SUPREME COURT OF QUEENSLAND

CITATION:	*GPS Power P/L & Ors v Gardiner Willis & Assoc P/L* [2000] QCA 495
PARTIES:	**GPS POWER PTY LTD** ACN 009 103 422 (plaintiff/appellant) **GPS ENERGY PTY LTD** ACN 063 207 456 (plaintiff/appellant) **SUNSHINE STATE POWER BV** ARBN 062 295 425 (plaintiff/appellant) **SUNSHINE STATE POWER (NO 2) BV** ARBN 063 382 829 (plaintiff/appellant) **SLMA GPS PTY LTD** ACN 063 779 028 (plaintiff/appellant) **RYOWA II GPS PTY LTD** ACN 063 780 058 (plaintiff/appellant) **YKK GPS (QUEENSLAND) PTY LIMITED** ACN 062 905 275 (plaintiff/appellant) **v** **GARDINER WILLIS & ASSOCIATES PTY LTD** ACN 067 249 914 (defendant/respondent)
FILE NO/S:	Appeal No 3699 of 2000 SC No 5189 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 December 2000
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2000
JUDGES:	de Jersey CJ, Pincus JA and Williams J Separate reasons for judgment of each member of the Court, de Jersey CJ and Williams J concurring as to the orders made, Pincus JA dissenting
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	INSURANCE – GENERAL – CO-INSURED PARTIES INSURANCE – GENERAL – POLICIES OF INSURANCE – CONSTRUCTION – appellants' contract of insurance

defined "the Insured" to include contractors and consultants, subject to limitations on the extent of their activities insured – loss suffered by appellants through respondent's negligence – appellants received payment from insurer covering most of the loss – appellants sought to recover full amount of loss from respondent – whether claim brought by way of subrogation – whether respondent an "insured" under policy of insurance – whether waiver of subrogation against other insureds in policy extended to all claims against those insureds, or only to extent that those insureds covered by policy of insurance

Agip Petroleum Co, Inc v Gulf Island Fabrication, Inc, 920 F Supp 1318 (1996), discussed
Co-operative Bulk Handling Ltd v Jennings Industries Ltd (1996) 17 WAR 257, cited
Marathon Oil Company v Mid-Continent Underwriters, 786 F 2d 1301 (1986), discussed
National Oilwell (UK) Ltd v Davy Offshore Ltd [1993] 2 *Lloyds Rep* 582, not followed
Petrofina (UK) Ltd v Magnaload Ltd [1984] QB 127, cited
Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107, mentioned
Wiley v Offshore Painting Contractors, Inc 711 F 2d 602 (1983), discussed
Wiley v Offshore Painting Contractors, Inc 716 F 2d 256 (1983), discussed
Woodside Petroleum Development Pty Ltd v H & R-E & W Pty Ltd (1999) 20 WAR 380, discussed

COUNSEL: S C Williams QC, with M J Liddy, for the appellants
P H Morrison QC, with D G Clothier, for the respondent

SOLICITORS: Gadens Lawyers for the appellants
Corrs Chambers Westgarth for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the respective reasons for judgment of Pincus JA and Williams J.

[2] The issue is whether one reads in a literal way the exclusion, and waiver, of rights otherwise arising by subrogation. The respondent falls within the definition of "The Insured" because it was a consultant. The subrogation provisions deny the insurer the right to exercise "any rights of subrogation against any other Insured(s)" – "other", that is, than an insured which has received a payment (ie the appellants) (para (c)); and they provide that the insurer waives any right arising by subrogation against "any Insured … described by (the) Policy" (para (d)(ii)). Literally applied, those provisions therefore apparently avail the appellants, because the respondent fell within the category of "The Insured"; so that in consequence, the insurer should be taken to have waived the right to recover asserted here.

[3] The question is, however, whether one should depart from that literal approach, in a sense transposing the limitation on the insurance cover available to the respondent in that capacity as an "Insured" party, into the operation of the subrogation provisions. The point arises because the definition of "The Insured" places the respondent into that category only for matters other than "in respect of (its) professional duty of care to other" insured entities, with the payment made to the appellants having arisen from the respondents' breach of their professional duty.

