

SUPREME COURT OF QUEENSLAND

CITATION: *Mattress Innovations Pty Ltd v Suncorp Metway Insurance Limited* [2013] QCA 377

PARTIES: **MATTRESS INNOVATIONS PTY LTD ACN 114 338 751
as trustee for ROCKLEA PROPERTY TRUST**
(appellant)
v
SUNCORP METWAY INSURANCE LIMITED
ACN 075 695 966
(respondent)

FILE NO/S: Appeal No 3264 of 2013
SC No 2434 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 27 August 2013

JUDGES: Holmes and Fraser JJA and North J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Allow the appeal.**
2. Set aside the orders made in the Trial Division.
**3. Order instead that there be judgment for the plaintiff
against the second defendant for \$160,826.86 for claim
plus an amount for interest to be agreed between the
parties or, in default of agreement within 14 days
hereof, in an amount to be fixed by the Court.**
**4. The parties have leave to file and serve written
submissions about the amount of interest within
14 days hereof, or within such further period as
a Judge or the Registrar allows.**
**5. The respondent is to pay the appellant's costs of the
proceedings in the Trial Division and of the appeal.**

CATCHWORDS: INSURANCE – THE POLICY – PRINCIPLES OF
CONSTRUCTION – where a building owned by the
appellant was destroyed by fire – where fire was an insured
event under an insurance policy the appellant made with

the respondent – where the appellant was registered under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) – where a provision of the policy provided for the respondent to reduce the amount paid to take account of any input tax credits to which an insured might be entitled – where, in response to the appellant’s claim, the respondent elected to pay the appellant the cost which would have been incurred in the reinstatement of the insured property – where the respondent paid 10/11^{ths} of the amount of each Sum Insured to the appellant, reflecting its construction of the provision in issue at trial – where the trial judge upheld the respondent’s construction of the provision – where the appellant contended that it was entitled to the whole amount of each Sum Insured – whether the policy authorised the respondent to reduce by 1/11th the payment made to the appellant

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 78-20

Mattress Innovations Pty Ltd v MIB Insurance Brokers Pty Ltd & Anor [2013] ANZ Ins Cas 61-964; [2013] QSC 28, related

COUNSEL: R Ashton for the appellant
J McKenna QC for the respondent

SOLICITORS: Hylands Lawyers for the appellant
DLA Piper for the respondent

- [1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.
- [2] **FRASER JA:** This appeal turns upon the proper construction of a provision in an insurance policy concerning the effect upon payments under the policy of imputation tax credits to which the insured is entitled under *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (“the GST Act”).
- [3] The appellant owned land improved by buildings. It leased the property to a company which carried on business as a mattress and furniture warehouse. The appellant was registered under the GST Act, it treated payments of rental it received from the lessee as being subject to GST, it treated expenditures relating to the property (including insurance premiums and money spent to repair or rebuild the buildings) as giving rise to input tax credits in an amount equal to the GST payable on those supplies, and it submitted GST returns on that basis.
- [4] The buildings and their contents were totally destroyed by a fire on 25 April 2007. The fire was an insured event under an insurance policy made between the appellant and the respondent insurer in February 2007. In addition to the section of the policy covering destruction of the buildings by fire up to the “Sum Insured” there were separate sections, each having a separate Sum Insured, for removal of debris, destruction of contents, and business interruption. The insured’s loss exceeded each Sum Insured.
- [5] On 21 August 2007, in response to a claim under the policy the respondent paid to the appellant a total amount made up of 10/11^{ths} of each Sum Insured of \$1,800,000

(building), \$150,000 (contents), \$10,000 (“Removal of Debris – Additional to Extra Benefit \$10,000”), and \$140,000 (Business Interruption, Annual Revenue). The payment reflected the insurer’s construction of the provision which is in issue in this appeal, General Condition 16.2. The trial judge held that the insurer’s construction was correct. The appellant contends that the trial judge should have held that the insurer was obliged to pay the whole amount of each Sum Insured.

- [6] The certificate of insurance provided:

“ ...

SECTION 1 – FIRE & SPECIFIED EVENTS/ACCIDENTAL DAMAGE

...

