SUPREME COURT OF QUEENSLAND

CITATION:	*Crown Equipment Pty Ltd v ACN 098 568 702 Pty Ltd & Anor* [2013] QSC 24
PARTIES:	**CROWN EQUIPMENT PTY LTD (ACN 000 514 858)** (Plaintiff) **v** **ACN 098 568 702 PTY LTD** (First Defendant) **QBE UNDERWRITING LIMITED** (Second Defendant)
FILE NO/S:	BS No. 10352 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2012, further submissions 10, 13 December 2012
JUDGE:	Ann Lyons J
ORDERS:	**1. The Second Defendant be appointed to represent each of the members of Names of "DA Constable Syndicate 386" of the Society of Lloyds, the underwriters of policy XO02418OT/4153 held by the First Defendant, as insured, from 18 February 2005 at 4pm to 18 February 2006 at 4pm, pursuant to *Uniform Civil Procedure Rules* 1999, r 76** **2. The answer to the first question in the Application filed in the Supreme Court on 4 July 2012 is 'yes'** **3. The answer to the second question in the Application filed in the Supreme Court on 4 July 2012 is 'no'**
CATCHWORDS:	PRACTICE AND PROCEDURE – where separate determination of issues before trial was warranted under *Uniform Civil Procedure Rules* 1999, r 483 – where representative order was made under *Uniform Civil Procedure Rules* 1999, r 76 appointing the managing agent of an insurance Syndicate as the representative of that Syndicate INSURANCE – PROFESSIONAL INDEMNITY INSURANCE – COMBINED PUBLIC AND PRODUCTS LIABLITY INSURANCE – CONSTRUCTION AND

INTERPRETATION OF INSURANCE POLICY – where the insured supplied labour to a third party – where a deductible applied to payments made under the insurance policy in relation to injury to an employee of the third party – meaning of "principal" – meaning of "worker"

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS

WORKERS' COMPENSATION – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION – alternative rights for damages at common law or by statutory right of indemnity – construction and interpretation of *Workers' Compensation and Rehabilitation Act* 2003, ss 207B and 270

Law Reform Act 1995 (Qld), s 6(c)
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 207B, s 270, s 271
Uniform Civil Procedure Rules 1999 (Qld) , r 76, r 483

Advance Traders Pty Ltd v McNab Constructions Pty Ltd and Anor [2011] QSC 212
Australasian Medical Insurance Limited & Anor v CGU Insurance Limited [2010] QCA 189
Australian Paper Manufacturers v American International Underwriters (Australia) Pty Ltd [1994] 1 VR 685
Bosner v Melnacis [2002] 1 Qd R 1
Fox v Wood (1981) 148 CLR 438
Harbour City Real Estate Pty Ltd t/a Re / Max Harbour City Hickson v Goodman Fielder Limited [2009] HCA 11 at [9]
Real Estate v Cargill No (3) [2009] FCA 669
Lange v Queensland Building Services Authority [2011] QCA 58
McCann v Switzerland Insurance Australia Ltd (2000) 176 ALR 711 at [22]
National Vulcan Engineering Insurance Group Ltd & Ors v Transfield Pty Ltd [2003] NSWCA 327
Nissho Iwai Australia Ltd v Malaysian International Shipping Corp, Berhad (1989) 167 CLR 219
Transfield Pty Ltd v National Vulcan Engineering Insurance Group Ltd & Ors [2002] NSWSC 830
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd [2011] QCA 312

COUNSEL: K Holyoak for the Plaintiff
E Goodwin for the Second Defendant

SOLICITORS: Bruce Thomas Lawyers for the Plaintiff
DibbsBarker for the Second Defendant

ANN LYONS J:

This application

[1] This application relates to a dispute as to the interpretation of the terms of a policy of insurance and whether a special deductible of $50,000 applies to payments made under that policy.

Background

[2] The Plaintiff, Crown Equipment Pty Ltd ("Crown"), has a business of supplying, maintaining and repairing electric lift trucks. Gregory Talbot ("Talbot") was employed as a mechanic at Crown's premises at Acacia Ridge. Talbot was injured at the premises on 10 October 2005 when he stepped and subsequently slipped on a piece of cardboard covering an oil spill during the course of his employment.

[3] WorkCover Queensland ("WorkCover") has paid $138,700.46 to Talbot for the workplace injury pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the WCRA").

[4] Talbot served a Notice of Claim pursuant to the WRCA dated 12 June 2007 claiming damages in respect of his injuries.

[5] The First Defendant, previously known as RPM Contracting Pty Ltd ("RPM"), previously carried on a labour hire business and would hire out labour including trades assistants and mechanics to other businesses. Crown and RPM entered into an agreement whereby RPM would supply labour to Crown. RPM employed Chris Towner ("Towner") as a trade assistant. Pursuant to the agreement, RPM supplied the services of Towner to Crown.

