SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Rail Limited v Eden & Ors; State of Queensland & Anor v Kalari Proprietary Limited & Ors* [2019] QSC 212
PARTIES:	**QUEENSLAND RAIL LIMITED ACN 132 181 090** (first plaintiff) **v** **ANTHONY DAVID EDEN** (first defendant) **KALARI PROPRIETARY LIMITED ACN 004 595 395** (second defendant) **DORNOCH LIMITED** (third party) **AND** **STATE OF QUEENSLAND** (first plaintiff) **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN ROADS** (second plaintiff) **v** **KALARI PROPRIETARY LIMITED ACN 004 595 395** (first defendant) **ANTHONY DAVID EDEN** (second defendant) **DORNOCH LIMITED** (third party)
FILE NO/S:	BS 12846 of 2017 and BS No 2160 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2019
DELIVERED AT:	Maryborough
HEARING DATE:	12 February 2019
JUDGE:	Davis J
ORDER:	**1. The application for summary judgment brought in proceeding 12846 of 2017 by the third party is dismissed.** **2. The application for summary judgment brought in proceeding 2160 of 2018 by the third party is dismissed.**

3. **Each party may file and serve written submissions on the question of costs by 19 September 2019.**
4. **The issue of costs will be determined on the written submissions without further oral hearing.**
5. **Each party has liberty to apply to vacate order 4 if it wishes to make oral submissions on costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – where a road accident caused damage to a State controlled road and a rail bridge owned by Queensland Rail – where the insurer refused to indemnify the respondents for the damage so was joined as third party in both proceedings – where the third party applied for summary judgment against the respondents on the basis that that the claim for indemnity under the policy is doomed to fail because of the operation of exclusions – whether the defendants have any real prospect of success on the third party claims – whether there is a need for a trial

Explosives Act 1999, s 125
Heavy Vehicle National Law (Qld), s 89, s 223, s 228
Insurance Contracts Act 1984 (Cth), s 54
Land Act 1994, s 95
Transport Infrastructure Act 1994, s 48
Transport Operations (Road Use Management) Act 1995, s 83
Transport Operations (Road Use Management-Dangerous Goods) Regulation 2008, s 8, s 221
Transport Operations (Road Use Management-Road Rules) Regulation 2009, s 297
Uniform Civil Procedure Rules 1999, r 29, r 293, Schedule 4

Antico v Heath Fielding Australia Pty Ltd (1997) 188 CLR 562, cited
Batistatos v Roads and Traffic Authority (2006) 226 CLR 256, cited
Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd [2009] 2 Qd R 202, cited
Chan v Macarthur Minerals Ltd [2019] QSC 143, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, followed
FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd (2001) 204 CLR 641, cited
Gray v Morris [2004] 2 Qd R 118, cited
Maxwell v Highway Hauliers Pty Ltd (2014) 252 CLR 590, cited
Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 2) [2010] FCA 275, cited
Spencer v Commonwealth (2010) 241 CLR 118, cited
Theseus Exploration NL v Foyster (1972) 126 CLR 507,

followed
Wallaby Grip Ltd v QBE Insurance (Australia) Ltd; Stewart v QBE Insurance (Australia) Ltd (2010) 240 CLR 244; [2010] HCA 9, cited

COUNSEL: S Couper QC with D Markwald for the third party in each proceeding (applicant in the two applications)
RE Cavanagh SC with K Holyoak for the defendants in each proceeding (respondents to the two applications)
A Nicholas for the plaintiffs in each proceeding

SOLICITORS: Barry & Nilsson for the third party/applicants
Lander & Rogers for the defendants/respondents
Clayton Utz for the plaintiffs

[1] Kalari Proprietary Limited (Kalari) and Anthony David Eden (Mr Eden) are defendants in two separate claims.[1] By third party claims they seek indemnity from Dornoch Limited (Dornoch) under a policy of insurance which was styled "Wholesale Risk Solutions; Public and Products Liability Including Errors & Omissions Insurance" (the policy)

[2] In each of the two proceedings, Dornoch has applied for summary judgment against Kalari and Mr Eden[2] on the third party claims and submits that the claims for indemnity under the policy are doomed to fail because of the operation of exclusions.

