

SUPREME COURT OF QUEENSLAND

CITATION: *Nominal Defendant v FAI General Insurance Co Ltd (in liquidation)* [2004] QSC 309

PARTIES: **NOMINAL DEFENDANT**
(applicant)
v
FAI GENERAL INSURANCE CO LTD (IN LIQUIDATION)
(respondent)

FILE NO: SC No 4171 of 2004

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 17 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 9 September 2004

JUDGE: Chesterman J

ORDER:

- 1. It is ordered that the applicant Nominal Defendant have leave to commence this proceeding, SC No 4171 of 2004, against the respondent, FAI General Insurance Company Ltd (in liquidation);**
- 2. It is declared that as and from 15 March 2001 the Nominal Defendant is and was entitled to all rights to recover contribution pursuant to s 38(4)(c) of the *Motor Accident Insurance Act 1994 (Qld)* and rights to recover debts pursuant to ss 58 and 59 of that Act, which, but for its insolvency, the respondent would have had pursuant to Compulsory Third Party policies issued by it and in force on 15 March 2001;**
- 3. It is ordered that the respondent pay the applicant's costs of and incidental to this application to be assessed on the standard basis.**

CATCHWORDS: INSURANCE – INSURANCE COMPANIES – OTHER INSURANCE BUSINESS – where the respondent carried on business as a licensed insurer pursuant to the *Motor Accident Insurance Act 1994 (Qld)* ('the Act') – where the applicant was the Nominal Defendant pursuant to s 16 of the Act – where the respondent insolvent – where the applicant became the insurer of the Compulsory Third Party policies which the

respondent had underwritten and issued to registered owners of motor vehicles – whether the applicant sought be granted a declaration that it was entitled to retain moneys received under the Compulsory Third Party policies issued by the respondent

Corporations Act 2001 (Cth), s 5G, s 471B, s 474, s 478
Motor Accident Insurance Act 1994 (Qld), s 16, s 33, s 38, s 58, s 59, s 61, s 62(1), s 63(3), s 91, s 106
Motor Vehicles Insurance Act 1936 (Qld), s 14(2)

COUNSEL: Mr P A Keane QC, with Ms J H Dalton, for the applicant
 Mr B Coles QC, with Mr P J Dunning, for the respondent

SOLICITORS: Bain Gasteen for the applicant
 Blake Dawson Waldron for the respondent

- [1] Between 22 December 1994 and 15 March 2001 the respondent FAI General Insurance Co Ltd (in liquidation) ('FAI') carried on business as a licensed insurer pursuant to the terms of the *Motor Accident Insurance Act 1994 (Qld)* ('the Act'). The applicant is the Nominal Defendant, the body corporate established by s 16 of the Act. On 15 March 2001 provisional liquidators were appointed to FAI by order of the Supreme Court of New South Wales. On 27 August 2001 that court determined that FAI was insolvent and ordered that it be wound up. On 23 March 2001 a notice was published in the Queensland Government Gazette pursuant to s 91 of the Act to the effect that FAI had become insolvent on 15 March 2001. By the terms of s 33(2) of the Act the Nominal Defendant became the insurer in CTP policies which FAI had underwritten and issued to registered owners of motor vehicles.
- [2] A 'CTP' policy is, of course, a policy of insurance 'for a motor vehicle insuring against liability for personal injury caused by, through or in connection with the motor vehicle' required by the Act and issued in accordance with its provisions.
- [3] Section 91(1) of the Act provides that;
- 'If the commission publishes a gazette notice to the effect that a named insurer previously licensed under this Act became insolvent on a particular date, the insurer is presumed, for the purposes of this Act, to have become insolvent on that date.'

The Commission is the Motor Accident Insurance Commission which is charged with responsibility for the operation of the Act and its scheme of compulsory motor vehicle insurance.

- [4] Section 33(2) of the Act provides:
- 'If the insurer under a CTP insurance policy becomes insolvent, the Nominal Defendant becomes the insurer under CTP policies in force under this Act for which the insolvent insurer was formerly the insurer unless the policies are transferred to some other licensed insurer.'

