SUPREME COURT OF QUEENSLAND

CITATION:	*Nominal Defendant v FAI General Insurance Co Ltd (in liq)* [2005] QCA 185
PARTIES:	**NOMINAL DEFENDANT** (applicant/respondent) **v** **FAI GENERAL INSURANCE COMPANY LTD (IN LIQUIDATION)** ACN 000 327 855 (respondent/appellant)
FILE NO/S:	Appeal No 8951 of 2004 SC 4171 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2005
JUDGES:	Williams and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – QUEENSLAND – where the Nominal Defendant became 'the insurer' pursuant to provisions of the *Motor Accident Insurance Act* 1994 upon the insolvency of the appellant – whether on proper construction of s 33 of the *Motor Accident Insurance Act* 1994, the Nominal Defendant succeeds to the insolvent insurer's rights and liabilities *Corporations Act* 2001 (Cth), s 5G(3) *Motor Accident Insurance Act* 1994 (Qld), s 33, s 38, s 58, s 59, s 61, s 91, s 106 *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610
COUNSEL:	B A Coles QC, with D A Kelly, for the appellant W Sofronoff QC, with J H Dalton SC, for the respondent
SOLICITORS:	Blake Dawson Waldron for the appellant

Bain Gasteen for the respondent

[1] **WILLIAMS JA:** Consequent upon the insolvency of the appellant, FAI General Insurance Company Ltd (in liq.), in March 2001, the respondent, the Nominal Defendant, pursuant to the provisions of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act") "became the insurer" with respect to policies in force under the Act for which the appellant was "formerly the insurer". In that role, the respondent:

(i) paid out a total of approximately $291 million in respect of claims under policies issued pursuant to the Act by the appellant;

(ii) 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 policies issued pursuant to the Act by the appellant;

(iii) received approximately $27 million as contributions pursuant to s 38(4)(c) of the Act in respect of claims under policies issued pursuant to the Act by the appellant;

(iv) received approximately $200,000 pursuant to the recovery provisions of s 58 and s 59 of the Act in respect of policies issued pursuant to the Act by the appellant.

[2] At first instance the following declaration was made:

> "As and from 15 March 2001 the Nominal Defendant is and was entitled to all rights to recover contributions 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."

The practical effect of that declaration was that the respondent was entitled to retain the amounts specified in paras (iii) and (iv) above, and any further amounts recovered pursuant to the sections of the Act referred to therein. The appellant appeals against the making of that declaration and merely seeks an order that the application by the respondent for that order be dismissed. The implication from the appellant's submissions is that the liquidator of the appellant would be entitled to the amounts received by the respondent particularised in paras (iii) and (iv) above.

[3] Between 22 December 1994 and 31 December 2000, the appellant was duly licensed under the Act to conduct business as a licensed insurer under the Act and to issue what the statute called a "CTP insurance policy". It went into provisional liquidation on 15 March 2001, and was ordered to be wound up by order of the New South Wales Supreme Court on 27 August 2001 on the ground that it was insolvent. 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."

Section 91(1) of the Act then provides:

> "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."

On 23 March 2001 notification was published in the Queensland Government Gazette that the appellant became insolvent on 15 March 2001.

[4] Section 33(1) is also relevant for present purposes; it provides:

> "The Nominal Defendant's liability for personal injury caused by, through or in connection with a motor vehicle is the same as if the Nominal Defendant had been, when the motor vehicle accident happened, the insurer under a CTP insurance policy under this Act for the motor vehicle."

[5] Much of the argument for the appellant was based on the distinction between the wording of s 33(2) of the Act (which merely said that the respondent "becomes the insurer" under the relevant policy) and that used in s 106(2) of the Act (which deals with an insurer under the *Motor Vehicles Insurance Act* 1936 (Qld), the "former Act", becoming insolvent). The wording used in the later section is that the "Nominal Defendant succeeds to the insolvent insurer's rights and liabilities under the contract of insurance". It was submitted that that was an indication that pursuant to s 33(2) of the Act the respondent did not succeed to "rights"; it succeeded only to "liabilities". Because of that, it is necessary, as contended for by senior counsel for the respondent, to note some significant differences between the Act and the former Act.