[6] On 15 August 2008, WorkCover issued a Contribution Notice pursuant to s 278A of the WRCA on RPM. Crown alleges that Talbot's injuries were caused or contributed to by RPM's negligence and alleges that Towner had seen the oil spill and, instead of cleaning it up or informing Crown of the spill, had covered it with the cardboard.

[7] The Lloyds Syndicate (DA Constable Syndicate 386) had entered into a contract of insurance in February 2005 with RPM for the period 18 February 2005 until 18 February 2006 in relation to RPM's "Legal Liability to third parties to pay compensation in respect of ....personal injury and/or property damage occurring during the period of insurance as a result of an occurrence and happening in connection with the business."[1]

[8] The Second Defendant, QBE Underwriting Limited ("QBE"), is the managing agent of that Lloyds Syndicate.

[9] RPM had been placed in liquidation on 5 September 2006 and was deregistered on or around 27 December 2009 by the Australian Securities and Investment Commission ("ASIC").

[1] Affidavit of Georgina Cissy Wong, dated 29 May 2012, exhibit GCW1, at p 19.

[10] On 8 September 2008, WorkCover agreed to pay on its own behalf and on behalf of Crown the sum of $400,000 net of any statutory benefits to Talbot, in full and final settlement of the claim together with statutory costs of $7,595.

[11] On 18 September 2009, Crown filed a Claim and Statement of Claim in the Supreme Court seeking damages for negligence, breach of statutory duty and breach of contract against RPM as tortfeasor pursuant to s 6(c) of the *Law Reform Act* 1995 (Qld) ("*Law Reform* Act") in the sum of $546,295.46.

[12] RPM was reinstated to the Company Register on 15 March 2010 by ASIC. The company is otherwise completely wound up and has no assets to satisfy any judgment Crown may obtain against RPM other than the benefit of the policy of insurance which it held with the Lloyds Syndicate ("The Policy").

[13] QBE claims it is entitled to impose a deductible of $50,000 on any payment made in respect of claims for: (a) injury to any employee of Crown; and (b) recovery of payments made under Queensland Workers Compensation Legislation pursuant to the Contract of Insurance.

[14] The present application is brought for a separate determination before trial of the following questions pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"):

1. Is QBE entitled to impose a deductible of $50,000 on any payment made by QBE indemnifying RPM for any liability RPM has for the injury to Crown's employee Talbot, by virtue of endorsement 18(a), exclusion 7.19, condition 8.4 and items 7 and 9 of the schedule of the Policy?

2. Is QBE entitled to impose a deductible of $50,000 on any payment made by QBE indemnifying RPM for any liability RPM has for the injury to Crown's employee Talbot, by virtue of endorsement 18(b), exclusion 7.19, condition 8.4 and items 7 and 9 of the schedule of the Policy?

Preliminary issues

[15] The Second Defendant is the managing agent of the relevant Lloyds Syndicate and it is not the insurer. The parties, however, have agreed that it is appropriate that a representative order under UCPR r 76 be made appointing the Second Defendant as representative of the Lloyds Syndicate which is the Underwriter of the insurance policy. The Lloyds Syndicate is not a legal entity.

[16] I am satisfied that the correct course is to make a representative order under UCPR r 76.

[17] The next issue is whether there should be a determination of the questions posed before trial pursuant to UCPR r 483. I note that the Defendants do not oppose the construction issues, arising from the Further Amended Defence, being determined separately and summarily under UCPR r 483. I am also satisfied that, in the circumstances of this case, and in accordance with the relevant principles enunciated by Boddice J in *Advance Traders Pty Ltd v McNab Constructions Pty*

Ltd and Anor,[2] it is appropriate to proceed pursuant to r 483 for a separate determination before trial. I am satisfied that it is just and convenient to do so.

[18] I also consider that a separate determination will have utility as it will resolve the question as to which exclusions apply and whether a special deductible of $50,000 applies. Furthermore, I agree with the submission of Counsel for the Applicant Plaintiff that the settlement of these questions in advance will contribute to the saving of time and money and is not linked to any contentious factual matters.

The relevant terms of the Policy

[19] Clause 1 of the Policy provides:

> "1. Insuring clause
>
> Subject to the terms of this Policy, Underwriters will pay to or on behalf of the Insured all sums which the Insured shall become legally liable to pay by way of compensation in respect of:
>
> 1.1 Injury
>
> 1.2 Damage
>
> 1.3 Advertising Liability
>
> happening during the Period of Insurance as a result of an Occurrence in connection with the Insured's Business."

[20] Clause 2.3 of the Policy provides:

> ""Deductible" means the amount payable by the Insured in respect to each Occurrence and includes all Defence Costs and Additional Expenses as described under Clause 6 of this Policy."