- [5] Although the Act does not expressly prohibit an insolvent company from being a licenced insurer under the Act it is obvious that that is the consequence should a licenced insurer become insolvent. For a start a corporation which becomes insolvent cannot carry on business save for the limited purpose of winding up its business. Section 62(1) of the Act provides that '[a] body corporate carrying on the business of general insurance ... may apply to the commission for a licence' under the Act. It follows that to be a licenced insurer the body corporate must be carrying on the business of general insurance, and an insolvent company could not do so. The same indication is found in s 63(3)(a) which provides that a licence under the Act may be granted only if the Commission is satisfied that the applicant has the financial resources to carry on business as a licenced insurer.
- [6] These general indications aside it is obvious from the combined operation of s 91(1) and s 33(2) that upon publication in the gazette of a notice that an insurer had become insolvent it ceases to be an insurer under the Act and the Nominal Defendant 'becomes the insurer' in its place.
- [7] The affidavit of Ms Anderson, the Insurance Commissioner and Nominal Defendant appointed under the Act, shows that none of the policies issued by FAI which were in force on 15 March 2001 were transferred to any other licenced insurer.
- [8] The affidavit establishes further facts which are of particular relevance to the application and which are not in dispute. They are:

' ...

7. At the time of FAI's insolvency, there were in existence claims under CTP policies in respect of which FAI had been appointed the claim manager pursuant to s 38(1) of the Act and had properly paid, or agreed to pay, both:
- (a) monies as claim manager, and
 - (b) amounts awarded or paid out upon such claims
- for which it was entitled to claim contribution from other licensed insurers pursuant to s 38(4) of the Act. Nominal Defendant has received monies pursuant to s 38(4) of the Act in satisfaction of those claims for contribution.
8. At the time of FAI's insolvency, there were in existence claims under CTP policies in respect of which FAI was one of two or more insurers liable, but in respect of which it had not been appointed the claim manager pursuant to s 38(1) of the Act. In respect of some of these claims, the claim manager was entitled to contributions from FAI pursuant to s 38(4)(c) of the Act, but had not been paid those contributions by FAI. Nominal Defendant has paid contributions of that type.
9. At the time of FAI's insolvency, there were in existence claims under CTP policies in respect of which FAI had rights

of recourse pursuant to ss 58 and 59 of the Act. Nominal Defendant has exercised such rights since FAI's insolvency.

10. At the time of FAI's insolvency, there were in existence claims under CTP policies made upon FAI pursuant to the Act which it had not paid. Nominal Defendant has incurred expenses investigating these claims and has paid those claims it has determined it ought properly to pay.
11. Since FAI's insolvency, there have arisen claims on CTP policies which prior to its insolvency, FAI issued as licenced insurer, and in respect of which FAI received premiums. Nominal Defendant has paid and has incurred expenses investigating these claims and has paid those claims which it has determined it ought properly to pay.
12. Since the Nominal Defendant assumed the rights and obligations of FAI as licenced insurer, it has:
 - (a) paid a total of approximately \$291 million in respect of claims under CTP policies issued by FAI;
 - (b) paid out approximately \$22.04 million in satisfaction of claims, expenses and contributions pursuant to s 38(4)(c) of the Act, in respect of CTP policies issued by FAI;
 - (c) received approximately \$27 million as contributions pursuant to s 38(4)(c) of the Act in respect of claims under CTP policies issued by FAI;
 - (d) received approximately \$200,000 pursuant to the recovery provisions at ss 58 and 59 of the Act in respect of CTP policies issued by FAI.'

[9] The applicant seeks a declaration that it was entitled to recover, and is entitled to retain, the moneys identified in paragraphs 12(c) and (d) of Ms Anderson's affidavit. FAI disputes the applicant's claim and asserts that those moneys and any sums of a like nature which may be recovered in the future are the property of FAI or its liquidators.

[10] To appreciate the point it is necessary to regard ss 38, 58 and 59 of the Act.

[11] Section 38 provides:

- '(1) If 2 or more motor vehicle are involved in a motor vehicle accident in circumstances in which 2 or more insurers may be liable ... 1 of the insurers (the "**claim manager**") is to act for all the insurers ...
- (2) The claim manager is to be decided by agreement between the insurers ... or ... is to be decided under the industry deed.