[6] Both statutes essentially provided that on registration of a motor vehicle it would be covered by a policy of insurance with respect to accidents caused by, through or in connection with that motor vehicle during the 12 month period the registration was in force. But there were significant differences between the statutes with respect to the policy of insurance. The respondent submitted that the Act effected "a radical change, a fundamental change, in motor vehicle insurance law".

[7] The former Act required registered owners of motor vehicles to obtain a contract of insurance with an insurer licensed under that statute. That policy of insurance was irrevocable, and on transfer of the ownership of the vehicle the new owner received the benefit of the policy. Section 3 of the former Act provided that the "owner of any motor vehicle shall at all times during the registration … keep himself indemnified by a contract of insurance … with some licensed insurer". That former Act was clearly based on the concept of there being a contract of insurance between the licensed insurer and the registered owner of the motor vehicle. All persons who drove the motor vehicle were deemed to be the authorised agents of the registered owner. In consequence, when personal injury was caused by, through or in connection with that motor vehicle the claim had to be made against, and the cause of action was against, the registered owner and that registered owner then had to seek indemnification pursuant to the contract of insurance.

[8] The Nominal Defendant (Queensland) was brought into existence as a body corporate by amendments to the former Act in 1961. That entity was then made answerable for claims for damages for personal injury caused by, through or in connection with a motor vehicle where the vehicle was not insured pursuant to the former Act or was unidentified. Such claims were satisfied out of the Fund created by the amending legislation. As Mr Sofronoff QC for the respondent submitted, the

amendments introducing The Nominal Defendant (Queensland) to the former Act did not equate that entity with an insurer under that Act; The Nominal Defendant (Queensland) had a statutory liability to pay damages in certain prescribed circumstances, whereas under the former Act the liability of a licensed insurer was pursuant to the contract of insurance it had issued.

[9] In 1961, the Standard Insurance Company Limited, a licensed insurer under the former Act, became insolvent, as did Seven Seas Insurance Company Limited in 1962. In consequence, the former Act was amended in 1962 to make The Nominal Defendant (Queensland) liable with respect to claims for personal injury for which the registered owner of the motor vehicle involved would have been indemnified pursuant to the contract of insurance between himself and one or other of those licensed insurers. Because The Nominal Defendant (Queensland) was replacing a party to the contract of insurance the statute provided in s 14(2) that The Nominal Defendant (Queensland) should have "to the exclusion of the insurer, the same duties, liabilities, rights and powers in respect of any claim for damages … as the insurer would have had under this Act and the relevant contract of insurance under this Act". As Mr Sofronoff QC submitted, the language of contract had to be used because the statute was concerned with the transference of rights and obligations derived from a contract of insurance between the licensed insurer and the registered owner of the motor vehicle.

[10] The Act, however, has abandoned the concept of a contract of insurance as the basis of the liability of the licensed insurer to satisfy the claim for damages for personal injury. Section 4 of the Act defines a "CTP insurance policy" as meaning:

> "(a) a policy of insurance under this Act for a motor vehicle insuring against liability for personal injury caused by, through or in connection with the motor vehicle; or
>
> (b) a policy of insurance, or a statutory indemnification, for a motor vehicle registered under the law of another State or a Territory, providing insurance, or indemnifying against liability, for personal injury caused by, through or in connection with the vehicle anywhere in Australia."

That section also defines the expression "statutory insurance scheme" as meaning "the insurance scheme established by this Act". Section 21 of the Act provides that on "lodging an application for the registration of a motor vehicle … the applicant must select a licensed insurer to be the insurer under the CTP insurance policy for the vehicle …". On registration the "appropriate insurance premium" is paid to the department of government administering the Act and that premium is then in turn paid to the licensed insurer. Section 22(1) of the Act is important; it provides that a "CTP insurance policy under this Act is binding on the licensed insurer by force of this Act, and a licensed insurer cannot repudiate, or decline to issue or renew, a CTP insurance policy". Then s 23(1) provides that upon registration "a policy of insurance in terms of the schedule comes into force for the motor vehicle" and that policy "remains in force for the period of registration". Finally, s 24 should be noted; it provides that a "CTP insurance policy is unaffected by a change of ownership" of the motor vehicle.