[21] Clause 2.5 of the Policy provides:

> ""Injury" means death, bodily injury, sickness, disease, disorder, disability, shock, fright, mental anguish and mental injury to any person."

[22] Clause 2.15 of the Policy provides:

> "Worker" means any person employed by the Insured or deemed to be employed by the Insured whether pursuant to any Workers' Compensation Law or otherwise."

[23] Clause 2.16 of the Policy provides:

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[2] [2011] QSC 212.

"Workers' Compensation Law" means any law relating to compensation for Injury to Workers or employees."

[24] Clause 2.6 of the Policy provides:

> ""Insured" wherever used in this Policy means the Insured named in the Schedule and,
>
> 2.6.1 Any subsidiary company (including subsidiaries thereof) of the Insured, and
>
> 2.6.2 Any other entity controlled by it and over which it assumes active management."

[25] Clause 2.10 of the Policy provides:

> ""Occurrence" means an event, including continuous or repeated exposure to substantially the same general conditions, which results in Injury and/or Damage and/or Advertising Liability neither expected nor intended from the standpoint of the Insured. All events of a series consequent on or attributable to one source or original cause shall be deemed one Occurrence."

[26] Clause 3 of the Policy provides:

> "Indemnity to others
>
> The indemnity granted by this Policy will extend to:
>
> 3.1 Any principal in respect of the liability of such principal to third parties arising out of the performance by the Insured of any written contract or agreement with the Insured for the performance of work for such principal but this Policy shall only indemnify the principal to the extent that the Insured is required to insure such liability pursuant to such written contract or agreement, but subject always to the terms of this Policy."

[27] Clause 4 of the Policy provides:

> "Cross Liabilities
>
> Subject at all times to the terms of this Policy, each person or party indemnified is separately indemnified in respect of claims made by any of them against any other of them provided that the Underwriters' total liability shall not exceed the Limit of Indemnity for all claims under this Policy."

[28] Clause 7 of the Policy provides:

> "Exclusions

This policy does not cover liability directly or indirectly caused by, arising out of or in any way connected with:

...

7.9 Injury to any Worker.

Provided that if the Insured:

7.9.1 Is required by law to insure or otherwise fund, whether through self insurance, statutory fund or other statutory scheme, all or part of any common law liability (whether limited in amount or not) for such Injury; or

7.9.2 Is not required to so insure or otherwise fund such liability by reason only that the Injury is to a person who is not a Worker or "employee" within the meaning of the relevant Workers' Compensation Law or the Injury is not an Injury which is subject to such Law;

then this Policy will respond to the extent that the Insured's liability would not be covered under any such fund, scheme, Policy of insurance or self insurance arrangement had the Insured complied with its obligations pursuant to such Law.

7.10 7.10.1 Any Workers' Compensation Law;

7.10.2 The provisions of any industrial award or agreement or determination or any contract of employment or workplace agreement where such liability would not have been imposed in the absence of such industrial award or agreement or determination;

7.10.3 Employment Practices.

…

7.19 The Deductible and/or self-insured retention shown in the Schedule."

[29] Clause 8.3 of the Policy provides:

"This Policy and any endorsements attached to this Policy shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy or the Schedule shall bear such specific meaning wherever it may appear."

[30] Clause 8.4 of the Policy provides:

"The amount shown within the Schedule as an excess or Deductible is the first amount for all claims arising out of any one Occurrence which is to be bourne (sic) by the Insured."

[31] The Schedule then provides:

"7. DEDUCTIBLE $5,000 each and every Occurrence (costs inclusive)

Except

$50,000 each and every Occurrence (costs inclusive) in respect of injury to worker Claims.

....

9. ENDORSEMENTS Additional to Standard Wording

- Endorsement 2 – Care, Custody, Control $100,000
- Endorsement 18 – Injury to Worker Deductible $50,000"

[32] Endorsement 18 provides:

"Endorsement 18: Injury to Worker Deductible Clause

Endorsement attaching to and forming part of Policy Number: XO024180T/4153

INSURED: RPM Contracting Pty Limited

ENDORSEMENT EFFECTIVE FROM: 18 February 2005

It is hereby noted and agreed that in respect of any:

a. Injury to any employee of a principal, contractor, subcontractor or contract labour hire personnel for which the Insured is held legally liable to pay compensation; and/or

b. Claims for the recovery of payments made under the relevant Workers' Compensation legislation of any State or Territory of Australia. The following Exclusion is added to this Policy:

The deductible is amended to AUD$50,000 each and every Occurrence.

Other than as amended above, the terms of this Policy shall continue to apply.