- (3) ...
- (4) The claim manager –
 - (a) may exercise the powers and perform the functions conferred by this division ... in relation to the claim and the claimant for all insurers ...
 - (b) ...
 - (c) is entitled to contributions from the other insurers ... for expenditure properly incurred as claim manager, and for amounts awarded or paid out on the claim.
- (5) ...
- (6) ...'

[12] Section 58 of the Act provides that if personal injury arises out of a motor vehicle accident and (i) the insured person was driving without the owner's authority or other lawful justification; or (ii) if the insured person intended to injure the claimant; or (iii) if the insured person at the time of the accident was incapable of exercising effective control over the motor vehicle because of the consumption of alcohol or other drugs then:

‘the insurer may recover, as a debt, from the insured person any costs reasonably incurred by the insurer on a claim for the personal injury’.

This section also applies to personal injury arising out of a motor vehicle accident which is caused by a defect in the motor vehicle caused by the wrongful act of a manufacturer or repairer. In such cases the insurer may recover from the manufacturer or repairer costs incurred which reasonably reflect the degree of the manufacturer's or repairer's responsibility for the accident which caused the injury.

[13] Section 59 allows an insurer to recover from a claimant or other person who defrauds or attempts to defraud the insurer any costs reasonably incurred by the insurer because of the fraud.

[14] After 15 March 2001, when the applicant became the insurer on policies which were in force, and on which FAI had been the insurer, the applicant recovered moneys pursuant to s 58 and/or s 59 and was paid contribution from other insurers pursuant to s 38. However, the payments made to indemnify insured persons under the policies which gave the insurer rights to recover contributions from other insurers, or payments from insured persons, were made by FAI prior to 15 March 2001.

[15] FAI's submissions are that, in effect, the rights to recover these moneys accrued to it prior to its insolvency because their origin is found in the payments which FAI made under the CTP policies it had written. Accordingly the rights were assets of FAI and any money recovered from the enforcement of those rights must be applied for the benefit of its creditors. The applicant's submissions are that the Nominal

Defendant became the insurer on each of the policies which were in force immediately before the gazettal of the notice and in respect of which FAI was the insurer. The submission continues that the effect of s 33(2) of the Act is to substitute the Nominal Defendant for FAI as the insurer on those policies and, as insurer, the Nominal Defendant had, on and from 15 March 2002, all the rights, as well as the liabilities, of an insurer given by the Act on the FAI policies.

- [16] Before turning to consider the respective submissions a formality must be dealt with. Because FAI is in liquidation the application can only be brought pursuant to the Court's leave pursuant to s 471B of the *Corporations Act* 2001 (Cth). It is an appropriate case to grant leave because the dispute concerns matters which have arisen after and as a consequence of the liquidation. It concerns whether a substantial sum of money is an asset of the company's in liquidation, or whether they were moneys properly payable to the Nominal Defendant.
- [17] The applicant's submission have the attraction of simplicity. Its point is that, having become the insurer on what I have called the FAI policies by operation of s 33(2), it had and could exercise the rights given by the Act to insurers. The subsection operates, it is submitted, so as to effect a substitution of the Nominal Defendant for FAI on the policies to which the subsection applies.
- [18] In my opinion s 33(2) operates to transfer or assign the rights and obligations of an insurer under the policies to what it applies from FAI to the Nominal Defendant. This is done in a way which would probably not have been possible under the general law. The transfer or assignment occurs without the need for notice to policyholders of the assignment, or for the consent of insured or insurers. The contracts of insurance in force before publication of the notice remain in force after it. They are the same policies, in force for the same term and on the same terms. The only difference is that the benefits and burdens, the rights and obligations of the insurer passed, instantly, from FAI to the Nominal Defendant. The assignment operated prospectively only. There was no retrospective adjustment of rights or liabilities. Premiums paid to FAI prior to 15 March 2001 are retained by it, and payments made under the policies to indemnify insured persons prior to that date remain expenditure on FAI's account. As and from 15 March 2001 all rights which inured to a licenced insurer from the Act were the Nominal Defendant's, as were any liabilities which arose under the policies or the Act.
- [19] This substitution of the Nominal Defendant for FAI in the policies which otherwise remain unchanged does appear to be the plain intent of s 33(2). The phrase 'becomes the insurer' is entirely apt to achieve that result and, indeed, appears to be its obvious meaning.
- [20] If one considers ss 38, 58 and 59 from this point of view that, the Nominal Defendant has been substituted as the insurer on the FAI policies, the applicant's contention is made out. Section 38 confers an entitlement on a claim manager (i.e. a licenced insurer under the Act) to contributions from other insurers where it has properly incurred expenditure as claim manager. Likewise ss 58 and 59 allow an insurer to recover costs it reasonably incurred on a claim under the policy. These rights of recourse and rights to contributions are rights of the insurer. On and from 15 March 2001 it was the Nominal Defendant which was the insurer on the policies.

