SUPREME COURT OF QUEENSLAND

CITATION:	*Sherlex P/L & Ors v Thornton & Ors* [2003] QCA 461
PARTIES:	**SHERLEX PTY LTD** ACN 071 381 970 **IRVINGO PTY LTD** ACN 010 411 677 **SETTLERS COVE DEVELOPMENT PTY LTD** ACN 056 564 446 (plaintiffs/second respondents) v **BRETT ANTHONY THORNTON** and **CATHERINE MAREE THORNTON trading as MEDICAL PLUMBING SERVICES** (first defendants/first respondents) **BOC GASES AUSTRALIA LIMITED** ACN 000 029 729 (second defendant) **PARKER ENZED AUSTRALIA PTY LIMITED** ACN 005 805 407 (third defendant) **JM KELLY BUILDERS PTY LIMITED** ACN 009 801 665 (fourth defendant) **SHANCO CONNECTORS PTY LTD** ACN 010 674 281 (fifth defendant) **PIRTEK ROCKHAMPTON PTY LTD** ACN 054 184 717 (sixth defendant) **PARKER ENZED TECHNOLOGY PTY LIMITED** ACN 005 879 130 (seventh defendant) **AMP GENERAL INSURANCE LIMITED** ACN 008 405 632 (first third party/appellant) **JOHN ATKINSON** (second third party) **TADGELL AVIATION SERVICES PTY LTD** ACN 010 390 904 (third third party)
FILE NO/S:	Appeal No 6303 of 2003 SC No 3795 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision

ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2003
JUDGES:	Davies and Jerrard JJA and Jones J Judgment of the Court
ORDER:	**1. Appeal allowed** **2. Set aside orders made on 30 June 2003** **3. Dismiss first respondents' application** **4. First respondents pay appellant's and plaintiffs' costs of that application** **5. First respondents pay appellant's costs of this appeal**
CATCHWORDS:	INSURANCE - GENERAL - POLICIES OF INSURANCE - CONSTRUCTION - where plaintiffs were bailee of helicopter chartered to another company for medical services - where respondents engaged to design, supply and install oxygen system for use in helicopter - where oxygen exploded and destroyed helicopter - where plaintiffs sued respondents in respect of its loss - where respondents claimed to be indemnified in respect of plaintiffs' loss pursuant to insurance policies with appellant - where, by insurance policies, appellant agreed to pay all law costs in connection with any claim for compensation - where policy lists a number of claims for which appellant will not pay - whether agreement to pay law costs is limited in operation to claims for compensation for matters not excluded by exclusion clause APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - RIGHT OF APPEAL - WHEN APPEAL LIES - FROM INTERLOCUTORY DECISIONS - GENERALLY - where trial judge ordered that issue of whether appellant obliged to pay respondents' costs of defending plaintiffs' action should be decided as a separate question - whether appropriate to make this order
COUNSEL:	P D T Applegarth SC, with D A McLure, for the appellant S S W Couper QC for the first respondents T W Quinn for the second respondents
SOLICITORS:	Minter Ellison for the appellant Spark Helmore for the first respondents Norton White (Sydney) for the second respondents

THE COURT:

1. This appeal and the questions in issue

[1] This is an appeal from orders made by a judge of the Supreme Court on 30 June 2003 pursuant to Part 5 of the *Uniform Civil Procedure Rules*. Those orders were, relevantly:

1. that pursuant to r 483 of the *Uniform Civil Procedure Rules* the following question between the first defendants and the first third party be decided separately from other issues and before the trial of the proceedings between the first defendants and the first third party:

> "Whether pursuant to policy of insurance number 4Y031124J the first third party is obliged to pay the first defendants' costs of defending the plaintiffs' action against the first defendants".

2. The court declares that pursuant to policy of insurance number 4Y031124J the first third party is obliged to pay to the first defendants all law costs, charges and expenses incurred by the first defendants in the defence of the plaintiffs' action against the first defendants.

[2] The appeal is by the first third party AMP General Insurance Limited ("AMP"). The first defendants, who are the respondents, are Brett Anthony Thornton and Catherine Maree Thornton trading as Medical Plumbing Services ("Medical Plumbing"). The plaintiffs in the action, which take no part in this appeal other than to protect an existing costs order in its favour, are Sherlex Pty Ltd, Irvingo Pty Ltd and Settlers Cove Development Pty Ltd which we shall collectively refer to as "Sherlex". AMP has appealed against both of his Honour's orders. It contends, firstly, that he should not have made the order that the question which he formulated be decided as a separate question. And in the alternative it contends that he decided it wrongly.