INSURED PROPERTY

ITEM	BASIS OF SETTLEMENT	SUM INSURED
BUILDINGS	Reinstatement	\$1,800,000.00

...”.

- [7] It was common ground that the construction question could be answered without reference to the other sections of the policy.

- [8] The policy document provided:

“ ...

GENERAL DEFINITIONS

...

When the words or expressions below have not been defined in Sections, they will have the following meanings:

...

Certificate of Insurance – the current Certificate of Insurance issued by Us which forms part of Your Policy and shows:

- (a) the policy number, the Sections which apply to You, the Period of Insurance and the details of Your insurance;

...

GENERAL CONDITIONS

The General Conditions apply to all Sections of Your Policy, except as otherwise stated.

...

16. Goods and Services Tax Endorsement

This Endorsement attaches to and forms part of Your Policy, effective from the commencement date of the Period of Insurance shown in your Certificate of Insurance.

1. Information You Must Give Us

If You are registered, or required to be registered, for goods and services (GST) tax purposes, You must when requested

tell us what Your entitlement to input tax credits (ITC's) is for Your Insurance premium.

2. **Calculating Claims¹**

If You make a claim under this Policy, any payment or supply We make to You in respect of the acquisition of goods, services or other supply (or monetary compensation in lieu thereof) or otherwise in relation to Your claim will be calculated on the GST inclusive cost of Your claim.

In calculating such payment, We are entitled to reduce it by any ITC which You are, or would be, entitled to:

- (a) for the acquisition of such goods, services or other supply; or
- (b) had the compensation been used to acquire such goods, services or other supply

However, the total of all payments We make to You will not exceed Your sum insured, limit or sublimit of liability, or other monetary limitation.

The sums insured, limits and/or sublimits of liability, or any other monetary limitations are inclusive of any taxes, levies, duties or charges that the payment would be affected by or subject to.

3. **Payments**

If You make a claim and We are obliged by law to withhold any amount from the payment in order to satisfy that law (for example, because You have not provided Your ABN where required to do so), the amount withheld will be treated as forming part of the claim payment paid to You under this policy (even though You have not received the withheld amount).

4. **Interpretation**

- (a) Where this Endorsement is in conflict with any other provision of this Policy, this Endorsement will apply.
- (b) Reference to payments made to You include payments made on Your behalf or at Your direction.
- (c) Other expressions which are not defined but which are used in any legislation will have the meaning given to them in that legislation. Examples of this are 'GST', 'ABN' and 'ITC'.

...

FIRE AND DEFINED EVENTS/ACCIDENTAL DAMAGE SECTION 1

Insurance

In the event of destruction of or damage to any of the Insured Property occurring during the Period of Insurance and directly caused either by an insured Defined Event or as described in an applicable Optional Benefit,

¹ These reasons refer to this provision as General Condition 16.2.

We will:

- (a) in the case of destruction, at Our option:
 - (i) pay to You the Value of the Insured Property destroyed; or
 - (ii) in accordance with General Condition [13]² Restoration of Property:
 - (A) restore such property; or
 - (B) substitute property for that destroyed;

...

Definitions

Unless the context otherwise requires, where the following words and expressions appear in or are read in conjunction with this Section, they will have the following meanings:

...

Value - has the meaning given to it in 'Basis of Settlement' in this Section.

...

Basis of Settlement

The following provisions are to be read subject to the provision headed 'Sum Insured' in this Section.

...

Market Basis

...

Indemnity Basis

...

Reinstatement Basis

When the Certificate of Insurance indicates that the insurance is provided on a Reinstatement Basis, Value means and (where the Insured Property is damaged) the amount of the damage is:

the cost, as at the date of the event giving rise to the claim, which would be incurred in the reinstatement of the Insured Property destroyed or damaged, including architects', surveyors', legal and consulting engineers' fees, necessarily incurred in the reinstatement.

Subject to the following Reinstatement or Replacement Condition, reinstatement here will mean:

- (a) when the Insured Property is destroyed, its rebuilding in a condition equal to but not better or more extensive than its condition when new; and

² The policy actually says 16 but it was agreed that this was an error.

