SUPREME COURT OF QUEENSLAND

CITATION:	*RHG Home Loans Pty Ltd v Employers Mutual New South Wales Limited & Ors* [2011] QSC 28
PARTIES:	**RHG HOME LOANS PTY LTD (ACN 053 725 741)** (applicant) **v** **EMPLOYERS MUTUAL NEW SOUTH WALES LIMITED** (first respondent) and **WORKCOVER QUEENSLAND** (second respondent) and **PAUL ERIC MARSHALL** (third respondent)
FILE NO:	BS 796 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2011
JUDGE:	Applegarth J
ORDERS:	**1. Declare that the second respondent is obliged to indemnify the applicant against any liability established against the applicant by the third respondent arising out of a claim made by the third respondent against the applicant being a claim for damages for personal injuries sustained by the third respondent in Sydney, New South Wales, on 22 May 2007 and that such indemnity be made pursuant to the policy of insurance number WAA940902676 subsisting between the applicant and the second respondent.** **2. Declare that the first respondent is not obliged to indemnify the applicant against any liability established against the applicant by the third respondent arising out of a claim made by the third respondent against the applicant being a claim for damages for personal injuries sustained by the third respondent in Sydney, New South Wales, on 22 May**

2007.

3. The second respondent pay:

(a) The applicant's costs of and incidental to the proceeding on an indemnity basis.

(b) The first respondent's costs of and incidental to the proceeding on the standard basis.

(c) The third respondent's costs of and incidental to the proceeding on the standard basis.

CATCHWORDS: WORKERS' COMPENSATION – INSURANCE AND LEVIES – LIABILITY OF INSURERS AND STATUTORY AUTHORITIES – OTHER MATTERS – company employed sales account manager in Queensland – employee based in Brisbane – employee injured during an outdoors "team building" exercise during a company conference in Sydney – conference involved the employee being in New South Wales for less than 48 hours – company held compulsory insurance in both Queensland and New South Wales – both insurers deny indemnity against employee's claim for damages, and contend that the other is obliged to indemnify – company seeks declaration as to which insurer is liable to indemnify – whether there is a sufficient connection with New South Wales in the circumstances to oblige the company to insure in New South Wales against the claimed liability – whether the statutory obligation in s 155 of the *Workers Compensation Act* 1987 (NSW) to insure against damages claims is qualified by s 9AA of that Act

LEGISLATION: *Workers Compensation Act* 1987 (NSW) s 9AA, s 155
Workers Compensation and Rehabilitation Act 2003 (Qld) s 10

CASES: *Ballantyne v Workcover Authority of NSW* [2007] NSWCA 239 cited
Burrows v The Workers' Compensation Board of Queensland [1997] QCA 182 considered
Francis v Emijay Pty Ltd [2006] 2 Qd R 5; [2006] QCA 62 followed
Mynott v Barnard (1939) 62 CLR 68 cited

COUNSEL: J Rolls for the applicant
J Catsanos for the first respondent
R Treston for the second respondent
P Goodwin for the third respondent

SOLICITORS: Thynne & Macartney (town agents for Kemp Strang) for the applicant
Moray & Agnew for the first respondent
Mullins Lawyers for the second respondent
Richardson & Lyons for the third respondent

Introduction

[1] The third respondent, Mr Marshall, commenced employment with the applicant (RHG) on 8 January 2007. He went to Sydney for two days of induction on 10 and 11 January 2007. Thereafter, he was based in Brisbane, and worked at RHG's Brisbane office in the position of "Sales Account Manager – Qld City & West". Mr Marshall travelled to Sydney on 21 May 2007 to attend a conference conducted by his employer at the Powerhouse Museum. This Northern Region Conference included a "team building" session on 22 May 2007. Whilst undertaking the mountain bike section of that session at the Royal Botanical Gardens, Mr Marshall was injured.

[2] RHG, at the relevant time, held policies of workers' compensation insurance with both the first respondent (Employers Mutual) and with the second respondent (WorkCover). The claim made by Mr Marshall was referred by RHG to Employers Mutual, which declined to provide indemnity on the basis that an indemnity ought be provided by RHG's Queensland workers' compensation insurer, WorkCover. As a result, Mr Marshall gave notice of his claim for damages to WorkCover pursuant to the provisions of the *Workers Compensation and Rehabilitation Act* 2003 (Qld) ("the Queensland Act"). On 8 October 2010 WorkCover stated that it was not prepared to provide indemnity to RHG in respect of the claim for damages made by Mr Marshall.