[3] Sherlex was the bailee under a bill of sale of a Bell helicopter which it chartered to another company for emergency medical services. It engaged Medical Plumbing to design, supply and install an oxygen system for use in the helicopter for the supply of oxygen to patients carried in the helicopter. Whilst the helicopter was stationary on the ground, oxygen in some part of the system so installed exploded completely burning and destroying the helicopter. Sherlex then sued Medical Plumbing in respect of its loss. Medical Plumbing, in turn, joined AMP with whom it had taken out a number of insurance policies which, together with some clauses common to all, were called a "Trades Peoples Insurance Contract". It claimed to be indemnified in respect of the plaintiffs' claim under one of those policies described as "Policy 7 - Public and Products Liability Policy".

[4] On the assumption, which it was prepared to make for the purpose of having the question decided, that any liability of AMP to indemnify Medical Plumbing in respect of the subject matter of Sherlex's claim was excluded by the exclusions clause in Policy 7,[1] Medical Plumbing sought to have the question so formulated by his Honour determined separately and his Honour acceded to that course. That question in turn involved two further questions. The first was whether the clause pursuant to which AMP agreed to pay law costs and charges and expenses was limited in its operation to claims for compensation as to matters not excluded by the exclusion clause of the policy. And the second was whether, even if that were not so, Sherlex's claim, to the extent that it may be based on faulty design, was one

---

[1] It did not admit this.

caused directly by and happening in the course of the conduct of the business as defined in the policy.

[5] In its written outline on appeal AMP contended that there was a third question: whether, in any event, liability to pay those costs, or some of them, was excluded because they were not incurred with its consent. However it is unnecessary to further consider that question because Mr Applegarth SC, for AMP, concedes that, if AMP was otherwise liable to pay those costs, it would have been unreasonable of it to refuse such consent. In order to understand the other questions it is necessary to set out some relevant terms of the policy and some relevant facts.

2. The relevant policy terms

[6] Policy 7 is in printed form bound up with the others already referred to and the common clauses. As is the practice in such policies its clauses are not numbered. As it covers public liability and products liability in relevantly identical terms it is sufficient to set out only the relevant part of the first of those.

> "**EXTENT OF COVER**
>
> **(1) PUBLIC LIABILITY**
>
> If you become legally liable to pay Compensation for:
>
> a. bodily injury (including death and illness);
>
> b. damage to tangible property (including loss of tangible property);
>
> and such liability occurs during the Period of Insurance as a result of an Occurrence caused directly by and happening in the course of the conduct of the Business, carried on at and from any place referred to in the Schedule, we will pay all sums to meet that Compensation up to the limit/sub-limit of liability described in the Schedule.
>
> We shall also pay in connection with any claim for Compensation referred to above all law costs and charges and expenses incurred in the settlement or defence of that claim, provided they are incurred by us or by you with our consent. This also includes all law costs, charges and expenses recoverable from you by any claimant."

[7] Later in the policy there is an exclusion clause relevantly for present purposes in the following terms:

> "**EXCLUSIONS TO POLICY 7**
>
> **(1) PUBLIC LIABILITY**
>
> **(Including Optional Additional Benefits)**
>
> We shall NOT pay for any claims:
>
> … "

Then follow a number of kinds of claims which the insurer will not pay; for example in respect of bodily injury to any person arising out of the course of their employment by Medical Plumbing.

3. The construction of those provisions

[8] Whether the second paragraph under the heading "**(1) PUBLIC LIABILITY**" is limited in its operation to claims for compensation as to matters not excluded by the exclusion clause of the policy depends on whether "any claim for Compensation referred to above" in that paragraph means any claim for compensation for bodily injury (including death and illness) or damage to tangible property (including loss of tangible property), claimed to have occurred during the period of insurance as a result of an occurrence caused directly by and happening in the course of the

conduct of the business carried on at and from the place referred to in the schedule; or whether it means only such claim for compensation as is not excluded by the exclusions clause. In determining that question it is necessary first to decide what the phrase "referred to above" means.

[9] It is plain that "referred to above" means referred to in the first paragraph and that it must therefore refer either to "claim" or to "Compensation". Once that is seen it can also be seen that it must refer to "Compensation" for that term appears in the first paragraph and "claim" does not.