[3] The two applications raise identical issues and it was common ground that the two applications should be heard together.

[4] The plaintiffs in the actions, State of Queensland, the Chief Executive Department of Transport and Main Roads, and Queensland Rail Limited all made written submissions and short oral submissions to which it is unnecessary to refer. The matters of contention in the applications are between the defendants and Dornoch, the third party.

Background

[5] Kalari operates a business which involves the freighting of bulk materials by road. Mr Eden was employed by Kalari as a driver of its trucks.

[6] On 5 September 2014, Mr Eden was driving one of Kalari's prime movers from Charleville, south along the Mitchell Highway.

[7] The prime mover's cargo was a substantial quantity of prilled ammonium nitrate.

[8] While travelling along the Mitchell Highway, the prime mover left the road. Mr Eden and Kalari plead in the proceedings that the prime mover caught fire and Mr Eden then drove the vehicle from the road. In that manoeuvre the vehicle rolled and serious explosions followed.

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1 BS 12846 of 2017 and BS 2160 of 2018.
2 *Uniform Civil Procedure Rules* 1999, r 293

[9] The Mitchell Highway is a State controlled road. By s 95 of the *Land Act* 1994, the road is property which vests in the State of Queensland. By s 48 of the *Transport Infrastructure Act* 1994, the Chief Executive has a right to recover costs of repair of a State controlled road from any person who damages it "intentionally, recklessly or negligently".

[10] Queensland Rail Limited is the owner of railway infrastructure.

[11] The explosions and subsequent fire from the disabled prime mover caused damage to both the Angela Creek bridge, which is part of the highway, and the Angela Creek rail bridge, which is part of the railway infrastructure. The State and the Chief Executive have claimed against Mr Eden and Kalari the sum of $7,886,481.51 being the costs of repair of the Angela Creek Bridge. Queensland Rail has claimed against Mr Eden and Kalari the sum of $3,920,400.19 being the costs of repair of the Angela Creek rail bridge.

[12] Section 48 of the *Transport Infrastructure Act* relied upon by the State of Queensland and the Chief Executive essentially creates a cause of action based on a failure to take reasonable care. Those plaintiffs reply on s 48(1). Section 48 in its entirety is in these terms:

> "**48 Recovery of cost of damage**
>
> (1) If—
>
> (a) a person intentionally, recklessly or negligently causes damage to road works or ancillary works and encroachments on a State-controlled road, whether or not an offence is committed; and
>
> (b) the chief executive repairs the damage or replaces or reconstructs as necessary the road works or ancillary works and encroachments;
>
> the person is liable to pay to the chief executive the cost of repair, replacement or reconstruction.
>
> (2) If—
>
> (a) the damage is caused by the operation of a vehicle; and
>
> (b) the driver of the vehicle is unknown or can not be located;
>
> the person in whose name the vehicle is registered is liable for the costs of repair, replacement or reconstruction for which the driver would be liable.
>
> (3) Subsection (2) does not apply if the vehicle was being used without the agreement or knowledge of the person in whose name the vehicle is registered.
>
> (4) If—
>
> (a) a court finds a person guilty of an offence against this Act; and

(b) in committing the offence, the person caused damage to road works or ancillary works and encroachments;

the court may, in addition to imposing a penalty, order the person to pay an amount towards the cost of repairing the damage."

[13] All plaintiffs rely on s 125 of the *Explosives Act* 1999 which is in terms:

"**125 Recovery of costs of government action**

(1) This section applies to a dangerous situation or an explosives incident (an ***incident***) completely or partly involving or arising from, or involving the danger of—

(a) the escape of an explosive; or

(b) an explosion or fire involving explosives.