[3] RHG seeks a declaration as to whether Employers Mutual or WorkCover is obliged to indemnify it in respect of Mr Marshall's claim. Each insurer asserts that the other is obliged to provide indemnity. If, as WorkCover submits, s 155 of the *Workers Compensation Act* 1987 (NSW) ("the NSW Act") is engaged, then by virtue of s 10(2)(b) of the Queensland Act the policy of accident insurance taken out by RHG with WorkCover does not apply in respect of a claim for damages by Mr Marshall.

The issue

[4] The issue is whether or not the claimed liability to pay damages to Mr Marshall is a liability against which RHG is required to obtain insurance cover pursuant to the NSW Act. This depends on whether or not there is a sufficient connection to engage the obligation to insure under s 155 of the NSW Act in respect of the claimed liability.

[5] Employers Mutual submits that RHG is not obliged to insure against a liability to pay damages to Mr Marshall. It relies on two decisions of the Court of Appeal of Queensland to submit that, leaving aside the effect of s 9AA of the NSW Act, Mr Marshall's presence in New South Wales was, to use the language of Fitzgerald P in *Burrows v The Workers' Compensation Board of Queensland*, "fortuitous, fleeting or sufficiently unusual", so that his employment lacked a sufficient connection with New South Wales to engage the NSW Act.[1] Employers Mutual places particular reliance upon the judgment of McMurdo J in *Francis v Emijay Pty Ltd* who illustrated the same point with the example of an employee who was sent to New South Wales for a day or so of training, and who would not be regarded as someone then employed in New South Wales.[2]

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1 [1997] QCA 182 at 4 ("*Burrows*").

2 [2006] 2 Qd R 5; [2006] QCA 62 ("*Francis*")

[6] Employers Mutual also relies upon the enactment of s 9AA of the NSW Act to submit that the obligation to insure in s 155 of that Act was subject to the requirement that Mr Marshall's employment was connected with New South Wales, with the existence of such a connection being determined in accordance with s 9AA. According to this argument, since New South Wales is not the State in which Mr Marshall usually worked, s 9AA(3) dictates that his employment was not connected with New South Wales. Compensation under the NSW Act is only payable in respect of employment that is connected with that State. Employers Mutual submits that because Mr Marshall was not a worker to whom RHG was liable to pay compensation, there was no obligation to insure under s 155 of the NSW Act in respect of any injury to him.

[7] WorkCover submits that there are "sufficient relevant connectors with New South Wales for the application of s 155 to this case, regardless of connectors which also exist with Queensland." It points to factors that are said to demonstrate that Mr Marshall's presence in New South Wales was neither fortuitous, fleeting nor unusual. Authoritative decisions of courts in New South Wales and Queensland are said to overwhelmingly point to these connectors being sufficient for s 155 of the NSW Act to be engaged. WorkCover submits that the operation of s 155 is not constrained by the limitations contained in s 9AA, and there is no warrant for reading down the words in s 155 as if those limitations applied to a claim for damages.

The relevant legislation

[8] Section 48 of the Queensland Act, as it existed at 22 May 2007, obliged every employer to maintain accident insurance in respect of both the employer's legal liability for compensation and the employer's legal liability for damages. Section 10 of the Queensland Act defines "damages" as follows:

> "**10 Meaning of damages**
>
> (1) Damages is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to –
>
> (a) the worker; or
> (b) if the injury results in the worker's death – a dependant of the deceased worker.
>
> (2) **A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under** –
>
> (a) another Act; or
> (b) **a law of another State**, the Commonwealth or of another country.
>
> (3) Also, a reference in subsection (1) to the liability of an employer does not include a liability to pay damages for loss of consortium resulting from injury sustained by a worker." (emphasis added)

[9] The terms of s 10(2)(b) highlight the central issue in this case: did a law of New South Wales require RHG to hold compulsory insurance cover against a liability to pay damages to Mr Marshall? This directs attention to s 155 of the NSW Act which requires an employer to maintain insurance for the employer's liability under the NSW Act "in respect of all workers employed by the employer" and in respect of the employer's liability independently of the NSW Act (save for a liability arising under certain specified laws) for any injury "to any such worker."