The construction of the Policy to determine the relevant "Deductible"

[33] The question, therefore, is what deductible applies here. The relevant principles in relation to the construction of contracts of insurance have been set out in some detail by both Counsel in their submissions and are uncontroversial. I will summarise those principles as follows:

1. The insured bears the onus of invoking the primary cover afforded by the Policy together with any proviso to any exclusion whilst the insurer bears the onus of invoking the exclusion;[3]

2. Contracts of insurance are construed in accordance with the same principles that apply to any commercial contract;[4]

3. Where special conditions are added to a standard form contract, then, unless agreed otherwise, the special conditions are given greater weight. Similarly, a specific provision is usually given greater weight than a general provision;[5]

4. Clauses in dispute should be interpreted according to their natural meaning. A deductible clause should be given its ordinary and natural meaning read in light of the contract as a whole and the object of the contract;[6]

5. The Policy should be construed in such a way that the deductible clause is not rendered otiose;[7]

6. A court is entitled to consider headings and marginal notes when interpreting a clause, unless there is a contractual prohibition on the use of headings or marginal notes. However, the wording of the clause must prevail;[8]

7. The policy is to be read in its commercial setting so as to fulfil and not restrain the commercial purpose. In *McCann v Switzerland Insurance Australia Ltd*[9] Gleeson CJ relevantly held;

> "A policy of insurance, even one required by statute, is a commercial contract and should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure;" and

8. The contra preferentum rule is to be invoked as a maxim of last resort to remove ambiguities where other approaches have failed.[10]

The First Question: Is QBE entitled to impose a deductible of $50,000 on any payment made indemnifying RPM for any liability it has by virtue of Endorsement 18(a)?

[34] Pursuant to Exclusion 7.19 and Condition 8.4, the policy provides for a deductible as set out in the Schedule.

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3 *Australian Paper Manufacturers Ltd v American International Underwriters (Australia) Pty Ltd* [1994] 1 VR 685.

4 *Australasian Medical Insurance Limited & Anor v CGU Insurance Limited* [2010] QCA 189

5 *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* [2011] QCA 312.

6 *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp, Berhad* (1989) 167 CLR 219

7 *National Vulcan Engineering Insurance Group Ltd & Ors v Transfield Pty Ltd* [2003] NSWCA 327 and *Transfield Pty Ltd v National Vulcan Engineering Insurance Group Ltd & Ors* [2002] NSWSC 830.

8 *Harbour City Real Estate Pty Ltd t/a Re / Max Harbour City Real Estate v Cargill No (3)* [2009] FCA 669.

9 (2000) 176 ALR 711 at [22].

10 *Lange v Queensland Building Services Authority* [2011] QCA 58.

[35] The Schedule at Item 7 then provides for two possible deductibles, namely a standard deductible of $5,000 for each and every Occurrence (costs inclusive) and an exception of "$50,000 [for] each and every Occurrence (costs inclusive) in respect of Injury to *w*orker Claims". (my emphasis)

[36] The Schedule at Item 9 refers to Endorsements which are "Additional to Standard Wording" and refers to "Endorsement 18 – Injury to Worker Deductible $50,000". Endorsement 18 is then headed "Injury to Worker Deductible Clause". That Endorsement provides that it is "noted and agreed that in respect of any (a) Injury to any employee of a principal, contractor, subcontractor or contract labour hire personnel for which the Insured is held legally liable to pay compensation" the Deductible is amended to AUD 50,000 for each and every Occurrence.

[37] As previously outlined, "Insured" is defined by clause 2.6 to mean "the Insured named in the schedule" and is clearly a reference to RPM as it is the only company which is named in that schedule. The business of RPM is then described in Item 5 of the Schedule as "Principally blue collar labour hire, property owners/occupiers and associated activities".

[38] I agree with the submission by Counsel for Crown that the reference in Item 7 of the Schedule to "*w*orker Claims" (as opposed to *W*orker Claims) must be a reference to Endorsement 18 as there is no other reasonable interpretation. Specifically, whilst "*w*orker" is not defined in the Policy, it cannot refer to workers generally, as that would mean that anybody in employment who was injured could be described as a worker. Item 7 is also unlikely to apply to a "*W*orker", defined in clause 2.15 to mean "any person employed by the Insured or deemed to be employed by the Insured whether pursuant to any Workers' Compensation Law or otherwise," as it would then be excluded by Exclusion 7.9. I agree with the submission that there is no point in having a deductible applicable to a claim by a Worker whose claim is in fact excluded.

[39] Endorsement 18 then refers to two situations which trigger the "Worker Deductible Clause". In paragraph 18(a), there is a requirement that there is an injury to "any employee of a principal, contractor, subcontractor or contract labour hire personnel for which the Insured is held legally liable to pay compensation". None of those expressions are defined in the policy.