- (b) when the Insured Property is damaged, the repair of the damaged portions to a condition substantially the same as but not better or more extensive than its condition when new.

...

Sum Insured

Our liability under this Section is limited to the Sum Insured:

- (a) expressed against the particular Insured Property in the Certificate of Insurance (subject to escalation described in Condition 6 Escalation and Extra Benefit 10 Seasonal Increase - Stock); and
- (b) expressed against the particular Optional Benefit in the Certificate of Insurance.

...”.

- [9] The trial judge acknowledged, as appears not to have been in dispute, that General Condition 16 was “infelicitously drafted” and marked by “poor word choice, and a lack of conceptual clarity as a matter of ordinary English”,³ but held that the insurer’s construction was correct.
- [10] The appellant’s argument at trial may be summarised as follows: the first sentence of General Condition 16.2 requires a calculation commencing with the amount of the insured’s claim (“...any payment or supply We make...in relation to Your claim will be calculated on the GST inclusive cost of Your claim”); the second sentence then requires a reduction of the (GST inclusive) claimed loss by 1/11th to accommodate the notional input tax credit to which the insured would be entitled if it were paid a sum equivalent to the whole of its claimed loss on a supply attracting GST; if the resulting amount exceeds the Sum Insured the third sentence then applies to limit the insurer’s liability to the Sum Insured. The trial judge considered that this approach was attractive because it provided a “cohesive thread linking the four sentences together, in the order in which they appear” and made sense of the third sentence beginning “However”, a word which implied that what preceded it might otherwise be taken to mean something to the contrary of what the third sentence provided.⁴ The trial judge observed that, if the insurer’s construction was correct, the insurer could not advance a sensible reason for the location of the third sentence and the commencing word “However”.
- [11] In this appeal the insurer argued that the third sentence referred to a case in which the insurer made several payments by way of indemnity under different sections of the policy. Accepting, however, that each of the several payments should be reduced by the amount of the input tax credit to which the insured is or would be entitled upon reinstatement, the third sentence implies that payments should continue to be made in accordance with the terms of the policy until their total equals the Sum Insured. It remains the case that the insurer’s construction is not reconcilable with the text and location of the third sentence.
- [12] The trial judge was also troubled about the consequence of the insurer’s interpretation that, in the case of payment rather than reinstatement, the Sum Insured, which was described in the policy as the limit of the respondent’s liability,

³ [2013] QSC 28 at [14].

⁴ [2013] QSC 28 at [22].

would be altered to 10/11^{ths} of the amount stated in the certificate of insurance.⁵ The trial judge nevertheless considered that the appellant’s construction should be rejected because the insurer’s construction was “conceptually more commercially sensible...and has a more commercially sensible operation in practice”. The trial judge considered that this approach accorded with the rule of construction that a policy of insurance, as a commercial contract, should be given a “business-like interpretation”, with attention being given to its language, the commercial circumstances which it addresses, and the objects intended to be secured.⁶