[11] It is clear that the Act creates a new form of policy of insurance which is not dependent upon a contract between the licensed insurer and the owner of the motor vehicle. Pursuant to the statutory scheme, if personal injury is caused by, through

or in connection with a motor vehicle, the insurer is directly liable to pay the damages. That is made clear by s 52(1) of the Act which provides that if "an action is brought in a court for damages for personal injury arising out of a motor vehicle accident, the action must be brought against the insured person and the insurer as joint defendants". The licensed insurer is not a tortfeasor at common law, but because of the statutory liability imposed on it by the legislation it must be a party to the litigation.

[12] It is in those circumstances that s 33 of the Act speaks of the respondent becoming the insurer under CTP policies in force under the Act on the insolvency of a licensed insurer. Because there was no contract of insurance it was not necessary to speak of rights and obligations pursuant to a contract; it was sufficient to speak in terms of the insolvent licensed insurer being replaced by the Nominal Defendant. In my view it is also important to recognise that by operation of s 33(1), upon the Nominal Defendant becoming the insurer by virtue of sub-s (2), the position is "the same as if the Nominal Defendant had been, when the motor vehicle accident happened, the insurer under a CTP insurance policy under this Act for the motor vehicle".

[13] The Act constitutes the Nominal Defendant as a body corporate and provides that for certain purposes it is to be "taken to be a licensed insurer" (s 18). Section 106(1) then provides that the Nominal Defendant under the Act "succeeds to rights and liabilities of the Nominal Defendant under the former Act for personal injury arising out of motor vehicle accidents that happened before the commencement of this Act". Then s 106(2), previously noted, provides that the Nominal Defendant under the Act succeeds to the rights and liabilities where an "insurer liable under a contract of insurance issued under the former Act becomes insolvent".

[14] All that to my mind clearly explains why it was necessary in s 106 to provide for succession to "rights and liabilities" whereas in s 33 it was sufficient to refer to succession.

[15] It is also important in my view to recognise that in the Act the expression "in force" when used with respect to a CTP insurance policy does not always have the same meaning. Section 23(2) provides that the policy remains "in force for the period of registration". That means that the policy of insurance responds to a claim for damages for personal injury caused by, through or in connection with the motor vehicle during that period of registration, a period of 12 months. But the policy is not what is often called a "claims made" one. In other words it responds to claims for damages caused during the relevant period and not to "claims made" during the relevant period. The Act prescribes time limitations with respect to making a claim and those periods may be extended in certain prescribed circumstances. Overarching that is the general three year limitation period applying to actions claiming damages for personal injury. Again, that period may be extended in specific circumstances (infancy, mental capacity and want of knowledge of material facts may provide a basis for extending the limitation period well beyond three years). It follows that though the policy in question may not be "in force" for purposes of s 23(2) it is still "in force" with respect to claims and possible claims relating to personal injury caused during the 12 month period of registration referred to in that section. In consequence when s 33(2) refers to the Nominal Defendant becoming "the insurer under CTP policies in force under this Act for which the insolvent insurer was formerly the insurer" the reference is not merely to the 12 month registration period during which the former insurer becomes insolvent. On

becoming the insurer by operation of that statutory provision the Nominal Defendant becomes the insurer who must respond to claims for damages for personal injury where the former insurer was the CTP insurer at the time the injury was sustained, regardless of whether the injury was sustained some years before the insurer became insolvent, or whether the claim with respect to the injury was first made many years after the former insurer became insolvent, or whether the injury was sustained after the former insurer became insolvent but during the 12 month period the policy in question was in force pursuant to s 23(2) of the Act. In all those circumstances the Nominal Defendant will be liable to pay the damages where they were not in fact paid by the now insolvent licensed insurer who issued the policy in force at the time the loss was sustained. It must also be remembered that the policy is not spent on the making of a claim and its settlement; there may be any number of incidents during the 12 month period of registration a policy is in force giving rise to a claim for damages.

[16] All of that indicates the extent to which the respondent is liable to meet obligations arising from CTP insurance policies issued by the appellant pursuant to the Act. The respondent has already paid out in excess of $300 million to meet such obligations, and that is not necessarily the limit. In theory there may well be minors who sustained serious brain injuries in a motor vehicle accident involving a vehicle covered by a CTP policy issued by the appellant and who have not yet made a claim. The respondent cannot yet say that its books are finally closed with respect to obligations flowing from the insolvency of the appellant.