[40] In my view, Crown's injured worker, Talbot, cannot be categorised as "contract labour hire personnel" as he was an employee of Crown. Neither do I consider that he was a "subcontractor" nor an employee of a subcontractor. Talbot was not an employee of a "contractor" as there is no doubt that Crown was not furnishing, supplying or providing anything. Neither could it be said that Crown was rendering services to RPM. The real question, therefore, is whether the injury to Talbot was an injury to an employee of a principal. Was Crown a "principal"?

[41] There is no doubt that the meaning of the word "principal," when used as a noun, is variable and will take its meaning from its context. Whilst there are multiple authorities where the word "principal" has been considered, Crown submits that the word has always yielded to the object of the sentence in which it was used or its context. I agree with Crown's contention that the strictly legal meaning of a person authorising an agent would not cover this situation. However, I do not agree with the subsequent analysis by Counsel for Crown that the word "principal" should in

any way be narrowed by the two words which succeed it in Endorsement 18(a), namely the words "contractor" and "subcontractor". Crown argues that a contractor or subcontractor describes persons in the chain of performance of contracts "down the line" whilst the word "principal" refers to the person "up the line". Crown therefore submits that the true construction of the word "principal" is further narrowed to the performance of work.

[42] Essentially, Counsel for Crown argues that the key to the meaning of the word "principal" as used in the Policy, which then gives a common thread to the succeeding two words, appears in clause 3.1, which extends an indemnity to "Any principal in respect of the liability of such principal to third parties arising out of the performance by the Insured of any written contract or agreement with the Insured for the performance of work for such principal but this Policy shall only indemnify the principal to the extent that the Insured is required to insure such liability pursuant to such written contract or agreement" subject to the terms of the Policy.

[43] Crown submits that with clause 3.1 in mind, the construction of Endorsement 18(a) and the commercial object it is intended to serve becomes clearer, particularly when read in conjunction with the cross liability clause in clause 4 of the Policy.

[44] Accordingly, Crown submits that RPM, as the insured, is only subject to the $50,000 deductible in Endorsement 18(a) *if* any of the principal's employees are injured by RPM while RPM is performing work for the principal. It is submitted that this makes commercial sense because ordinarily, employees of the insured would be excluded from coverage by Exclusion 7.9 due to the availability of alternative cover for the risk, that is, WorkCover. As employees of the principal are not employees of the insured making the claim under the policy, Exclusion 7.9 does not apply. However, where work is being performed for such a principal, the risk is analogous and that is underwritten by a higher deductible.

[45] Crown essentially argues, therefore, that the only workers excluded under Exclusion 7.9 are employees of the insured and not employees of a principal, which is entitled to indemnity under clause 3.1 of the Policy. It is argued that the common thread of work being performed can be discerned from the categories in Endorsement 18(a), including a contractor or subcontractor. It is argued that the category of contract labour hire personnel cannot be a reference to RPM's own employees who are hired out as they are excluded under Exclusion 7.9. Accordingly, Crown argues that it must refer to contract labour personnel engaged to do work for the principal, the contractor or the subcontractor and the increased deductible is the price paid for the coverage of such risks.

[46] Crown argues that none of those constructions extends Endorsement 18(a) to the injury to an employee of Crown. Crown argues that RPM supplied a worker to Crown rather than actually performing work for Crown. Therefore, to extend Endorsement 18(a) to an injury to an employee of Crown would require a broader reading of the word "principal" than the Policy itself assigns in context. It is further argued that to do so would not only expand an exclusion (Exclusion 7.19) contrary to the canons of construction but it would be incompatible with any business object that could be discerned from the Policy.

[47] Counsel for Crown also contends that for QBE's argument to be made good, the endorsement would have to be read as excluding injuries caused by contract labour

hire personnel employed by, or injuries to employees of, host employers. Crown argues against a broad construction being given to the word "principal" where it appears in Endorsement 18(a) as it could potentially apply to employees of any person who entered into a contract with RPM by which RPM provided work, services or any benefit, including RPM's capacity as a property owner or occupier, which would mean that if an employee of a person entered one of RPM's properties under a licence to do so, it would be subject to the $50,000 deductible when there is no commercial reason for such a claim to be subjected to that deductible.

[48] It is therefore argued that the word "principal" should bear the specific meaning given to it in clause 3.1 wherever it may elsewhere appear. It is also argued that an exclusion should be read down and a construction preferred which promotes coverage, including the width of its application, in the case of ambiguity.

[49] I am not persuaded by this unnecessarily complicated argument. Furthermore, Crown is not actually seeking to invoke clause 3 which is a clause which extends an "Indemnity to Others". The statement of claim does not in fact plead that clause 3 of the agreement requires RPM to indemnify Crown. The only reason clause 3 is referred to by Counsel for Crown is to restrict what I consider to be the clear intention of Endorsement 18. There is, in fact, no ambiguity.