(2) If a government entity incurs costs because of an incident, the entity may recover the costs reasonably incurred in dealing with the incident as a debt owing to the entity or the State.

(3) The costs are recoverable jointly and severally from the following persons—

(a) the person who owned the explosives when the incident happened;

(b) the person who possessed the explosives when the incident happened;

(c) the person who caused the incident;

(d) the person responsible (other than as an employee, agent or subcontractor of someone else) for the explosives.

(4) However, costs are not recoverable from a person who establishes that—

(a) the incident was due to the act or default of another person; or

(b) the person could not, exercising reasonable care, have prevented the incident; or

(c) the incident was not attributable to an employee, agent or subcontractor of the person.

(5) This section does not limit the powers a government entity has apart from this Act."

[14] The plaintiffs also make their claims in negligence.

[15] It is unnecessary to analyse the defendants' defences to the claims save to observe:

(i) Kalari and Mr Eden both plead facts in support of a defence under s 125(4) of the *Explosives Act*;[3]

(ii) Kalari and Mr Eden deny intentionally, recklessly or negligently causing damage to the Angela Creek Bridge and thereby deny liability under s 48 of the Transport Infrastructure Act;[4]

(iii) Kalari and Mr Eden deny any breach of duty.[5]

[16] Kalari held two policies of insurance, one with Dornoch and one with Zurich Insurance Limited. The Zurich policy provided insurance to a limit of $2,500,000 for liability arising from the transportation of dangerous goods. Zurich has paid $2.5 million pursuant to the policy and has no further liability.

[17] Dornoch refused to indemnify Kalari and Mr Eden who then joined Dornoch as third party in both proceedings.

[18] Dornoch has pleaded the benefit of the exclusion clauses and says that they are a complete answer to the third party claims made against it. On that basis, it brings the present applications arguing that no trial is necessary.[6]

The relevant provisions of the policy

[19] The insuring clause in the Dornoch policy is as follows:

> "The Insured[7] named in the Schedule having made to the Insurers a written proposal which is deemed to be incorporated herein and having paid or agreed to pay the premium stated in the Schedule then subject to the terms, conditions and exclusions contained in or endorsed on this Policy the Insurers will pay to or on behalf of the Insured all sums provided by the Policy which the Insured shall become legally liable to pay as compensation for:
>
> 1. Personal Injury or
>
> 2 Property Damage or
>
> 3. Advertising Liability
>
> caused by an Occurrence within the Territorial Limits as stated herein in connection with the Insured's Business."

[20] It is common ground that:

(iv) the policy was current over the period in which the incident occurred;

(v) both Kalari and Mr Eden were insured under the policy;

(vi) the loss sustained by the plaintiffs was "property damage" within the policy;

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3 2160/18 further amended defence, paragraphs 15-20E; 12846/17 amended defence, paragraphs 4A, 9I-9L and 9M.

4 2160/18 further amended defence, paragraphs 23-34.

5 2160/18 further amended defence, paragraphs 35-45; 12846/17 amended defence, paragraphs 4A, 9I-9L.

6 *Uniform Civil Procedure Rules* 1999 r 293; "Defendant" includes a third party, see Dictionary Schedule 4.

7 Kalari is named in the schedule as an "insured" and the "insured" is defined as including any employee of an insured (Kalari), here Mr Eden.

(vii) the policy insured against liability for property damage.

[21] The policy contains various exclusion clauses. Those relied upon by the third party are clauses 2 and 17.