- [21] It is clear that FAI was not the insurer after that date. This is obvious from the terms of s 33(2). Moreover it is implicit from the provisions mentioned earlier that once it became insolvent FAI could not be an insurer under the Act. Because it was not an insurer it no longer had the rights of recourse or rights to contribution conferred by ss 38, 58 and 59. These rights are conferred by statute and a statutory condition to their exercise is that the person seeking to exercise them be an insurer. Rights of that kind which FAI had as an insurer were lost when it was deprived of that capacity by reason of its insolvency. They did not and could not form part of FAI's assets available for distribution amongst creditors.
- [22] There is a slight difficulty involved in accepting the applicant's submissions. The rights to recovery depend upon an insurer having paid out on a claim for personal injuries, and then making a claim to recover the amount paid out, or part of it, from an insured person or another insurer in one of the circumstances identified in ss 38, 58 and 59. In the cases in question it was FAI which paid out under the policies but it is the Nominal Defendant which, as insurer, has recovered payment. The difficulty, that FAI incurred the costs but the Nominal Defendant has exercised the rights of recourse and of contribution, can be overcome by regarding 'the insurer' where it appears in these sections as meaning 'the insurer named in the policy from time to time'. A change in the identity of the insurer during the currency of the policy would not then prevent the sections from operating. If this answer is not adopted then the rights conferred by the sections would not, in the circumstances with which the application is concerned, be exercisable at all. It is clear that FAI after 15 March 2001 was not the insurer under any of the policies and could not recover contributions or recourse. If the Nominal Defendant cannot recover the moneys then the rights given by the statute for the proper administration of the Act will be lost. Such a result should be avoided if at all possible.
- [23] The respondent's submissions focus upon other provisions of the Act which specifically provide for the transfer of rights to the Nominal Defendant upon the insolvency of a licenced insurer. Because s 33(2) does not expressly confer rights on the Nominal Defendant as these other sections do, the submission continues that the omission is deliberate and the subsection was not intended to have the effect the Nominal Defendant sees in it.
- [24] Reference is first made to s 61 of the Act which provides:
- (1) If an insurer becomes insolvent, any costs reasonably incurred by the Nominal Defendant on claims under CTP insurance policies for which the insolvent insurer was the insurer become debts of the insolvent insurer to the Nominal Defendant and provable in the insolvency.
 - (2) The debts of the insolvent insurer that arise under subsection (1) have the same order or priority in the winding up ... as if the Nominal Defendant were the insured person under policies of insurance ...
 - (3) If the claim for which costs were incurred by the Nominal Defendant is covered by a contract of reinsurance, the Nominal Defendant succeeds to the rights of the insolvent insurer under the contract of reinsurance.'

This section, FAI submits, ‘by its clear and express terms manifestly is the legislative scheme chosen by ... Parliament to adjust rights of creditors in the event of an insolvent insurer.’ Section 33(2) makes the Nominal Defendant responsible for the obligations of a defaulting (insolvent) insurer. Without that provision the policy holders would not be indemnified in the event of a claim against them. Section 61 provides the corresponding recompense, that the Nominal Defendant is to be regarded as a creditor in the defaulting insurer’s winding up. Similarly s 61(3) appropriates to the nominal defendant the defaulting insurer’s rights under any reinsurance contracts.