[10] Section 155 relevantly provides:

> "**155 Compulsory insurance for employers**
>
> (1) An employer (other than a self-insurer) shall obtain from a licensed insurer, and maintain in force, a policy of insurance that complies with this Division for the full amount of the employer's liability under this Act in respect of all workers employed by the employer and for an unlimited amount in respect of the employer's liability independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country) for any injury to any such worker."

Prior to 1 January 2006, s 155 was not expressly qualified so that the obligation to insure under it was subject to a requirement that the worker's employment be connected with New South Wales. The need for such a connection was, however, implicit, and whether there was a relevant connection with New South Wales was the subject of decision in a number of cases.

[11] Section 9AA of the NSW Act, which came into force on 1 January 2006 relevantly provides:

> "**9AA Liability for compensation**
>
> (1) Compensation under this Act is only payable in respect of employment that is connected with this State.
>
> (2) The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
>
> (3) A worker's employment is connected with:
>
> (a) the State in which the worker usually works in that employment, or
>
> (b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or

> (c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located. ..."

[12] An issue for determination in this application is whether s 9AA of the NSW Act qualifies the obligation to insure under s 155 both in respect of an employer's liability to pay compensation and the employer's liability to pay "common law" damages of the kind claimed by Mr Marshall. Employers Mutual submits that s 9AA means that the obligation to insure under s 155 is subject to the requirement that the employment be connected with New South Wales, that the existence of such a connection is determined in accordance with s 9AA(3) in this case and that, as a result, RHG was not obliged to insure under s 155 of the NSW Act in respect of the liability claimed by Mr Marshall. WorkCover submits that s 9AA is concerned only with liability for compensation, that the obligation to obtain insurance in respect of a claim for damages is not constrained by the limitations contained in s 9AA and that there is no warrant for reading into s 155 those limitations.

[13] I shall first address the operation of s 155 on the assumption that it is not constrained by the limitations contained in s 9AA in respect of a liability to pay damages and then turn to the issue of statutory interpretation that the enactment of s 9AA raises.

The application of s 155 of the NSW Act, unconstrained by s 9AA

[14] Prior to s 9AA coming into force, the operation of s 155 depended on the existence of a relevant connection with New South Wales. Expressed differently, s 155 could not be taken to have a valid operation in respect of an employer's liability arising from employment that had no sufficient connection with New South Wales. This was because it could not be supposed as a matter of statutory construction that the section was intended to impose an obligation to insure, and create an offence for failing to insure, in a case in which the employer, workers employed by it, their employment activities and the injury had no connection with New South Wales. Some sufficient connection with New South Wales was required in order for the section to apply and the obligation to insure to arise.

[15] A number of authorities have considered whether circumstances were sufficient to engage the operation of s 155(1) of the NSW Act in cases where the injury occurred in New South Wales.

[16] In *Burrows* the respondent's employer at the time he was injured was a company incorporated in Queensland, which was not registered elsewhere and which had its only premises in Queensland. Its business as a transport operator regularly involved it in business activities in New South Wales. The respondent, the driver of one of its vehicles, went to New South Wales on numerous occasions in the course of his employment and he was injured in New South Wales while he was working there in the course of his employment. Fitzgerald P, with whom Mackenzie and Helman JJ agreed, concluded that s 155(1) of the NSW Act was not inapplicable "merely because neither employer nor employee is resident or domiciled, based or located, whichever be thought most apposite, in New South Wales when an employee is

injured".[3] Section 155 of the NSW Act was found to apply to the respondent's then employer in respect of the work-related injury that he suffered in New South Wales in the course of his employment. Fitzgerald P observed that the NSW Act, described in its long title as an Act "to provide for the compensation and rehabilitation of workers in respect of work related injuries", was "plainly intended to have a wide and beneficial operation."[4] There was no identified reason to read down s 155(1) so as to exclude from its ambit the kind of work-related injury which occurred in New South Wales in that case. Fitzgerald P expressed the following reservation:

> "However, there might be other provisions in the New South Wales Act to which the attention of this Court has not been drawn which effect some limitations in some circumstances, and it is possible that, for example, subsection 155(1) of the New South Wales Act is inapplicable if an employee's presence in New South Wales when he or she is injured in the course of his or her employment is fortuitous, fleeting or sufficiently unusual."[5]