[22] Exclusion 2 is as follows:

> "The insurers shall not be liable to indemnify the insured in respect of …
>
> **2. Motor Vehicles**
>
> Liability to pay compensation for Personal Injury or Property Damage arising out of the ownership, possession, operation, use or legal control by the Insured of any Vehicle:
>
> (a) which is registered or
>
> (b) in respect of which insurance is required by virtue of any legislation relating to motor vehicles, or
>
> (c) which is otherwise Insured in respect of the same liability
>
> Provided that this Exclusion does not apply to Vehicles whilst being operated or used by the Insured as a Tool of Trade.[8] This Exclusion does not apply to Personal Injury or Property Damage:
>
> (1) caused by or arising from the delivery or collection of goods to or from any vehicle where such Personal Injury or Property Damage occurs beyond the limits of any public carriageway or public thoroughfare
>
> (2) arising out of the loading or unloading of or the delivery or collection of goods to or from any vehicle used in work undertaken by the Insured or on the Insured's behalf but not in the Insured's physical or legal control
>
> (3) caused by or arising from the operation or use of any Vehicle which is being used for lifting, lowering, loading or unloading whilst being operated or used by or on the Insured's behalf within the confines of the Insured's premises
>
> (4) in the event that compulsory insurance or statutory indemnity does not provide indemnity but not where a breach of legislation relating Vehicles is involved"

[23] Exclusion 17 appears as:

> "**17. Hazardous/Dangerous Goods or Materials**
>
> The storage, transportation, processing, treatment, removal or dispersal of any Hazardous/Dangerous Goods or Materials except where such storage, transportation, processing, treatment, removal or dispersal is conducted fully in accordance with all legal, state or federal legislation or by law applicable thereto."

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[8] By the policy a vehicle used for haulage is not being used as a "Tool of Trade".

Relevant statutory provisions

[24] Dornoch alleges that the defendants breached various laws concerning the transportation of the sodium nitrate. Under the *Transport Operations (Road Use Management-Dangerous Goods) Regulation* 2008, some vehicles must be insured against liability for damage arising out of fire, explosion or leakage of dangerous goods (which I will call "dangerous goods insurance"). Section 221 provides as follows:

> "**221 Duties of owner**
>
> (1) The owner of a vehicle must not use the vehicle, or permit it to be used, to transport a placard load unless—
>
> (a) the use of the vehicle is covered by a policy of insurance or other form of indemnity, for a sum of at least $5,000,000, for—
>
> (i) personal injury, death, property damage and other damage (other than consequential economic loss) arising out of fire, explosion, leakage or spillage of dangerous goods in, on or from the vehicle or any packaging transported in or on the vehicle; and
>
> (ii) costs incurred by or for a Commonwealth, State or Territory government authority in a clean-up resulting from a fire, explosion, leakage or spillage of dangerous goods in, on or from the vehicle or any packaging transported in or on the vehicle; or
>
> (b) the owner has an approval under section 224 for the use of the vehicle and is complying with the conditions to which the approval is subject.
>
> Maximum penalty—60 penalty units.
>
> (2) Each load bearing vehicle, whether or not a motor vehicle and whether or not it is being used in combination with another vehicle, is a vehicle for subsection (1).
>
> (3) For subsection (1), each vehicle in a combination may be insured under a policy that applies to the combination as a whole."

[25] Section 221 contains the concept "placard load" which is the subject of s 83. That provides:

> "**83 When load must be placarded**
>
> (1) A load that contains dangerous goods must be placarded if—
>
> (a) it contains—
>
> (i) dangerous goods in a receptacle with a capacity of more than 500L; or

(ii) more than 500kg of dangerous goods in a receptacle; or

(b) it contains an aggregate quantity of dangerous goods of 250 or more and those goods include—

(i) dangerous goods of UN division 2.1 that are not aerosols; or

(ii) dangerous goods of UN division 2.3; or

(iii) dangerous goods of packing group I; or

(c) it contains dangerous goods of category A of UN division 6.2; or

(d) it contains an aggregate quantity of dangerous goods of UN division 6.2 (other than category A) of 10 or more; or

(e) it contains an aggregate quantity of dangerous goods of 1,000 or more.

(2) However, a retail distribution load complying with chapter 7.3 of the ADG Code is not a load that must be placarded."

[26] Section 83 refers to "dangerous goods". Section 33 defines "dangerous goods" by reference to the "ADG Code". The ADG Code is the Australian Code for the Transport of Dangerous Goods by Road and Rail.[9] It is not an issue that a load of sodium nitrate is "dangerous goods".