[25] The respondent notes the same contrast with s 106 of the Act. It is part of the transitional provisions facilitating the replacement of the *Motor Vehicles Insurance Act 1936 (Qld)* (‘the former Act’) by the Act. Section 106 provides:

- ‘(1) The Nominal Defendant under this Act succeeds to rights and liabilities of the Nominal Defendant under the former Act ...
- (2) If the insurer liable under a contract of insurance issued under the former Act becomes insolvent –
 - (a) the Nominal Defendant succeeds to the insolvent insurer’s rights and liabilities under the contract of insurance; and
 - (b) the provisions of this Act that apply to the insolvency of an insurer under a CTP insurance policy apply with any changes prescribed by regulation.
- (3) ...
- (4) ...
- (5) ...’

The respondent stresses the phrase ‘succeeds to rights’ which appears in both ss 61 and 106, but which is not found in s 33(2). The omission is said to be deliberate and to point to the legislature’s intention that the latter subsection does not confer any rights on the Nominal Defendant when it became the insurer consequent upon FAI’s insolvency. The submission is that the extent to which Parliament intended to confer rights on the Nominal Defendant to protect it or recompense it for having to assume the liability of insolvent insurers is expressly conferred by s 61.

[26] The applicant’s answer to this submission is that the terms in which s 33(2) achieves the result that the Nominal Defendant assumes the liabilities of an insolvent insurer also bring about the result that it succeeds to the rights of an insolvent insurer. By providing that the nominal defendant ‘becomes the insurer’ it takes on, or succeeds to, both the rights and obligations of the former insurer. I accept this submission. I think it is plainly right. By becoming the insurer the Nominal Defendant assumes FAI’s accrued but unsatisfied liabilities as well as contingent or future liabilities, and rights. The respondent’s complaint is that the Nominal Defendant should not succeed to FAI’s accrued rights, though it accepts that it does succeed to future rights. There is nothing in s 33(2) which operates to allocate some rights but not others, or to attribute some liabilities but not others. The Nominal Defendant becomes the insurer with all the attendant rights and obligations of the former

insurer as from the date of the substitution. The reason for the absence in s 33(2) of the phrases found in s 61 and s 106 is that they are unnecessary. The subsection is, in its own terms, sufficient to confer rights as well as liabilities on the Nominal Defendant.

- [27] The applicant submits that s 61 confers rights on the Nominal Defendant in addition to those it acquires by reason of becoming the insurer which are principally those of recourse and contribution. Section 61 confers the additional rights of proving in the winding up for moneys paid out on a policy, and the right to recover under a policy of reinsurance made with FAI. Merely by becoming the insurer under the CTP policies the Nominal Defendant would not become a party to contracts of reinsurance made by FAI. It would probably not have had the right to prove in the winding up. Section 61 is concerned with a different subject matter to s 33(2). The different wording in s 61 is not therefore an obstacle to accepting the applicant's construction of s 33(2).
- [28] The applicant points out that there is good reason why its submission should be accepted. The evident purpose of s 33(2) was to ensure that the insurer on each CTP policy was solvent and able to meet, on behalf of its insured, claims arising out of personal injuries caused by, through or in connection with a motor vehicle. To achieve this purpose the Nominal Defendant must have sufficient funds to meet claims against the insured persons in respect of whom it became the insurer pursuant to the operation of s 33(2). The funds available to the Nominal Defendant are not inexhaustible. Section 33(4) provides that if the Nominal Defendant Fund (established by s 29) proves insufficient to meet liabilities arising under s 33(2), payments must be made to it from the Motor Accidents Insurance Fund (established by s 28). There is, however, a limit. Section 33(5) provides that the total payments from the latter fund may not exceed amounts identified in s 106(3) and (4). The risk that the Nominal Defendant Fund might be insufficient to meet the liabilities added to the Nominal Defendant upon FAI's insolvency would be reduced if, as insurer under those policies, the Nominal Defendant could exercise the rights of recourse and rights of contribution in question. This point is, I think, a good one. I do not think it necessary to have regard to the purposive approach to construe s 33(2) because I think its meaning is plain, but the purpose of the section would support that construction.
- [29] It is, perhaps, curious that the position of the Nominal Defendant when it takes over the liabilities of an insolvent insurer are not expressed in detail as they were in the former Act – s 14 of which dealt with the insolvency of two named licensed insurers. As and from the date of the respective insolvencies the section provided:
- ‘2. ... the Nominal Defendant ... shall have, to the exclusion of the insurer, the same duties, liabilities, rights and powers in respect of any claim for damages to which this section applies as the insurer would have had under this Act and the relevant contract of insurance under this Act prior to (the respective dates) if the claim had been made to the insurer before such time ...’
- [30] Section 106 of the Act gives to the Nominal Defendant the rights conferred by s 14(2) of the former Act in the event that an insurer had issued a policy of