- [13] One reason why the trial judge rejected the appellant’s construction was that it was premised upon the argument that the words “Your claim” in the first sentence meant “the actual claim made by the insured” but the second sentence referred to a payment rather than to a claim.⁷ The trial judge accepted the insurer’s argument, which was repeated on appeal, that the word “payment” in the second sentence meant the “actual payment to be made to the insured...in accordance with the policy terms – including being within the policy limit”.⁸ In my respectful opinion, that argument is not persuasive. It construes the second sentence in isolation from the third sentence which, as the trial judge accepted, conveyed that what preceded it might otherwise result in a payment which exceeded the amount of the Sum Insured. Another weakness of the argument is that the word “payment” in the second sentence connotes a notional rather than actual payment; that is so because “it” (the “payment”) may be reduced. I respectfully agree with the trial judge that the focus of the second sentence is not upon “claim” (as the appellant accepted in the argument it advanced on appeal), but its focus is also not upon the payment itself; rather, it is concerned with the impact of the GST Act upon the calculation of the payment. The impact of the GST Act upon the calculation is comprehensively described in the first two sentences. Those sentences contain no reference to the Sum Insured.
- [14] The insurer argued that, since the Sum Insured was \$1,800,000.00, any “claim” described in the first sentence could not be for an amount exceeding \$1,800,000.00, so that a “payment” under the second sentence must necessarily be reduced by an input tax credit calculated with reference to an amount no greater than \$1,800,000.00. As the insurer also acknowledged, however, the word “claim” does not connote a claim for any particular amount. The meaning of that word is not defined but it emerges clearly enough from General Conditions 2 and 3. General Condition 2 requires the insured to notify the insurer immediately upon the happening of any event or occurrence which might reasonably be expected to give rise to a claim under the policy and, amongst other things, to give the insurer “...full details of the circumstances of the event or occurrence in writing on the appropriate claim form as soon as possible, and provide at Your expense, all proofs and information concerning the loss, destruction, damage, Personal Injury or liability the subject matter of a claim”. General Condition 3 confers broad powers upon the insurer where “a claim is or may be made” concerning damage or destruction of insured property to investigate and assess the claim. It therefore appears that a “claim” is not a claim for an identified amount but is merely a demand that the insurer indemnify the insured in accordance with the policy.

⁵ [2013] QSC 28 at [40].

⁶ [2013] QSC 28 at [27].

⁷ [2013] QSC 28 at [19], [23], [24].

⁸ [2013] QSC 28 at [23].

- [15] The insurer argued that the trial judge was correct in considering that in the second sentence the word “payment” in the words “In calculating such payment” connotes a payment “in accordance with the policy terms – including being within the policy limit”.⁹ The insurer argued that this was required because the “payment” was to be “calculated on the GST inclusive cost of Your claim”, that was a reference to the Value of the Insured Property referred to in (a)(i) of the insuring clause, “Value” was defined as having the meaning given to it in “Basis of Settlement”, and the introductory words of the “Basis of Settlement” clause required reference to the Sum Insured. The argument breaks down at the last proposition, which is inconsistent with the definition of “Value”. That definition does not adopt the entire Basis of Settlement clause. It adopts only the meaning given to “Value” in the Basis of Settlement clause. “Value” is defined for each basis of settlement. For the reinstatement basis, “Value” is defined to mean “the cost...which would be incurred in the reinstatement of the Insured Property destroyed...”. That definition is not qualified by the Sum Insured clause. Rather, the Sum Insured is subsequently applied as a cap upon the insurer’s liability where (a)(i) of the insuring clause otherwise would require the insurer to pay an amount which exceeds the Sum Insured.
- [16] The expression “such payment” in the second sentence of General Condition 16.2 refers back to the “payment” to be calculated on the GST inclusive costs of the claim referred to in the first sentence, but, as I have mentioned, the focus here is upon the calculation of the payment or, more precisely, the effect of the GST Act upon that calculation. Contrary to the insurer’s argument, the word “it” in the second sentence does not refer to “the payment which was calculated and proposed to be made” pursuant to the first sentence. Rather, the first sentence describes the starting point of the calculation – relevantly, the GST inclusive cost of reinstatement of the destroyed buildings – and the second sentence authorises the insurer to include in that calculation a reduction of the amount of any input tax credit to which the insured is entitled or would be entitled if it reinstated the destroyed buildings. Importantly, that the limitation of the insurer’s liability to the Sum Insured has no bearing upon the calculation described in the first and second sentences is consistent with the structure and text both of General Condition 16.2 and of the policy as a whole.
- [17] The appellant’s submission that the last sentence of General Condition 16.2 does not comprehend GST should not be accepted. Unlike General Condition 16.1, the last sentence does not expressly refer to GST, but GST is comprehended by the expression “any taxes”. However, the issue in this appeal concerns the amount of the payment which the insurer is obliged by the policy to pay to the insured. Such a payment is not subject to GST.¹⁰ The question whether the insurer’s liability extends to the Sum Insured, or only to 10/11^{ths} of the Sum Insured, depends entirely upon the calculation required by the first three sentences. The more natural construction is that the insurer’s liability extends to the Sum Insured.
- [18] Under that construction, where there is under-insurance the calculation required by the second sentence involves reductions from the Value of the Insured Property rather than from the Sum Insured. That the insurer would be required to ascertain the Value at this point is not a reason for rejecting this construction. It seems objectively likely that the insurer might in any event calculate the Value (relevantly

⁹ [2013] QSC 28 at [23].