[10] It then follows, in our opinion, that the "Compensation referred to above" is compensation which, by the first paragraph, AMP promises to pay all sums to meet; that is, compensation which satisfies the positive requirements of that paragraph and which is not excluded by the negative provisions of the exclusions clause. That is because the promise to pay in that paragraph is not an unqualified promise; it is qualified by the exclusions clause. So, for example, it is not all bodily injury coming within the terms of the first paragraph in respect of which the insurer will pay all sums to meet compensation because it will not pay any sum to meet compensation for bodily injury to any person arising out of their employment by Medical Plumbing.

[11] What then is a claim for such compensation? In our opinion it is a claim for compensation which satisfies the positive requirement of the first paragraph, that is, a claim for compensation for bodily injury or damage to tangible property, occurring during the period of insurance, resulting from an occurrence caused directly by and happening in the course of conduct of the business; and also which satisfies the negative requirement of the exclusions clause. It is only all law costs, charges and expenses incurred "in connection with" the settlement or defence of such a claim that AMP by the second paragraph promises to pay.

[12] Of course it is not only costs in connection with a successful claim which are payable by the second paragraph. The claim may fail notwithstanding that it is for compensation which satisfies the positive requirements of the first paragraph and the negative requirements of the exclusions clause; for example, because the insured was not negligent or not in breach of contract.

[13] Had it been appropriate to answer the question which his Honour posed, it follows that, on the assumption on which it was posed, it would have required a negative answer.

4. Whether it was appropriate to decide that question

[14] We do not think it was appropriate to decide that question unless, at least, on the assumption on which it was posed, it could have been decided either way; that is, provided that there could have been no factual issues in the way of a decision either way. And it seems to us that there may well have been unresolved factual issues which stood in the way of the decision which his Honour reached.

[15] The term "Business" in the first paragraph under the heading "**(1) PUBLIC LIABILITY**" is defined to mean the business described in the schedule. In the schedule the business is described as "MEDICAL & INDUSTRIAL GASES".

[16] In our opinion that term is ambiguous or at least susceptible of more than one meaning.[2] It may mean the manufacture of such gases, the manufacture of equipment for the use of such gases, the transportation of such gases, the installation of such gases in equipment, the installation of equipment for the use of such gases or the design of equipment for some of these purposes; or all of those and perhaps other activities. Mr Couper QC, for the first respondents, contended, and his Honour appeared to accept, that it unambiguously meant all of those things. We do not accept that contention. The term is, in our opinion, too wide to have a definable meaning. It is much more likely that it was a careless and inadequate summary of one or only some of those activities.

[17] That susceptibility of more than one meaning may, however, be able to be resolved by reference to evidence of the surrounding circumstances.[3] Without further evidence of what took place between the parties leading up to the issue of this policy it is not entirely clear to what extent matters occurring during the course of prior negotiations between Medical Plumbing and an insurance agent, Atkinson, established objective background facts known to AMP; in particular, the nature of the business actually being carried on by Medical Plumbing. However it seems likely that Mr Thornton, on behalf of Medical Plumbing, during the course of discussions with Mr Atkinson, described Medical Plumbing's business, looking at its business card, as "specialising in the Installation, Maintenance and Servicing of Medical and Industrial Gases". And in the proposal for the policy, which Mr and Mrs Thornton signed at the request of and in the presence of Mr Atkinson, they described the business as "installation, maintenance and service of medical and industrial gases". It therefore seems likely, but by no means certain, that by the time the policy was issued, the nature of Medical Plumbing's business, in those terms, was a fact known to both parties.

[18] If that was so it would probably resolve the susceptibility of more than one meaning of the description of the business in the policy. But we do not think that that question can be satisfactorily resolved on the present state of the evidence.

[19] Unless that question is resolved we do not think it can be determined whether and if so in what circumstances design work was covered by the policy; and, at least on one view, it was faulty design which is the basis of the plaintiffs' claim. And even if Medical Plumbing's business, within the meaning of the policy, was "installation, maintenance and service of medical and industrial gases" it may not be entirely clear, in the absence of evidence, whether that business would or may include design; and secondly, if it does, whether it would include design of the kind alleged here. In the absence of evidence which may be relevant to those matters we do not think that that question can be satisfactorily answered.

[20] Because, in our opinion, the question which his Honour posed could not have been decided in the affirmative in the absence of further evidence, we do not think it was an appropriate question for separate determination. In those circumstances we think that his Honour erred in so ordering that it be decided separately.

Orders

1. Allow the appeal.
2. Set aside the orders made on 30 June 2003.

---

2 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

3 Ibid.

3. Dismiss the first respondents' application.
4. Order the first respondents to pay the appellant's and the plaintiffs' costs of that application.
5. Order the first respondents to pay the appellant's costs of this appeal.