[17] It is now necessary to turn to those sections of the Act which are directly in issue in this matter. To facilitate the handling of claims where more than one motor vehicle, and in consequence more than one licensed insurer, is involved in a claim, s 38 provides a machinery provision to facilitate the handling and resolution of the claim. One of the insurers acts as the "claim manager" on behalf of all the licensed insurers involved; it is not necessary to detail further the statutory provisions relating thereto. Section 38(4)(c) deals with the apportionment of all outgoings as between the insurers after the claim has been resolved; it provides:

> "The claim manager –
>
> …
>
> (c) is entitled to contributions from the other insurers on the basis prescribed by the industry deed for expenditure properly incurred as claim manager, and for amounts awarded or paid out on the claim."

[18] As already noted, the respondent has received approximately $27 million as contributions from other insurers pursuant to that provision. It is not clear on the material before the Court whether all of that amount relates to expenditure incurred by the appellant prior to 15 March 2001 and not recovered from the other insurers by that date. Certainly the argument before this Court proceeded on the basis that at least some of that amount had been so incurred. It seems to me that the result would be the same whether the amount represented expenditure incurred by the appellant prior to 15 March 2001 and not recovered, or expenditure by the respondent after that date where it was acting as “claim manager in respect of a claim to which a CTP policy issued by the appellant applied”.

[19] Reading s 33(1) and (2) together as I have suggested above, on the succession of the respondent with respect to CTP policies under which the appellant was the insurer the respondent must be treated as the insurer as if it had been the insurer when the

motor vehicle accident happened. On that approach when s 38 speaks of the insurer it must, in relevant circumstances, be referring to the respondent. The consequence of s 33 of the Act is that the appellant is no longer to be regarded as the relevant insurer for purposes of the Act. That does mean that the respondent obtains the benefit of expenditure in fact incurred by the appellant prior to the date of insolvency but, as is demonstrated by the figures in this case, that benefit will generally be but a small percentage of the financial obligations incurred by the respondent. The learned judge at first instance regarded that as a recognition by the legislature that some additional funding would be necessary for the respondent in such circumstances; that is an explanation reasonably open. But it is sufficient in order to resolve the appeal to say that the succession of the respondent to the position of insurer as and from the date of the accident giving rise to the claim has the consequence that the respondent is entitled to any recoveries pursuant to s 38(4)(c) of the Act obtained after the date of insolvency.

[20] Sections 58 and 59 of the Act confer on an insurer certain "rights of recourse". Section 58 deals with a number of circumstances where "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". Specifically, that right of recourse exists where the motor vehicle was being used without the owner's authority at the relevant time, where the insured person intended to injure the claimant, where the driver was adversely affected by alcohol or a drug, or where the accident was attributable to a defect in the motor vehicle. Section 59 simply states that an insurer may recover from a claimant who defrauds the insurer any costs reasonably incurred by the insurer because of the fraud.

[21] As noted above, the respondent has received approximately $200,000 by way of recovery pursuant to s 58 and s 59. The position, in my view, is no different to that which pertains with respect to s 38(4)(c). Once the respondent succeeded to the position of the appellant as insurer, it was to be regarded for purposes of the Act as the insurer as and from the date of the accident. It follows that after 15 March 2001 the respondent was the only insurer entitled to recover those amounts.

[22] I raised during the course of argument what would be the position if, prior to 15 March 2001, the appellant had sued for recovery pursuant to either s 58 or s 59 of the Act and obtained judgment, but had not executed thereon as at the date of insolvency. I can see that in those circumstances there may be an issue as to whether the appellant or the respondent was entitled to enforce that judgment debt. But on the material that situation had not arisen in the present case, and in consequence it is not necessary to provide an answer. It is better to leave that question to be resolved if and when it directly arises.

[23] When read as a whole, the Act makes a reasonably clear dividing line between rights and obligations of the insurer in the position of the appellant and the respondent when there is an insolvency and s 33 is called into play. If a claim had been made to the appellant and it was not resolved prior to insolvency, any liabilities incurred by the appellant prior to that date (for example, fees payable to loss assessors or lawyers) would be debts provable in the liquidation, but the claimant would be entitled to pursue the claim against and recover damages from the respondent. The respondent would have rights of recovery pursuant to s 38(4)(c), s 58 and s 59 of the Act with respect to that claim.