[17] *Francis* concerned the issue of whether an employer in New South Wales was bound to obtain the insurance policy provided for in s 155 of the NSW Act to cover a contractual liability which an employee asserted against his employer. The Court concluded that the employer was obliged by s 155(1) of the NSW Act to provide for its liability in damages to Mr Francis. The Court did not question the correctness of the decision in *Burrows*. Williams JA, who agreed with the separate reasons given by both Keane JA and McMurdo J, did not seek to define "the outer limits of the range of operation of s 155". This is because it was "clear beyond doubt" that the section applied to the circumstances at hand which involved an injury sustained in New South Wales by a "worker" at a time when he was there in his capacity as a worker.[6] Williams JA referred to the decision in *Burrows* and stated that a review of the amendments to the NSW Act since *Burrows* did not call for a reconsideration of the conclusion reached in that case. Williams JA stated: "if anything, the subsequent amendments support the conclusion therein reached."[7]

[18] Keane JA (as his Honour then was) noted the possible qualification raised by Fitzgerald P in *Burrows*, and did not suggest that such a qualification might not exist. Instead, Keane JA referred to the primary judge's finding that Mr Francis' presence in New South Wales was not "fortuitous, fleeting or sufficiently unusual".[8]

[19] In this matter WorkCover points to the following observation of Keane JA:

> "It is significant that, before this Court, QBE was unable to cite any authority which is contrary to the proposition that it is sufficient to engage the operation of s 155(1) of the NSW Act that the injury should have occurred in New South Wales, or which supports the proposition that s 155(1) is relevantly concerned only with liabilities

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3 [1997] QCA 182 at 4.
4 Ibid.
5 Ibid.
6 [2006] 2 Qd R 5 at 9; [2006] QCA 62 at [3].
7 Ibid at 11, [8].
8 Ibid at 13, [23].

> in tort or liabilities arising from a breach of contract of which the law of New South Wales is proper law."[9]

Viewed in isolation, the first part of this sentence might be interpreted as suggesting that it will always be sufficient to engage the operation of s 155(1) of the NSW Act that the injury should have occurred in New South Wales. I do not interpret it that way. If Keane JA had intended to disagree with the qualification raised by Fitzgerald P in *Burrows* then he would have said so. His Honour would have stated that it was sufficient to engage s 155 that the injury occurred in New South Wales, and that it had been unnecessary for the primary judge to consider whether Mr Francis' presence was "fortuitous, fleeting or sufficiently unusual". Moreover, if the presence of the injured worker in New South Wales was in itself sufficient to engage the operation of s 155, then Keane JA would not have referred at [35] to the fact that Mr Francis was not "fortuitously" in New South Wales when he was injured, and was there "in accordance with the terms of his employment and his employer's expectations".[10] I interpret the observation of Keane JA at [33] as simply referring to the fact that there was no previous authority cited by QBE of a case in which the relevant injury occurred in New South Wales in which s 155 was not engaged.

[20] If Keane JA had intended to state the unqualified proposition that it is sufficient to engage the operation of s 155(1) of the NSW Act that the injury occur in New South Wales, then his Honour would not have acknowledged the degree of uncertainty that s 155 was said to create "as to the precise moment when the obligation in s 155(1) operates to require an out-of-State employer to insure in respect of its workers."[11] Finally, Keane JA did not express any disagreement with the reasons of McMurdo J. In short, the reasons of Keane JA do not disapprove of the possible qualification discussed by the Court of Appeal in *Burrows* and do not state the unqualified proposition that it is sufficient to engage the operation of s 155(1) that the injury occur in New South Wales.

[21] McMurdo J did not accept the submission of the respondent that s 155 was engaged whenever an employee was working in New South Wales, however temporarily, in the course of their employment. The question of whether s 155 was engaged was "a factual one, requiring a consideration of the circumstances of a particular case".[12] The question was not answered simply by asking whether the worker was injured whilst working in New South Wales.