[4] The result of the case depends therefore on the construction of the contract of insurance. I do not consider that there is any sufficient reason to depart from a literal construction. The literal is here the "natural" construction. As Williams J points out, the interests of certainty favour easy identification of an "insured" entity for the purposes of the waiver of rights arising by subrogation; and that is maximised by the approach I favour. There is the additional consideration, also significant on my analysis, that had the parties wished to limit the provisions as the appellants contend, the parties could with ease have done so expressly, and with complete clarity.

[5] I consider that the appeal should be dismissed with costs. I respectfully agree with the reasons of Williams J.

[6] **PINCUS JA:** This is an insurance case in which the principal point is the construction of a clause in a policy limiting the insurer's right of subrogation. To put the problem shortly, the clause prevented suit by the insurer against the respondent if it was insured under the policy; but it was insured for certain purposes only. The policy relates to work done on the Gladstone power station in relation to which the respondent performed design and engineering functions. The appellants suffered loss as a result of damage to the power station, which was caused by the respondent's negligence. Most of the loss was recovered by the appellants under an insurance policy, but the respondent was sued by the appellants for the whole loss. As to that part of the loss ($418,761), which was covered by the insurance policy, the suit was brought by way of subrogation – i.e. by the insurer using the names of those of the insured who had suffered the loss.

[7] The learned primary judge dismissed the claim so far as it was brought by way of subrogation, on the ground that the subrogation clause in the policy protected the respondent against such a claim. The policy contains a definition of the expression "the Insured". The definition sets out a list of those who are within it, consisting in part of specifically named parties and in part of categories. There are two categories in one or both of which, it is admitted, the respondent is included:

> "(c) all contractors and sub-contractors (which shall include all other lower tier sub-contractors), but only to the extent of their activities in connection with the Insured Operations and their interest therein;"
>
> "(g) any unnamed party being of other category than specified under (a) to (f) above, having an insurable interest in the Insured Operations and/or Insured Property;"

Then the definition concludes:

> "This definition of 'the Insured' shall exclude consultants but <u>only</u> in respect of such consultants' professional duty of care to other persons &/or parties included in this definition of 'the Insured'".

The essence of the respondent's case is that this definition has only limited application, and is inapplicable to the word "Insured" used in the subrogation clause discussed below. As will appear, I do not think there is any good ground for so holding.

[8] The respondent was a consultant on the project and so if the last sentence of the definition, just quoted, had stopped with the word "consultants", the respondent would have been excluded from the definition. But the sentence goes on to limit the exclusion. There is a dispute as to the precise extent of the limitation, the appellants contending that the expression "included in this definition of 'the Insured'" qualifies "other persons" as well as "&/or parties", whereas the appellants say that it qualifies only "&/or parties"; it does not appear to me that it is necessary to resolve that point.

[9] The parties to this appeal agree that not only was the respondent a consultant, as I have mentioned, but the claim in question related to its professional duty of care to other parties included in the definition. So, the appellants contend, for the purposes of the events in question the respondent is not within the definition of "the Insured". If that is right, then it is not protected, the appellants say, by the subrogation clause which is cl 1 of the general conditions. Paragraph 1(a) gives the insurer a right of subrogation which would, if the clause stopped there, apply against the respondent. But pars 1(c) and (d) read as follows:

> "(c) In the event of the Insurers indemnifying or making a payment to any Insured(s), the Insurers shall not exercise any rights of subrogation against any other Insured(s) hereunder.
>
> (d) The Insurers agree to waive any rights and remedies or relief to which they may become entitled by subrogation against:-
>
> (i) any corporation or organisation (including its directors, officers, employees or servants) owned or controlled by the Insured named in paragraph (a) of The Insured definition herein;
>
> (ii) *any Insured* named or *described by this Policy* (including its directors, officers, employees or servants)". (emphasis added)

[10] The respondent contends that it is an insured because it is in certain circumstances entitled to be indemnified under the policy; whereas the appellants contend that prima facie, under the definition of "the Insured", the respondent is excluded and the limitation on the exclusion does not apply to it, because it was not entitled to be treated as "the Insured" in respect of its capacity as a person owing a professional duty of care to other persons included in the definition – the appellants being some such persons.

[11] It appears to me that, where the right of subrogation is sought to be exercised under the general law of insurance, there are good practical reasons to take a restrictive view of the right. These are discussed usefully in M A Clarke, "The Law Of Insurance Contracts", 2nd ed, in the last four pages of that work; see also Birds, "Modern Insurance Law", 4th ed, pp 311, 312. But where the right of subrogation depends, as it does here, on the terms of a contract, considerations such as those

mentioned by the authors whose works I have cited are of significance only if the contractual provisions are truly ambiguous.