[50] I consider that the clear and obvious purpose of Endorsement 18(a) is to limit the liability of QBE for injuries caused to an employee (such as Talbot) of a principal (such as Crown) by RPM's staff (such as Towner). I consider that the drafter has used the words "employee of a principal, contractor, subcontractor or contract labour hire personnel" in a fulsome way to try and capture all the possible contractual relationships that might be formed by RPM and its labour hire clients. I do not consider that the word "principal" should be restricted in the way argued by Crown.

[51] In my view, the words used in Endorsement 18(a) are such that they were indeed intended to cover the circumstances in this case whereby it is alleged that Talbot was injured by the actions of Towner. Clearly, there is an agreement between Crown and RPM. In the area of Workers' Compensation Law, the principal is ordinarily the party that hires or employs someone else. In the circumstances of this case, that party must be Crown.

[52] I agree with QBE's observation that, given the nature of RPM's business, if Endorsement 18(a) does not apply to this claim, what sort of claim does it actually refer to? Indeed, if it does not apply to this claim, then it has very little work to do.

[53] In my view, the answer to the first question is 'yes'.

The Second Question: Is QBE entitled to impose a deductible of $50,000 on any payment made indemnifying RPM for any liability it has by virtue of Endorsement 18(b)?

[54] Counsel for QBE argues that the deductible applies in this case because it involves a claim by Crown for the recovery of payments made under the state workers' compensation regime. Counsel argues that the total sum of $546,295.46 has not been calculated in a vacuum and consists of:

(a) the $400,000 paid under the settlement between WorkCover Queensland, Crown and Talbot;

(b) $138,700.46 being Worker's Compensation payments; and

(c) an amount of $7,595 in statutory costs.

[55] QBE argues that, if Crown succeeds, WorkCover will in fact recover all or part of the workers' compensation payments irrespective of how WorkCover seeks to characterise the relief sought. QBE argues that this is a claim for recovery of a payment under a piece of workers' compensation legislation. Counsel for QBE refers in particular to the fact that Endorsement 18(b) does not say "a claim under a piece of workers' compensation legislation for the recovery of payments made under the workers' compensation legislation". Accordingly, it is submitted that the word "claim" in Endorsement 18(b) is not confined to statutory claims under s 207B of the WCRA or claims made in the name of WorkCover or another statutory body.

[56] It is clear that Talbot received weekly compensation from WorkCover totalling at least $138,700.46.

[57] It is also clear that that payment was made pursuant to the WCRA which is obviously a piece of workers' compensation legislation. In any case, Crown did not make that payment, WorkCover did. Crown, however, now seeks $546,295.46 by way of indemnity or damages from RPM and further indemnity from QBE.

[58] I accept that WorkCover has agreed not to seek a refund of the workers' compensation payments paid to Talbot but that it will, in fact, recover that sum from any moneys paid to Crown. It may well be that WorkCover will be the recipient of whatever funds are ultimately paid to Crown.

[59] I also accept that the purpose of the WCRA is to ensure that there is no duplication or double payment where statutory benefits have been paid and a damages claim is subsequently made. As Bell J said in *Hickson v Goodman Fielder Limited*:[11]

> "The Compensation Act manifests a policy against the receipt of what might be called "double compensation"... In a case such as this, in which a worker recovers, first, compensation and, secondly, damages from a person other than the employer, s 151Z(1)(b) provides that the worker is liable to repay out of those damages the amount of compensation which has been paid in respect of the injury and that the worker is not entitled to any further compensation."

[60] The Second Amended Statement of Claim pleads that there was an agreement between Crown and RPM and that Towner's labour was supplied under that agreement. Crown argues that there were express or implied terms that the workers supplied would have certain attributes and training and that those terms have been breached such that Crown has suffered loss and damage. It is a claim for damages for breach of contract for the economic loss to which RPM exposed Crown or

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11 [2009] HCA 11 at [9].

alternatively for statutory contribution pursuant to s 6(c) of the *Law Reform Act*. The loss claimed as damages is the gross amount of damages paid to Talbot.

[61] There is no doubt that a claim for tortfeasor contribution under the *Law Reform Act* cannot be considered to be an action to recover damages or compensation for personal injuries. As the Court in *Bosner v Melnacis*[12] made clear, it is a claim of an entirely different character and is in effect a claim for a partial indemnity and in no sense an action to recover damages for personal injuries, although one of the factors which must be established is that the person against whom the claim is made is a person who is or would have been, if sued, liable for the same damage.

[62] Accordingly, in my view, it is not accurate to refer to this action by Crown against RPM for common law damages as a claim for recovery of workers' compensation benefits. It is a claim for damages and not a claim for the recovery of payments made or a claim for the recovery of the liquidated sum of $138,700.46.