[22] After referring to the qualification expressed by Fitzgerald P in *Burrows*, McMurdo J observed that the decision left open the possibility that in some circumstances, the presence of an employee in New South Wales in the course of his employment might not be sufficient.[13] His Honour referred to the two types of liability in respect of which s 155 required insurance and observed that the evident intent was that "the same worker or workers would be the subject of insurance against each kind of liability." Accordingly, it was "relevant to consider the circumstances in which an employer was liable under the Act for workers

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9 Ibid at 15, [33].
10 Ibid at 15, [35].
11 Ibid at 15, [35].
12 Ibid at 19, [51].
13 Ibid at 17, [45].

compensation".[14] Reference was made to amendments to the NSW legislation, including the enactment of s 9AA, which "clearly expressed" the particular factors that provide the required connection with New South Wales. Although those amendments did not affect the legislation that applied in the case under appeal, they were said to illustrate the relationship which exists between the operation of the workers' compensation scheme and the employer's obligation to insure under s 155.[15]

[23] The judgment of McMurdo J, with which Williams JA agreed, developed the following propositions:

- it is unlikely that the legislature "intended that an employer, when engaging a worker to work in another State but in circumstances where there was some prospect that the worker would be sent to New South Wales from time to time, should have to insure against that prospect";

- it is unlikely that the section was intended to oblige an employer to insure at the point when its employee enters New South Wales in the course of his employment for however short a time;

- the terms of the statute in their application to employment of a worker in New South Wales require "some presence and performance of services within New South Wales, to an extent that it could be said, in ordinary speech, that New South Wales was a place where the employee sometimes worked."

- for example, "an employee who was sent to New South Wales for a day or so of training would not be regarded as someone then employed in New South Wales";

- it would be insufficient if the employee's presence in New South Wales was "fortuitous, fleeting or sufficiently unusual".[16]

These propositions emerge from the following paragraphs:

> "[49] The obligation under s 155 is to insure, which is defined by circumstances which necessarily predate the injury. Much of the argument was in terms of whether the policy, which this employer had put in place with the applicant, responded to this claim. But the present question is whether the employer was obliged to insure against such a claim, and cannot be answered simply by where the accident occurred. In what circumstances then was insurance required for an employer whose workers sometimes worked in New South Wales, or for workers who simply might do so? It is unlikely to have been intended that an employer, when engaging a worker to work in another State but in circumstances where there was some prospect that the worker would be sent to New South Wales

14 Ibid at 17, [46].
15 Ibid at 17-18, [47].
16 Ibid at 19, [49] – [50].

> from time to time, should have to insure against that prospect. And was an employer outside the State obliged to insure at the point when its employee enters New South Wales in the course of his employment, for however short a time?
>
> [50] Section 155 imposes an obligation upon a person as "an employer" and in respect of all workers "employed by the employer". These are references to employment in New South Wales. So is the reference to "employment" in the definition of "injury" relevantly for the operation of the workers compensation scheme. At the point when someone was employed in New South Wales, the employer was obliged to insure. The employment of a worker in New South Wales, in this sense, does not refer to the making of the employment contract. It refers to the use of the employee's services, and it requires some presence and performance of services within New South Wales, to an extent that it could be said, in ordinary speech, that New South Wales was a place where the employee sometimes worked. So for example, an employee who was sent to New South Wales for a day or so of training would not be regarded as someone then employed in New South Wales. That is an example of that to which Fitzgerald P in *Burrows* was referring, in his qualification that the employee's "fortuitous, fleeting or sufficiently unusual" presence in New South Wales would be insufficient. The evident and beneficial purpose of a statute such as this would not be furthered in such cases by burdening employers outside the State with the obligation to insure, or the relevant authority in New South Wales with the obligation to pay compensation absent insurance.
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> [51] The question is then a factual one, requiring a consideration of the circumstances of a particular case but without regard to rigid criteria and, more particularly, choice of law rules. In the present case, Mr Francis was in New South Wales because it was his usual and recurring task to go there as a truck driver. He was in the relevant sense employed in New South Wales and his employer was thereby bound to insure against any liability to him for damages from his employment in New South Wales. The primary judge was right to hold then s 155 did operate to exclude the operation of the Queensland statute."

[24] I respectfully follow the approach of having regard to the circumstances of the particular case rather than rigid criteria. I apply the decisions in *Burrows* and *Francis* which recognise that the mere presence of the worker in New South Wales at the time of the injury may not be sufficient to engage the operation of s 155. I shall first apply this approach without reference to s 9AA, assuming in WorkCover's favour that s 9AA does not constrain the operation of s 155 in a case of liability for damages at common law, as distinct from a liability for compensation. However, for reasons which I shall give, I consider that s 9AA does

govern the circumstances in which an employer is obliged to insure under s 155 in respect of both liability for compensation payable under the NSW Act and for liability independently of that Act.

Was there a sufficient connection with New South Wales?