[27] Section 83 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) creates the offence of driving a motor vehicle without due care and attention. Section 83 provides as follows:

"**83 Careless driving of motor vehicles**

Any person who drives a motor vehicle on a road or elsewhere without due care and attention or without reasonable consideration for other persons using the road or place is guilty of an offence.

Maximum penalty-40 penalty units or 6 months imprisonment."

[28] Section 297 of the *Transport Operations (Road Use Management-Road Rules) Regulation* 2009 creates an offence of driving a vehicle unless the driver has proper control and has a clear view of the road. Section 297 is in these terms:

"**297 Driver to have proper control of a vehicle etc.**

(1) A driver must not drive a vehicle unless the driver has proper control of the vehicle.

Maximum penalty-20 penalty units.

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[9] Schedule 4 Dictionary to the Regulation.

(2) A driver must not drive a motor vehicle unless the driver has a clear view of the road , and traffic, ahead, behind and to each side of the driver.

Maximum penalty-20 penalty units."

[29] Perhaps unsurprisingly there is a law which prohibits a person from driving a heavy vehicle on a road when fatigued. Section 228(1) of the *Heavy Vehicle National Law* (Qld) provides:

"**228 Duty of driver to avoid driving while fatigued**

(1) A person must not drive a fatigue-regulated heavy vehicle on a road while the person is impaired by fatigue .

Maximum penalty-$6000."

[30] The prime mover was clearly a "fatigue-regulated heavy vehicle"[10] and "fatigue" is defined as follows:

"**223 What is fatigue**

(1) Fatigue includes (but is not limited to)—

(a) feeling sleepy; and

(b) feeling physically or mentally tired, weary or drowsy; and

(c) feeling exhausted or lacking energy; and

(d) behaving in a way consistent with paragraph (a), (b) or (c).

(2) The national regulations may contain provisions supplementing, clarifying or providing examples for any of the provisions of sections 223 to 226."

[31] Also unsurprisingly, there is a law which prohibits a person using a heavy vehicle on a road if the heavy vehicle is unsafe. Section 89(1) of the *Heavy Vehicle National Law* (Qld) provides:

"**89 Safety requirement**

(1) A person must not use, or permit to be used, on a road a heavy vehicle that is unsafe.

Maximum penalty-$6000.

(2) For the purposes of subsection (1), a heavy vehicle is unsafe only if the condition of the vehicle, or any of its components or equipment—

(a) makes the use of the vehicle unsafe; or

(b) endangers public safety.

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[10] *Heavy Vehicle National Law (Qld)*, s 7.

(3) Subsection (1) does not apply to a heavy vehicle for which a vehicle defect notice is in force and that is being moved in accordance with the terms of the notice."

[32] In their case against Dornoch, the defendants call in aid s 54 of the *Insurance Contracts Act* 1984 (Cth). That provision is:

"**54 Insurer may not refuse to pay claims in certain circumstances**

(1) 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.

(2) 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.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and

(b) 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."

Dornoch's position

[33] Dornoch's submissions are careful and detailed. In summary it submits that the exclusions unarguably apply for two reasons:

(i) the failure of the defendants to have the correct dangerous goods insurance (the dangerous goods insurance point); and

(ii) the failure to comply with various provisions concerning the driving of the vehicle (the manner of driving point).

[34] It is common ground that the onus is upon the third party to establish the exclusion[11] and upon the defendants to establish any exception to the exclusion.[12]

[35] As to the dangerous goods insurance point, Dornoch submits:

(i) Exclusion 2 prima facie applies because the claim is one for property damage "arising out of the ownership, possession, operation, use or legal control" of a relevant vehicle. This is not in dispute.

(ii) The only relevant exception to the exclusion is (4) and that does not apply because:

(a) although compulsory insurance or statutory indemnity does not provide indemnity;

(b) there has been "a breach of legislation relating to Vehicles", namely the failure to take out the proper amount of insurance under regulation 211 which prescribes a minimum of $5,000,000.