[12] The learned primary judge interpreted the policy in favour of the respondent with the assistance of certain authorities which require discussion. In *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyds Rep 582, the policy waived –

> "... rights of subrogation against any Assured and any person, company or corporation *whose interests are covered by this policy* ...". (emphasis added)

Colman J read that waiver as being confined in its effect -

> "... to claims for losses which are insured for the benefit of the party claimed against under the policy". (603)

The point of this observation was that the assured against whom the right of subrogation was sought to be exercised had cover under the policy which was limited in duration; the loss had occurred too late to entitle that assured to recover an indemnity under the policy. Colman J held that the benefit of the subrogation waiver was "only available for insured losses". (603)

[13] Although the case is helpful to the appellants in a general sense, in that the waiver clause was read in favour of the insurer, it does not appear to me that it lays down any general principle applicable here. In particular, I do not read the case as being authority for the proposition that a waiver clause is to be taken, whatever its terms, to forbid subrogation only in respect of losses in respect of which the defendant is covered under the relevant insurer's policy. Like many insurance authorities, *National Oilwell* is a decision on the wording of a particular contract. The learned primary judge, rightly in my opinion, did not apply the *National Oilwell* case to the circumstances which his Honour had to consider.

[14] The US Court of Appeals for the Fifth Circuit looked at a similar problem in *Marathon Oil Company v Mid-Continent Underwriters*, 786 F 2d 1301 (1986). The waiver covered "all subrogation"; Marathon resisted a claim by the insurer, on the basis of the waiver. It was covered only for liability it incurred as an operator, owner or charterer of a certain vessel and the insurance did not cover its liability arising from its capacity as a platform owner; it was in that capacity that it incurred liability. For the insurer to have succeeded in the *Marathon* case, it was necessary that the waiver clause be read down and that the Court of Appeals was not prepared to do. This US decision appears to accord perfectly with notions of interpretation of contracts in this country. *Wiley v Offshore Painting Contractors, Inc*, 711 F 2d 602 (1983) was a more complicated case; there, resistance to the subrogated claim was based on two points: that the waiver clause (613) protected the defendant and, secondly, that the defendant was within the general law doctrine that the insurer cannot claim subrogation against its own insured. Both these contentions were rejected, it being held (614) that the provisions in the relevant policies -

> "... naming Chevron [the defendant] as an additional assured and waiving subrogation simply do not pertain to Chevron's acts of negligence as the platform owner". (614)

When the case was reconsidered (716 F 2d 256 (1983)) Chevron succeeded, apparently on the basis that it was covered by one of the relevant policies and therefore within the rule of the general law protecting insured persons against subrogated actions by their insurer.

[15] These cases were discussed in *Agip Petroleum Co, Inc v Gulf Island Fabrication, Inc*, 920 F Supp 1318 (1996), where the insurer's claim was considered in detail by a magistrate judge, whose view of the matter was accepted by a district judge. The facts were rather similar to those in the *National Oilwell* case, but the result was opposite. The *Agip* decision appears to be based on orthodox principles. The subrogation clause (1326) waived "rights of subrogation against any Assured and any person, Company, Firm or Corporation whose interests are covered by this Policy". There was no express limitation of the waiver of subrogation to cases in which the defendant insured was entitled to indemnity under the policy and the court declined to read in such a limitation.

[16] Lastly, there is the Western Australian decision in *Woodside Petroleum Development Pty Ltd v H & R-E & W Pty Ltd* (1999) 20 WAR 380. There the insurer was defeated because the waiver clause covered "any Assured", a term which was, in effect, broadly defined so as to include people with whom the principal assured company had entered into an agreement "in connection with the subject matters of Insurance". The agreement that brought the defendants within this definition was one under which the relevant defendants guaranteed the performance of others in respect of work the subject of the insurance and undertook to indemnify the principal insured against losses incurred by this non-performance.

[17] The principal argument against the Court's conclusion was, it appears, that a waiver of rights of subrogation should, in general, be read down so as to give protection commensurate with the extent of insurance cover held by the parties claiming the benefit of the protection. That argument had some support from the *National Oilwell* case, which the Western Australian court (Malcolm CJ, Pidgeon and Ipp JJ) declined to follow.