[63] Counsel for Crown also relies on a comparison with the nature of a claim for recovery of payments under the WCRA to argue that Crown's claim against RPM is not a claim for the recovery of payments made under workers' compensation legislation.

[64] The relevant sections of the WCRA are in the following terms;

"**207B Insurer's charge on damages for compensation paid**

(1) This section applies to—

(a) an injury sustained by a worker in circumstances creating—

i. an entitlement to compensation; and

ii. a legal liability in the worker's employer, or other person, to pay damages for the injury, independently of this Act; and

(b) damages that an employer is not indemnified against under this Act.

(2) An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages at a time or for a period before the person becomes entitled to payment of damages by an employer or another person, is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.

(3) An employer or other person from whom the damages are recoverable must pay the insurer the amount of the first charge or, if the damages are not more than the amount of the first charge, the whole of the damages.

(4) Payment to the insurer under subsection (3), to the extent of the payment, satisfies the liability of the employer or other person for payment of the damages.

(5) A person can not settle, for a sum less than the amount that is a first charge on damages under subsection (2), a claim for damages had by the person independently of this Act for an injury to which there is an entitlement to payment of damages without the insurer's written consent.

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12 [2002] 1Qd R 1.

(6) If, without the insurer's consent, a settlement mentioned in subsection (5) is made, then to the extent that the damages recovered are insufficient to meet all payments due to the insurer under this section—

(a) the insurer is entitled to be indemnified by the employer or other person who is required by the settlement to pay the damages; and

(b) to that end, the insurer is subrogated to the rights of the person who has sought the damages, as if the settlement had not been made.

(7) If a person who has received compensation has not recovered, or taken proceedings to recover, damages for the injury from another person, other than the worker's employer—

(a) the insurer is entitled to be indemnified for the amount of the compensation by the other person to the extent of that person's liability for the damages, so far as the amount of damages payable for the injury by that person extends; and

(b) to that end, the insurer is subrogated to the rights of the person for the injury.

(8) Payment made as indemnity under subsection (7), to the extent of the payment, satisfies the person's liability on a judgment for damages for the injury.

(9) In addition to all rights of action had by the insurer to give effect to its right to indemnity under this section, all questions about the right and the amount of the indemnity may, in default of agreement, be decided by an industrial magistrate if all persons affected by the indemnity consent.

(10) In this section—

damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10."

"**270 When damages are to be reduced**

(1) The amount of damages that an employer is legally liable to pay to a claimant for an injury must be reduced by the total amount paid or payable by an insurer by way of compensation for the injury.

(2) However, the amount of damages must not be reduced by an amount paid under section 193.

(3) This section does not limit the reduction of the amount of the damages by any other amount that the insurer or the claimant is legally liable to pay on account of the worker under another law.

271 Assessment by court of total liability for damages

(1) This section applies if—

(a) damages are awarded for an injury; or

(b) damages are to be paid in settlement of a claim for an injury.

> (2) To establish the reduction under section 270(1) in damages for compensation paid, the claimant or insurer may apply to—
>
> (a) the court in which the proceeding is brought; or
>
> (b) if a proceeding has not been started—the Industrial Magistrates Court.
>
> (3) The court's decision is binding on the insurer and all persons entitled to payment by the insurer for the injury."

[65] There is no doubt that there are different characterisations given to payments made under ss 270, 271 and 207B of the WCRA. Sections 270 and 271 of the WCRA deal with the damages of a worker being reduced when the claim is against an employer who is covered by the WCRA. Section 207B, however, deals with a worker who seeks to recover damages from a non-employer or an employer not covered by the WCRA.

[66] The effect of s 270 WCRA is that any compensation already paid has to be deducted from the damages assessed against the employer of the worker. It is argued that a number of propositions have been established in relation to s 270 and they include:

(a) that the correct method to adopt in arriving at the amount for which judgment should be entered where a plaintiff has received workers' compensation benefits and been guilty of contributory negligence is to first assess damages, then to reduce the amount assessed by the appropriate percentage for contributory negligence and from that balance to deduct the total amount paid by way of workers' compensation; and

(b) the initial assessment of damages must be made without regard to any statutory limits of the court, so that if an assessment exceeds the jurisdictional limits of a court, but falls within it after deduction of contributory negligence, the amount of the judgment is the amount given after deduction of the damages for contributory negligence.

[67] Accordingly, it is submitted that the damages are assessed independently of the compensation and the final sum is assessed by deduction of any contributory negligence amounts before the reduction of the damages for the compensation paid. It is argued that this can only occur if the compensation payment is irrelevant to the damage assessment.