[25] Leaving aside for present purposes the application of s 9AA, the question is whether there is a sufficient connection with New South Wales. That question does not involve a balancing exercise to ascertain with which State the matter has a greater connection. It may be said that factors that demonstrate a connection between Mr Marshall's employment with RHG and Queensland are "irrelevant" to the question of whether RHG was obliged to insure in respect of an injury to Mr Marshall in the course of his employment.[17] Subject to the qualifications raised in *Burrows* and endorsed by at least a majority of the Court of Appeal in *Francis*, the authorities have tended to treat the fact that the accident occurred in New South Wales in the course of the employee's work as practically sufficient to establish the required connection with New South Wales.[18]

[26] WorkCover points to the following "connectors" in this case:

- RHG was registered in New South Wales and had its principal place of business there. At the relevant time it was known as RAMS Home Loans Pty Ltd.
- Its business activities occurred, amongst other places, within New South Wales.
- Mr Marshall was in New South Wales for an expected stay of two days.
- He had earlier travelled to New South Wales in January 2007.
- The type of in-house conference which Mr Marshall attended in May 2007 was a regular event.
- The injury occurred in New South Wales.

These matters are said to demonstrate that Mr Marshall's presence in New South Wales was neither fortuitous, fleeting nor unusual. WorkCover submits that he was expected to attend these training and team building exercises and that the identified "connectors" are sufficient to engage s 155 of the NSW Act.

[27] Mr Marshall was appointed to the position of Sales Account Manager – Qld City & West, and commenced working in that role on 8 January 2007. He operated from RAMS office in Brisbane and reported to the Regional Sales Manager - Northern Region. He was not required to perform any basic or ordinary duties associated with his role outside of Queensland. He was required to travel to New South Wales for work purposes on two occasions. The first was from 10-11 January 2007 when, as a new employee, he travelled to Sydney for induction training. The second trip

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17 *Ballantyne v Workcover Authority of NSW* [2007] NSWCA 239 at [124].

18 Ibid at [64] – [65].

was on 21-22 May 2007 so that he could attend the RAMS Northern Region Conference at the Powerhouse Museum.

[28] Mr Marshall and his co-workers were to arrive in Sydney early on the morning of 21 May and fly home late on the afternoon of 22 May. The agenda for the conference on 21 May involved topics such as Relationship Building and a workshop on Planning and Organising. There was a guest speaker that afternoon and a conference dinner that night. The agenda for Tuesday, 22 May required Mr Marshall and his co-workers to arrive at the Powerhouse Museum at 8.45 am for "Team Building Activity". The documents in evidence indicate that this session was to be conducted in the format of the Amazing Race (based on a television show of that name) conducted by an organisation named Thrill Team Events. The promotional material for this event indicates that participants would experience "iconic Sydney elements as a team in an engaging series of fun challenges."

[29] During this "team building session" and while on the mountain bike section of the session, Mr Marshall was involved in an accident which resulted in his claim against RHG.

[30] A director of RAMS Home Loans Pty Ltd at the time deposes that, at most, team building activity or training which may have required employees to travel interstate was organised by RAMS "not more regularly than every six months". Monthly sales meetings which incorporated training occurred monthly within each State, including Queensland. In addition, half-yearly product launches/credit updates were also conducted in each State.

[31] Employers Mutual submits that the workers' presence in New South Wales for the conference and team building session at which Mr Marshall was injured was, to use the language of Fitzgerald P in *Burrows*, "fortuitous, fleeting or sufficiently unusual". It notes that Mr Marshall was present in New South Wales for a conference and bonding event, was not performing his services in New South Wales and that the circumstances are precisely those contemplated by McMurdo J in *Emijay*, so as to place this case outside any obligation to insure under s 155.

[32] If I was to simply inquire whether the conference and team building session at which Mr Marshall was injured involved the performance by him of services within New South Wales "to an extent that it could be said, in ordinary speech, that New South Wales was a place where [Mr Marshall] sometimes worked"[19] then the answer to that inquiry would be "no". However, the question of whether there is a sufficient connection with New South Wales requires a consideration of all of the circumstances of the particular case, and not a single inquiry of this kind.

[33] The fact that RHG was registered in New South Wales and had its principal place of business there is relevant, but insufficient to establish the required connection. It conducted business activities within New South Wales, but Mr Marshall was not associated with its business activities in that State. His presence in New South Wales for the purpose of a conference held over two days could not be described as "fleeting". The evidence does not disclose whether the Northern Region's Conference always occurred in New South Wales, or how the venue for this conference was chosen.