[36] As to the manner of driving point, it is not submitted by Dornoch that a particular breach of any particular provision can be established with such clarity as would justify the granting of judgment in a summary way. However, what is submitted is that there obviously must be some explanation for the prime mover to leave the road and that logically can only be:

(i) driver error, being an error constituting a breach of at least one of s 83 of the *Transport Operations (Road Use Management) Act* 1995, regulation 297 of the *Transport Operations (Road Use Management-Road Rules) Regulation* 2009 or s 228 of the *Heavy Vehicle National Law* (Qld); or

(ii) some defect in the prime mover. Given the defendant's plea that the prime mover was on fire before Mr Eden drove it from the road, Dornoch submits that it follows that the vehicle must have been "unsafe" (so as to catch fire) and therefore being driven in breach of s 89 of the *Heavy Vehicle National Law* (Qld).

[37] Dornoch submits that the breach of s 211 and the various provisions concerning the transportation of the sodium nitrate means that the transportation is not "in accordance with all legal state or federal legislation" so exclusion 17 applies.

[38] There is still then s 54 of the *Insurance Contracts Act* to which I shall return later.

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[11] *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd; Stewart v QBE Insurance (Australia) Ltd* (2010) 240 CLR 244 at [25].

[12] *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 2)* [2010] FCA 275, [19]-[20].

Principles concerning applications for summary judgment

[39] The application is brought under r 293 of the *Uniform Civil Procedure Rules* 1999 (UCPR). That provides:

> "**293 Summary judgment for defendant**
>
> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
>
> (2) If the court is satisfied—
>
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[40] The Dictionary to the UCPR, Schedule 4 defines defendant as:

> "***defendant*** includes—
>
> (a) a person who is served with a counterclaim; or
>
> (b) a person who is served with a notice claiming a contribution or indemnity; or
>
> (c) a third, fourth or subsequent party; or
>
> (d) for chapter 4, part 7, division 3, see rule 130A; or
>
> (e) for chapter 14, part 2, see rule 544."

[41] The rule grants a discretion to give judgment ("the court may") where each of the preconditions identified in r 293(2)(a) and r 293(2)(b) are fulfilled. Rule 292 is in relevantly identical terms but authorises summary judgment in favour of a plaintiff. Most of the decided cases concern r 292.

[42] Rule 292 was considered in *Deputy Commissioner of Taxation v Salcedo*.[13] There, Williams JA (with whom McMurdo P and Atkinson J agreed but both giving supplementary reasons), firstly considered *Gray v Morris*[14] where it was said that judgment could only be given where the respondent was "bound to fail" or where the case was "one which cannot possibly succeed", one which had "no prospects of success" and/or one that was "hopeless" and then said:

> "[11] With respect that approach is not correct. Rule 292 and r 293 brought about significant changes in the law and procedure relating to summary judgment. The wording of r 292 and r 293 is clearly based on the drafting used in Part 24 of the *Civil Procedure Rules* (UK)

[13] [2005] 2 Qd R 232.
[14] [2004] 2 Qd R 118.

which came into force in the United Kingdom in 1999. In *Swain v Hillman* [2001] 1 All ER 91 the Court of Appeal had to consider rule 24.2, the equivalent of rule 292. Lord Woolf MR said at 92:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or . . .they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

Later, again speaking of the rule, he said at 94:

> "It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

In his reasons at 95, Pill LJ accepted that the term "real" was used in contradistinction to "fanciful". The third member of the court, Judge LJ, whilst recognising that summary judgment was a "serious step", went on to say at 96:

> "This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable."

…

[13] The approach adopted by the Court of Appeal in *Swain v Hillman* was approved by the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; particular reference should be made to Lord Hope of Craighead at 259-260, Lord Hutton at 272-3, and Lord Hobhouse of Woodborough at 282-3. Lord Hope at 260 approved of a statement that:

> "particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred."