¹⁰ The GST Act, s 78-20.

here, the GST inclusive cost of reinstatement of the buildings) before exercising the election given by the insuring clause. Such a calculation would be necessary at least in some cases for ascertaining the likely extent of the insurer's liability and for the insurer to make an informed decision whether to invoke the co-insurance condition to reduce the amount payable in the cases provided for in that condition. (The Certificate of Insurance provides that "Co-insurance 80% applies..."; it applies where the Sum Insured is less than 80 per cent of "all property of the same category or designation as the particular Insured Property owned by You at the Situation" and the damage or destruction to the insured property "exceeds ... 5% ... of the Sum Insured". In such a case, the insurer's liability is reduced according to the proportion which the Sum Insured bears to 80 per cent of the Total Value.)

- [19] Some of the examples of the operation of the policy upon the appellant's construction which the trial judge considered were not commercially sensible involved claims by an insured to amounts to which it was not entitled under the policy.¹¹ Because of my conclusion that the word "claim" does not connote a claim for a specified amount but is merely a demand that the insurer indemnify the insured in accordance with the policy, I would respectfully hold that these examples do not influence the proper construction of the policy.
- [20] The trial judge considered that it was anomalous that "an insured whose claim is more than the sum insured (ie. an under-insured insured) should be in a better financial position, relatively speaking, than an insured whose claim is within policy limits".¹² This was a reference to the fact that upon the appellant's construction, in the case of payments made by the insurer the insured will receive 10/11^{ths} of the insured's loss together with the benefit of an input tax credit for the remaining 1/11th loss, except where "the insured's claim is more than the sum insured"; in that case, the insured will receive the whole Sum Insured together with the benefit of an input tax credit in an amount equivalent to 1/11th of the Sum Insured.¹³ As the appellant pointed out, this analysis does not take into account the co-insurance condition. More importantly, the amount of an input tax credit is deducted from what otherwise would be the GST inclusive cost of reinstatement in every case; that in one case the whole amount of the Sum Insured is payable is a consequence only of the fact that the amount of the insured's loss extends to or beyond the limit of the insurer's indemnity even allowing for the required deduction of the amount of the input tax credits.
- [21] Another example posited by the trial judge illustrates the effect of the competing constructions where the required indemnity is less than the Sum Insured. In this situation the financial position of the insurer and the separate financial position of the insured does not change according to whether the insurer elected to reinstate or to pay the insured.¹⁴ That is so because the difference between the competing constructions lies only at the point in the calculation when the Sum Insured is taken into account.
- [22] In the remaining example posited by the trial judge in support of the view that the appellant's construction was not commercially sensible, the Sum Insured was \$1 million (GST inclusive) and the destruction of a building produced a loss of \$2 million (GST inclusive):

¹¹ [2013] QSC 28 at [26], [36].

¹² [2013] QSC 28 at [33].

¹³ The insured would receive that benefit if it spent the money in reinstatement.

¹⁴ [2013] QSC 28 at [32].

- “(a) If the insurer elects to pay for reinstatement up to the policy limit, it pays the builder \$1 million which includes \$90,909 GST. The insurer gains an input tax credit of \$90,909 and its net position is \$909,091 down on the claim. The insured meets the builder’s payments after the \$1 million mark is reached; pays the builder \$1 million, and receives an input tax credit of \$90,909. Its net position is \$909,091 down.
- (b) If the insurer elects to pay the insured rather than partially reinstate, and adopts the defendant’s interpretation of cl 16, it pays \$909,091 to the insured. Its position is \$909,091 down on the claim. The insured receives \$909,091 from the insurer; pays \$2 million to the builder, and receives input tax credits of \$181,818. The insured’s net position is \$909,091 down.
- (c) If the insurer elects to pay rather than partially reinstate, and adopts the interpretation of cl 16 propounded by the plaintiff, it deducts \$181,818 from the \$2 million claim, then pays \$1 million to the insured. Its net position is \$1 million down. The insured receives \$1 million; pays \$2 million to the builder, and receives input tax credits of \$181,818. Its net position is \$818,182 down.”¹⁵