insurance under the former Act, but became insolvent after the enactment of the Act.

- [31] It is impossible to know why the Act does not include a provision as explicit as s 14(2) of the former Act. It may be that the draftsman realised he had accomplished the same result with the greater economy of words found in s 33(2). There may be some other reason beyond discovery. Importantly, the meaning of s 33(2) is clear. It is not affected by any real or perceived curiosity that the result it achieves comes from a form of words different to that employed in s 14(2) of the former Act.
- [32] The parties in passing drew my attention to some provisions of the *Corporations Act* as touching upon the construction of the Act. Counsel for the respondent pointed out that s 474 of the *Corporations Act* provides that the liquidator of an insolvent company must take possession of all of the property which the company is or appears to be entitled to, and s 478 provides that the liquidator must collect the property and apply it in discharging the company's liabilities. The argument proceeded that the insurer's rights to contribution and rights of recourse were property of FAI which the liquidator had to get in and apply in accordance with the *Corporations Act*. The applicant's construction of the Act would interfere with the legislative intent of the *Corporations Act*. Although the *Corporations Act* is an Act of the Commonwealth there is not a constitutional inconsistency between the two Acts by reason of s 5G of the *Corporations Act*. To the extent that there is inconsistency between the Act and the *Corporations Act*, that Act gives way.
- [33] The conflict which the respondent finds between the two Acts by reason of the applicant's construction of s 33(2) is that rights which the liquidator should collect and apply in payment of FAI's debts pass instead to the Nominal Defendant because it 'becomes the insurer'. The conflict can be avoided by the application of s 5G of the *Corporations Act*, but this is a remedy of last resort. The Court should endeavour to construe the Act so as to allow it to operate harmoniously with the *Corporations Act*. It is submitted that the court should avoid the conflict by rejecting the applicant's construction.
- [34] I accept the respondent's submissions that the Court should, if possible, construe the Act so as to avoid a conflict or inconsistency with the terms of the *Corporations Act* governing the winding up of insolvent companies. On the applicant's preferred construction of s 33(2), which I accept, there is no such conflict. The subsection does not deprive FAI, or its liquidators, of property that would otherwise be available for distribution among its creditors. The effect of the provisions of the Act which have been discussed is that upon notification of FAI's insolvency in the gazette it ceased to be an insurer. From that point on it had and could exercise none of the rights which the Act gives to an insurer, particularly rights to contribution and rights of recourse. The Act does not divest FAI of any moneys it recovered through the exercise of those rights prior to its insolvency. Upon the substitution of the Nominal Defendant as the insurer pursuant to s 33(2) the rights to contribution and of recourse which arise out of events concerning the policies are the Nominal Defendants. The rights in question, and their value, are only available to an insurer which FAI ceased to be after 15 March 2001.

[35] I conclude that the applicant is entitled to the declaration sought. Accordingly I:

- (a) order that the applicant Nominal Defendant have leave to commence this proceeding, SC No 4171 of 2004, against the respondent FAI General Insurance Company Ltd (in liquidation);
- (b) declare that as and from 15 March 2001 the Nominal Defendant is and was entitled to all rights to recover contribution pursuant to s 38(4)(c) of the *Motor Accident Insurance Act* and rights to recover debts pursuant to ss 58 and 59 of that Act, which, but for its insolvency, the respondent would have had pursuant to CTP insurance policies issued by it and in force on 15 March 2001;
- (c) order that the respondent pay the applicant's costs of and incidental to this application to be assessed on the standard basis.