But in saying that, and this is a theme running through all the judgments, the overriding consideration must be the just disposition of the case - there must be a fair hearing. As Lord Hope put it again at 260:

> "I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly."

It is clear from his Lordship's reasoning that the test to be applied was whether there was a "real prospect of succeeding"; the test should not be formulated by using other verbiage. As Lord Hobhouse expressed at 282: "the criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

[14] This Court approved that approach in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259. There Holmes J, with the concurrence of Davies JA and Mullins J, speaking of r 293(2) and the expression "no real prospect of succeeding" said at 264-5:

> "That level of satisfaction may not require the meeting of as high a test as that posited by Barwick CJ in *General Steel*: 'that the case for the plaintiff is so clearly untenable that it cannot possibly succeed'. The more appropriate inquiry is in terms of the Rule itself: that is, whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains, without doubt, the case that: 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case.'"

In making that statement her Honour made a footnote reference to Swain v Hillman and Three Rivers District Council v Bank of England (No 3)."

And then later:

"[17] That review of the authorities clearly establishes to my mind that there has been a significant change brought about by the implementation of r 292 and r 293 of the UCPR. The test for summary judgment is different, and the court must apply the words found in the rule. To use other language to define the test (as was contended for in this case by counsel for the appellant relying on the reasoning of Chesterman J in *Gray v Morris*) only diverts the decision-maker from the relevant considerations. But, and this underlies all that is contained in the UCPR, ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial. In my view, the observations on summary judgment made by the judges of the High Court in *Fancourt v Mercantile Credits Ltd* [1983] 154 CLR 87 at 99 are not incompatible with that application of r 292 and r 293; what is important is that in following the broad principle laid down by their Honours the test as defined by the rules is applied."

[43] Also in *Salcedo*, Atkinson J observed:

"[46] As a result of r 5, r 292 and r 293 of the UCPR, a party seeking summary judgment is no longer required to satisfy the test set out by Barwick CJ in *General Steel Industries Inc v Commissioner for*

Railways (NSW) (1964) 112 CLR 125 at 130 "that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

> [47] As has been held in this Court, the test to be applied is that adopted by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 92 in relation to r 24 of the *Civil Procedure Rules* (UK) which is in similar terms to r 292 and r 293; that is, the court must consider whether there exists a real, as opposed to a fanciful, prospect of success. If there is no real prospect that a party will be successful in all or part of a claim, and there is no need for a trial, then ordinarily the other party is entitled to judgment. These rules benefit both parties as neither faces the expense of taking a matter to trial when the result of such a trial is inevitable as there is no real prospect of one of the parties being successful. There are also obvious advantages to the administration of justice if matters that can and ought be dealt with summarily, are so dealt with." (footnotes omitted)

[44] Whether there is a real practical difference between the test under rr 292 and 293 that "the defendant has no real prospects of successfully defending the claim"[15] and the test under the Supreme Court Rules, "that there is a question in dispute which ought to be tried"[16] has been the subject of differences of judicial opinion.[17]

[45] What is clear from the authorities is that great care must be exercised before denying a party the right to a trial.[18]

[46] Mr Couper QC, who led Mr Markwald for Dornoch, submitted that both his points are determined on the construction of the policy and of the legislation to facts which are materially not in issue.

[47] Even if the only matters in issue are matters of law (such as the construction of the statutory provisions and the policy), discretionary considerations may lead to the refusal of an application for summary judgment. If the legal argument is complex, a full hearing may be justified.[19]

Consideration

[48] The manner of driving point must fail. The pleadings show that there is a dispute between the parties, including the plaintiffs as to the cause of the accident. The defendants raise defences to the statutory claims and negligence is denied. It may well be that once the trial judge determines the cause of the accident, one of the provisions identified by Dornoch may be found to have been offended, thus enabling Dornoch to avail itself of one of the two exclusion clauses. Resolution of those issues requires a trial.

[49] As to the dangerous goods insurance point, the defendants do not agree with Dornoch's proposed construction of the policy.