[24] It should also be recorded that senior counsel for the appellant contended that s 61 of the Act supported the construction of s 38(4)(c), s 58 and s 59 which he advanced. Section 61(1) is in terms:

> "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."

The submission of senior counsel for the appellant was that it would be inequitable if the respondent was able to retain amounts recovered under the specific sections referred to and nevertheless prove in the insolvency. The answer, in my view, is that the respondent would have to bring into account amounts recovered pursuant to the sections in question before proving in the insolvency; in other words, it would be the nett amount which was provable in the insolvency.

[25] Section 61(3) also provides that the Nominal Defendant "succeeds to the rights of the insolvent insurer" under any contract of reinsurance held by the insolvent insurer. It may be that the Nominal Defendant would have had that right in any event by virtue of the doctrine of subrogation, but the statutory provision removes any doubt. There is nothing inequitable in conferring that right on the Nominal Defendant; it would not make any windfall profit out of recovering under the contract of reinsurance.

[26] Much of the argument addressed to the Court on behalf of the appellant implied that in some way it was unjust or inequitable that the respondent should be entitled to recover and retain amounts which primarily represented expenditure incurred by the appellant. But, as already noted, the respondent ordinarily would incur in such circumstances obligations well in excess of any such recoveries. Looked at in that way it is only equitable that the Nominal Defendant should get some return for the considerable liabilities imposed on it. Both counsel in the course of argument used the expression "seamless transition" in referring to the succession of the respondent as CTP insurer where the appellant had formerly been that insurer. The clear intent of the legislature was that there should be such a transition and upon the respondent succeeding the appellant that should be for all purposes under the Act. That is why the appellant no longer had the rights of recovery pursuant to s 38(4)(c), s 58 and s 59 of the Act.

[27] On the hearing of the appeal it was broadly accepted by each party that interpreting s 38(4)(c), s 58 and s 59 of the Act in the way contended for by the respondent did not lead to the conclusion that all or any of those provisions conflicted with the winding up provisions found in the *Corporations Act* 2001 (Cth). Counsel in general accepted the approach of Barrett J in *HIH Casualty and General Insurance Ltd (in liq.) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610 where s 5G(3) of the *Corporations Act* 2001 (Cth) was relied on to achieve that result.

[28] I can discern no error in the reasoning of the learned judge at first instance. It follows that the appeal should be dismissed with costs.

[29] **JERRARD JA**: In this appeal I have read the reasons for judgment of Williams JA and the orders proposed by his Honour, and respectfully agree with those. I add that while the appellant's position at first appeared attractive, in that its arguments would result in it keeping rights of action which were assets created by it having

satisfied liabilities prior to 15 March 2001, s 38, s 58, and s 59 of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act") require that the party getting those assets be the insurer. When the insurer becomes insolvent, s 33(2) provides that either the Nominal Defendant, or some other licensed insurer to whom the policies of the insolvent insurer are transferred, becomes the insurer under CTP policies in force under the Act for which the insolvent insurer was formerly the insurer.

[30] Accordingly, it is not permissible to read s 38, s 58, and s 59 by notionally replacing the words "the insurer" with the terms "the insolvent insurer" and the "substituted insurer"; the Act provides differently. I respectfully agree with Williams JA that the legislature has endeavoured to ensure that the Nominal Defendant, or other licensed insurer who is a transferee, stands in FAI's shoes after 15 March 2001 in all regards, bar none. The appellant understandably argues about the Nominal Defendant having assets the insurer acquired under those sections before 15 March 2001, but it may acquire other assets under them in respect of the same policy, in years still to come. For any one policy, there could be in sequence an original (insolvent) insurer, at least one transferee (insolvent) insurer, and then the Nominal Defendant. That does not make it permissible to read the words "the insurer" in those sections as referring to different insurers.

[31] That fact that s 61 gives the Nominal Defendant a special right to claim for its costs reasonably incurred in satisfying its liabilities – not bargained for by it – where those were previously the liabilities of FAI, does not require any different construction of s 38, s 58, and s 59. If the Nominal Defendant did not have that right, an insolvent insurer could falsely appear solvent, because relieved of liabilities but retaining premiums paid for policies for which the Nominal Defendant was the insurer.

[32] **HELMAN J:** I agree with the order proposed by Williams JA and with his reasons.