suffered by the respondent and lack of PAQS testing and it did not assert at trial that there was any measurable prejudice to the appellant.

56 Appellant's submissions [37] –

56.1 ***Kelly v New Zealand Insurance*** (1996) 130 FLR 97 was decided before, and did not apply the reasoning in, ***Antico***;

56.2 Whether an event is one that is "insured against" is not the test for the application of s54. Insurance covers or excludes losses or liabilities rather than "events". An excluded loss from a specified event may fall within s54 if the elements of that section are satisfied.

57 Appellant's submissions [37]-[39] –

57.1 The case of the unlicensed driver exclusion is analogous to the exclusion in the present case, given the positions of the appellant at trial on causation and prejudice. It is also analogous to the facts in ***Johnson v Triple C Furniture and Electrical Pty Ltd*** [2010] QCA 282; [2010] 2 Qd R 337. Where there is a contract with an unlicensed driver exclusion the insurer does not accept the risk of the vehicle being driven by an unlicensed driver. In a given case the unlicensed driver might be untrained and unskilled as a driver. Hence the exclusion would be "central to the risk insured". However in a particular case the driver might be skilled so that the act of driving without a licence could not reasonably be regarded as being capable of causing or contributing to any loss suffered by the insurer;

57.2 On the appellant's argument the unlicensed driver exclusion would impose a restriction or limitation that was inherent in a claim and, contrary to the example provided by the Australian Law Reform Commission, render s54 inapplicable.

58 Appellant's submissions [40] – The respondent applied for and the insurers agreed cover for losses and liabilities occurring during the period of insurance. The respondent recovered for its losses and liability, within the ambit of agreed cover, because the failure of its two drivers to undergo PAQS testing was not causally relevant to those matters and did not cause the insurers any prejudice.

59 The insurers' continuing denial of liability to indemnify in the present case, being a denial it has maintained for insurance provided more than a decade ago, is the kind of denial that section 54(1) was enacted to prevent.

Indemnity costs

60 In the event that that the appeal is dismissed the respondent seeks an order for payment of costs of the appeal on an indemnity basis in order to maintain the efficacy of the order for indemnity costs made by the Court of Appeal.

Part VII: Statement of argument on respondent's notice of contention or cross appeal

61 Not applicable.

Part VIII: Hours required for presentation of oral argument

62 The respondent estimates that two hours is required for the presentation of the respondent's oral argument.

Dated the 13th day of May 2014

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