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19 c.f. *Francis* (supra) at 19, [50].

[34] This is not a case in which an injury occurred in New South Wales in the course of the performance by an employee of his normal employment duties. Still, the fact that the injury occurred in the course of a conference that was intended to promote training and team building, rather than on an occasion when Mr Marshall was performing his usual work, does not alter the fact that the injury occurred in the course of his employment at an event that his employer encouraged him to attend and paid for. His presence in Sydney was not fortuitous. However, the event was sufficiently unusual to call into question whether a sufficient connection with New South Wales is established.

[35] The fact that the injury occurred in New South Wales has an obvious significance. However, upon the approach adopted in *Francis*, which I follow, the mere fact that the injury occurred in New South Wales may not be sufficient in all of the circumstances to establish the necessary connection with that State. It seems unlikely that an obligation to insure, and the consequences of failing to insure, should be visited upon an employer simply because an employee is injured in New South Wales. If that was the case, an employer from outside that State would be burdened with the obligation to insure, and the consequences of failing to do so, if an employee, based in another State, was injured whilst attending an unexpected and hastily-convened business meeting in Sydney from which she was scheduled to return the same day. It is hard to see in such a case why the fact that the injury occurred in that State should establish the necessary connection.

[36] Although Mr Marshall's trip to Sydney for the conference in May 2007 was not a fleeting visit, it was unusual. It did not involve the performance of his usual duties. It was not a regular event, such as a monthly sales meeting. It was the kind of occasion to which McMurdo J alluded in *Francis* at which it could not be said, in ordinary speech, that the worker was at a place where he sometimes worked. The example given by McMurdo J of an employee who was sent to New South Wales for a day or two of training and who would not be regarded as someone then employed in New South Wales is apposite.

[37] It might be said that the presence of Mr Marshall and other workers at the conference and team building session in Sydney was expected, and therefore it was reasonable for his employer to insure under the NSW Act against a liability of the kind claimed. However, RHG's knowledge that Mr Marshall was expected to travel to Sydney, and the opportunity that it had to effect insurance, do not determine the present issue. It often might be said that an employer can reasonably contemplate that a worker may be required in the course of their employment to be temporarily present in New South Wales. The question is not whether RHG expected Mr Marshall to be temporarily in Sydney for an activity associated with his work. The issue is whether it was obliged to insure against a liability arising from his temporary presence in New South Wales in all of the circumstances.

[38] At the time of the accident, Mr Marshall was not employed in New South Wales in the sense of being there in order to perform his normal duties. He was expected to be in Sydney for less than 48 hours. The type of conference and team building session that he attended was not a regular part of his employment. His attendance at the conference and team building session was unusual. Overall, the nature, duration and purpose of his presence in New South Wales on 21 and 22 May 2007 was "sufficiently unusual" to mean that his employment was not sufficiently connected

with New South Wales. Consequently the injury received by him is not one in respect of which RHG was obliged to insure pursuant to s 155.

[39] Even if I was to leave aside s 9AA, I would conclude that the circumstances did not engage s 155 of the NSW Act. However, for the reasons that follow, I consider that s 9AA applies.

The application of s 9AA

[40] I accept the submission of WorkCover that s 9AA relates to liability for compensation, as distinct from liability for damages, and that s 9AA has no equivalent in relation to damages. However, this does not dispose of the issue of whether the obligation to insure under s 155 in respect of liability for damages extends to workers whose employment is not connected with New South Wales in accordance with the test for connection set out in s 9AA. That issue turns on the interpretation of s 155.

[41] Section 155 obliges an employer to maintain a form of insurance for the employer's liability under the Act "in respect of all workers employed by the employer" and for certain liabilities independently of the Act for any injury to "any such worker". The identification of the "workers employed by the employer" determines the persons to whom a liability to pay compensation or a liability to pay damages is to be the subject of compulsory insurance. As McMurdo J stated in *Francis*[20], "The evident intent was that the same worker or workers would be the subject of insurance against each kind of liability."[21]

[42] In its context the phrase "all workers employed by the employer" does not mean all workers wherever they may be. Before the enactment of s 9AA the "workers" to whom s 155 and its predecessors applied depended upon the territorial limitation that was introduced into the section as a matter of construction. As Latham CJ explained in *Mynott v Barnard*: "It would be unreasonable to read the section as applying to all employers, all workers and all accidents everywhere. Some territorial limitation must be introduced in the construction of the section."[22]