[68] It is further argued that to ensure that this deduction is equitable, if the worker has to repay the gross amount of compensation, though the tax has been deducted, and the worker has only received the benefit of the net amount, then the *Fox v Wood*[13] component representing the tax paid is added back in. It is argued that this also explains the reasons why expenses paid by WorkCover are treated as damages. That is because these are actual expenses incurred on behalf of the worker. The statute requires those amounts to be repaid, even though they were not paid to the worker but to the service provider. The no fault weekly benefits, however, are treated differently in the assessment of damages. Where the plaintiff is legally obliged to repay the collateral amounts received in weekly benefits, out of the damages, the

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13 (1981) 148 CLR 438.

principle of compensation and the rule against double recovery is not thereby offended. Consequently, it is argued that except where the double compensation rule is offended, the receipt of benefits is to be disregarded.

[69] It is argued that if there are special damages then they are to be included as special damages but otherwise the receipt of compensation stands apart from the assessment of damages which are assessed as gross.

[70] It is therefore argued by Crown that the same approach applies where there is an action against a *non*-employer and therefore, it is incorrect to refer to an action between the worker and an employer of the worker (Crown in this case) for common law damages as one which is a claim for recovery of workers' compensation benefits. That is because the workers' compensation benefits are irrelevant to the assessment, except insofar as they may effect double compensation. It is also argued that these workers' compensation payments are not recovered and that the claim of the worker against the employer is not a claim for the recovery of payments under the workers' compensation legislation. It is a claim for damages by that worker to which the no fault compensation benefits are irrelevant but, by reason of s 270 WCRA, are then deducted once the gross assessment of those damages has been made.

[71] It would seem to me to be correct that the type of proceeding to which Endorsement 18(b) is addressed is that found in s 207B of WCRA and that the nature of the action is a statutory right of indemnity to recover the compensation. As I have already indicated, I do not consider that the statutory right of indemnity can be equated to the cause of action which the worker would have had had against the person liable to pay damages to the worker. The right of indemnity is indeed a right independent of the worker and is a right directly against the wrongdoer.

[72] The deductible provision in Endorsement 18(b) clearly refers to claims for recovery of payments under the relevant workers' compensation legislation. Endorsement 18(b) does not refer to a claim for damages but rather focuses specifically on the nature of the liability being for the recovery of payments.

[73] Having considered the policy, I consider that the distinction in the language is not accidental. I accept that a claim against an insured under the policy pursuant to s 207B of the WCRA is a legal liability by way of compensation in respect of injury because it fastens upon the legal liability of the insured to pay damages for the injury. However, Endorsement 18(b) is different and the focus is on the form of the claim, namely the recovery of the workers' compensation payments and is therefore a reference to a s 207B type of proceeding. As such, a proceeding is expressly for the recovery of the workers' compensation payment.

[74] I accept the submission that the commercial intent of Endorsement 18(b) is that, notwithstanding that a claim under s 207B is for the recovery of payments made under the relevant workers' compensation legislation, they fall within the insuring clause and are not excluded but rather, a higher deductible is imposed. Accordingly, the risk involves an injury having been sustained by a worker not excluded by Exclusion 7.9 and the price exacted for this coverage is a higher deductible.

[75] It is clear that there is no intention in the Policy that tortfeasor contribution proceedings or a claim in contract against the insured should be subject to a higher deductible. It would seem that such proceedings are orthodox between defendants.

[76] In my view, QBE's argument about the meaning which should be attributed to Endorsement 18(b) is not the likely business construction because if a worker sued both the employer and the non-employer, the higher deductible would not apply to the liability of the non-employer directly to the worker, but it would apply to any claim between the non-employer and the employer *inter se* for tortfeasor contribution or breach of contract. It would seem, therefore, that two different outcomes would be achieved depending on the form of the action when it is well established that the claim for contribution turns on the co-tortfeasors both having an extant liability to the Plaintiff for the same damage.

[77] I accept the submission of Counsel for Crown that the approach QBE seeks would require a radical resettling of the current jurisprudence concerning the nature and treatment of the reduction of the worker's claim for damages by the amount of the workers' compensation payment received by the worker and would lead to incongruous consequences.

[78] I consider that Endorsement 18(b) in relation to "Claims for the recovery of payments made under the relevant Workers' Compensation legislation" Does not include the claim by Crown against the first and second defendants.

[79] In my view, the answer to the second question is 'No'.

[80] Accordingly, there will be the following orders:

1. The Second Defendant shall be appointed to represent each of the members of Names of "DA Constable Syndicate 386" of the Society of Lloyds, the underwriters of policy XO02418OT/4153 held by the First Defendant, as insured, from 18 February 2005 at 4pm to 18 February 2006 at 4pm, pursuant to *Uniform Civil Procedure Rules* 1999, r 76.

2. The answer to the first question in the Application filed in the Supreme Court on 4 July 2012 is 'yes.'

3. The answer to the second question in the Application filed in the Supreme Court on 4 July 2012 is 'no.'