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15 Relevantly here would translate to "the defendant has no real prospects of succeeding on the third party claim".

16 Order 18, r 1(1A) of the Supreme Court Rules.

17 *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202, *Spencer v Commonwealth* (2010) 241 CLR 118 at [25] and [56]-[58], *Batistatos v Roads and Traffic Authority* (2006) 226 CLR 256 and see recently *Chan v Macarthur Minerals Ltd* [2019] QSC 143.

18 See the analysis of Flanagan J in *Chan v Macarthur Minerals Ltd* [2019] QSC 143 at [70]-[72].

19 *Theseus Exploration NL v Foyster* (1972) 126 CLR 507.

[50] The defendants submit, in relation to exclusion clause 2:

(i) while the exclusion prima facie applies, namely that the claim is for property damage "arising out of the ownership, possession, operation, use or legal control" of a relevant vehicle;

(ii) the exception in paragraph (4) to the exclusion is made out because:

(a) the insurance required to be taken out by section 211 of the *Transport Operations (Road Use Management – Dangerous Goods) Regulation* is not "statutory insurance" as that term is understood. The submission is that "statutory insurance" refers only to schemes like third party compulsory insurance schemes where the insurance is established by the statute itself;

(b) the insurance is not "compulsory insurance", but even if it is

(c) the insurance required was "at least $5,000,000" which means that it was not "compulsory" to take out insurance beyond $5,000,000;

(d) the present claim exceeds $5,000,000 so the "compulsory insurance" would never provide "indemnity";

(iii) the exception to the exclusion in paragraph (4), namely that there is "a breach of legislation relating to vehicles" does not apply because the "breach of legislation relating to vehicles", concerns not breaches of obligations to take out insurance but breaches going to the liability for loss.

[51] As to exclusion clause 17, the defendants submit, it seems from the pleadings, that "all legal, State or Federal legislation" refers to "the storage, transportation processing treatment, removal or dispersal of [dangerous good]" not insurance relating thereto.

[52] The application of s 54 of the *Insurance Contracts Act* has not been free from difficulty. It has been the subject of consideration in the High Court on numerous occasions.[20] If the exclusions apply then my preliminary view, without finally deciding the matter, is that driving the vehicle without the requisite insurance, may be an "act that occurred after the contract was entered into" entitling Dornoch (but for s 54(1)) to refuse to pay a claim. The failure to take out the insurance may itself be a relevant "omission" entitling Dornoch to refuse to pay the claim, which then triggers s 54.

[53] Questions then arise as to whether s 54 operates so as to prevent Dornoch from refusing to pay the claim or operates so as to reduce its liability by $2,500,000 being the difference between the amount of cover obtained through the Zurich policy and the minimum cover required by s 221.

[54] The parties, in argument before me, thought the question was whether or not the exclusion creates a restriction or limitation on the scope of cover which is inherent in the claim.[21] Competing submissions were made about that but it is unnecessary and inappropriate I think to express a view.

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[20] *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 562 and *Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590.

[21] *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 at [41] approved in *Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590 at [23].

[55] Difficult questions arise as to the construction of the exclusion clauses, the construction of s 211 of the *Transport Operations (Road Use Management – Dangerous Goods) Regulation* and the application of s 54 of the *Insurance Contracts Act*. Further, Dornoch seeks to have the questions of construction determined in circumstances where the policy and legislation would then be applied to facts still in dispute. In those circumstances, it is appropriate to dismiss the applications.

Orders

[56] It is ordered that:

1. The application for summary judgment brought in proceeding 12846 of 2017, by the third party is dismissed.

2. The application for summary judgment brought in proceeding 2160 of 2018, by the third party is dismissed.

3. Each party may file and serve written submissions on the question of costs by 19 September 2019.

4. The issue of costs will be determined on the written submissions without further oral hearing.

5. Each party has liberty to apply to vacate order 3 if it wishes to make oral submissions on costs.