[43] Rather than make the obligation to insure depend on the identification of a sufficient territorial connection after considering a variety of circumstances, the liability to pay compensation and the consequent obligation to insure against that liability is governed by s 9AA. That section relevantly states that compensation under the NSW Act is only payable "in respect of employment that is connected with this State", and contains provisions designed to determine when a worker's employment is connected with New South Wales. Section 9AA relates to the liability to pay compensation. However, it governs the employer's obligation to insure under s 155. This is because the obligation to insure is cast in terms of the employer's liability under the Act and the identification of the workers to whom the employer may be liable. The identification of the workers in this regard also serves to identify the workers in respect of whom the employer has a statutory obligation to insure for liability independently of the Act. This arises from the words "to any such worker" at the end of s 155(1).

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20 Supra at [46].

21 *Francis*, supra at 17, [46].

22 (1939) 62 CLR 68 at 73-74

[44] The interpretation of s 155 for which Employers Mutual contends, which finds support in the judgment of McMurdo J in *Francis*, does not involve reading into s 155 words that are not there. It involves giving the concluding words of s 155(1) their clear meaning. They refer to workers employed by the employer to whom the employer is liable under the Act. This, in turn, requires reference to s 9AA to determine whether a worker's employment is connected with New South Wales so that compensation is payable in respect of their employment.

[45] In short, the obligation to insure in s 155 is constrained by the limitations in s 9AA.

[46] By force of s 9AA(3)(a) a worker's employment is connected with the State in which the worker usually works in that employment. In this case Mr Marshall's employment was connected with Queensland, which was the State in which he usually worked in his position as Sales Account Manager. Because his employment was not connected with New South Wales for the purpose of s 9AA, compensation under the NSW Act was not payable in respect of his employment. At the relevant time he was not a worker in respect of whom RHG had a liability to pay compensation under the NSW Act and, accordingly, RHG was not obliged to maintain insurance pursuant to s 155 in respect of its liability independently of the NSW Act for an injury to him.

Conclusion

[47] The liability in damages claimed by Mr Marshall is not a liability against which his then-employer was required to provide under the NSW Act. RHG's insurer under its New South Wales compulsory insurance policy is not obliged to indemnify it in respect of Mr Marshall's claim.

[48] Because the claimed liability is not a liability against which RHG was required to provide under the NSW Act, s 10(2)(b) of the Queensland Act is not triggered. As a result, Mr Marshall's claim is a claim for damages within the meaning of s 10 of the Queensland Act. There is no doubt that RHG was Mr Marshall's "employer" and that he was a "worker" within the meaning of the Queensland Act. RHG's insurer under its Queensland compulsory insurance policy, WorkCover, is obliged to indemnify it against any liability established against it by Mr Marshall arising out of the relevant claim.

Orders and costs

[49] The application proceeded on the basis that RHG was entitled to obtain relief in the form of a declaration as to which of its insurers was obliged to indemnify it in respect of Mr Marshall's claim. It was also agreed that RHG was entitled to have its costs assessed on an indemnity basis against the insurer that was liable to indemnify it. Mr Marshall was a necessary respondent to the application and the parties accept that his costs should be paid by the insurer that is obliged to indemnify his former employer. It was also accepted that the costs of the application as between the two insurers should follow the event.

[50] The form of orders that I propose to make are as follows:

1. Declare that the second respondent is obliged to indemnify the applicant against any liability established against the applicant by the third respondent arising out of a claim made by the third respondent against the applicant

being a claim for damages for personal injuries sustained by the third respondent in Sydney, New South Wales, on 22 May 2007 and that such indemnity be made pursuant to the policy of insurance number WAA940902676 subsisting between the applicant and the second respondent.

2. Declare that the first respondent is not obliged to indemnify the applicant against any liability established against the applicant by the third respondent arising out of a claim made by the third respondent against the applicant being a claim for damages for personal injuries sustained by the third respondent in Sydney, New South Wales, on 22 May 2007.

3. The second respondent pay:

   (a) The applicant's costs of and incidental to the proceeding on an indemnity basis.

   (b) The first respondent's costs of and incidental to the proceeding on the standard basis.

   (c) The third respondent's costs of and incidental to the proceeding on the standard basis.