[23] What this example illustrates is that when GST tax liabilities and input tax credits are taken into account the insurer will be relatively worse off and the insured will be relatively better off if the insurer elects to reinstate (partially) rather than to pay. The significance of this consequence is diminished by various considerations. Even on the insurer’s construction, there may be one situation in which it will be obliged to pay the whole of the Sum Insured without the benefit of any input tax credit namely, in the case of an insured which is not entitled to claim any input tax credits.¹⁶ More significantly, this consequence of the appellant’s construction occurs only in the case of under-insurance. As mentioned earlier, in such a case the limit of the insured’s indemnity will be reduced by the co-insurance condition in circumstances in which it applies. It is also relevant that the differences in the parties’ financial positions are determined by the insurer’s exercise of an election under the insuring clause; that the financial consequences for parties to a contract differ according to the manner in which one party exercises an election conferred by the contract is commonplace.

[24] Even so, I would accept that the consequence illustrated by the trial judge’s example is somewhat anomalous. On the other hand, the construction adopted by the trial judge produces the result that the limit of the insurer’s liability to satisfy its obligations under the policy by payment to the insured is not the Sum Insured stated in the certificate of insurance in simple and unqualified terms, but is instead 10/11^{ths} of that amount. That is such a surprising result as to suggest that the construction which produces it could not reflect the intention of reasonable contracting parties.

¹⁵ [2013] QSC 28 at [30].

¹⁶ There was no challenge to the trial judge’s conclusion that there may be insured persons who are not entitled to claim input tax credits. The trial judge referred, as an example, to paragraph 91 and following of the Australian Taxation Office, *Goods and Services Tax Ruling* 2006/10 but observed that the complexity of the tax law in this respect was beyond what was necessary for the determination of this matter; [2013] QSC 28 at fn 4 and 5.

Furthermore, for the reasons given earlier, the appellant's construction of General Condition 16.2, that the insurer's maximum potential liability after taking into account input tax credits extends to the Sum Insured, more closely reflects the text and structure of that clause in the context of the policy as a whole than does the construction which the trial judge preferred. In my respectful opinion the appellant's construction is correct.

Disposition and Orders

- [25] The parties agreed that if, as I would hold, the reduction of 1/11th of the Sum Insured which the insurer made from its payment was not authorised by General Condition 16.2, the appellant was entitled to recover the amount of that reduction, namely \$160,826.86.¹⁷
- [26] The appellant claimed interest. The trial judge considered that, if the appellant's claim succeeded, interest should run from the date upon which the insurer otherwise paid the claim, 21 August 2007.¹⁸ Her Honour's reasons for that conclusion were not challenged in this appeal. That date should be adopted as the date from which interest runs. The agreed interest calculation at trial allowed for eight per cent interest, but that was a mean rate for the period between 21 August 2007 and 29 June 2012. I would afford the parties the opportunity of agreeing upon the amount of interest or, failing agreement, an opportunity to file a brief written submission on the point.
- [27] The following orders are appropriate:
1. Allow the appeal.
 2. Set aside the orders made in the Trial Division.
 3. Order instead that there be judgment for the plaintiff against the second defendant for \$160,826.86 for claim plus an amount for interest to be agreed between the parties or, in default of agreement within 14 days hereof, in an amount to be fixed by the Court.
 4. The parties have leave to file and serve written submissions about the amount of interest within 14 days hereof, or within such further period as a Judge or the Registrar allows.
 5. The respondent is to pay the appellant's costs of the proceedings in the Trial Division and of the appeal.
- [28] **NORTH J:** I have read the reasons of Fraser JA. I agree with his Honour's reasons and the orders he proposes.

¹⁷ Statement of Agreed Facts and Circumstances, paragraph 37.

¹⁸ [2013] QSC 28 at [42]-[43].