[18] Insofar as the *Woodside Petroleum* case decided that a clause providing for waiver of subrogation rights should be given its ordinary meaning and should not be read down so as to confine its operation in the way suggested by the *National Oilwell* case, I would, with respect, unhesitatingly follow that view. If the court were justified in leaning either way, in determining the scope of a clause waiving subrogation rights, it would seem sounder, as a matter of policy, to favour a construction enhancing, rather than restricting, the scope of the waiver.

[19] The difficulty, in the present case, is to decide whether the language of the waiver clause is sufficiently flexible to justify the construction the learned primary judge put on it. Mr Williams QC, senior counsel for the appellant, has in his favour a simple argument: that if one applies that part of the definition of "the Insured" which sets out the extent to which a consultant is within "the Insured", then the waiver cannot cover the respondent. That is so; the only answer which can be made is that it is impermissible, under this contract, to treat a person as an insured for some purposes but not others. To put that more broadly, the respondent's argument requires acceptance of the view that if a party is, in any capacity or for any purpose, an insured, it is an insured for all purposes. If that were so, if the respondent were given temporary insurance under this policy, it being contemplated that after a period of, say, a month it would take out its own insurance, it would have the benefit of the waiver clause, whenever the event giving rise to the relevant suit occurred.

[20] I can see no conceptual difficulty in the parties agreeing that a consultant shall be treated as an insured, under the policy, for one purpose but not for another. It is true that if one construes the waiver clause without reference to the definition and asks whether the respondent is an insured, the answer could well be "yes"; but in my respectful opinion, if one applies the definition the answer must be "It depends on the capacity in which the respondent acted, at the relevant time". It follows that, in my opinion, the appeal should be allowed.

[21] It is necessary to deal with two other points. One is that the appellants contended that they should succeed on the basis that the respondent is not a party to the contract and therefore can take no benefit under it. That appears to me to be inconsistent with two Western Australian decisions, the *Woodside* case and the earlier decision in *Co-operative Bulk Handling Ltd v Jennings Industries Ltd* (1996) 17 WAR 257. No reason of any substance was put forward against the correctness of those decisions, insofar as they apply the doctrine of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, and I would follow them. It was also suggested in the appellants' outline (which appears to have been drawn without reference to Practice Direction no 26 of 1999) that there is some advantage to be gained by the appellants from the circumstance that the claim brought was only in part and not in whole a subrogated one; that submission has no substance.

[22] I would allow the appeal with costs and vary the judgment given below by replacing the sum of $40,890.65 mentioned in that judgment by the sum of $459,651.65.

[23] **WILLIAMS J:** The background facts to the issues raised by this appeal are sufficiently set out in the reasons for judgment of Pincus JA which I have had the advantage of reading. In my view the critical issue in the proceedings is the proper construction of the policy of insurance in question. Because of that I find it necessary to refer to the policy in some detail.

[24] The cover sheet refers to the policy in the following terms: “Construction Works and Liability Blanket Insurance Policy for Gladstone Power Station”. The policy then recites that “In Consideration of the Insured named in the Schedule hereto paying the premium … The Insurers Severally Agree … they will indemnify the Insured as hereafter specified.” There follows a proviso stating that “the liability of the Insurers shall in no case exceed the limits specified in the Schedule …”.

[25] All the relevant provisions relating to the insurance are then to be found in the Schedule.

[26] When one turns to the Schedule the first provision therein is against the marginal heading “Insured”. Following the introductory words: “For their respective rights and interests” there follows in paragraph (a) a reference to “The GPS joint venturers comprising at inception” seven named companies. Those seven companies are thereafter referred to in the policy as “the Principal”. There then follows in paragraphs (b) to (k) ten named companies or entities.

[27] Against the marginal heading “Insured Operations” appears the following (as per endorsed alteration): “All construction and/or refurbishment contracts of any kind or description, commenced during the Policy Duration or work otherwise

undertaken in connection with the Business"; the expression "Business" is in turn defined essentially as the operation of the Gladstone Power Station and associated activity.

[28] The "Policy Duration" was stated to be from 29 March 1994 to 31 December 1996.

[29] There then follows a section of the Schedule headed by the term "Definitions" wherein under the heading "The Insured" the following appears:

> " "The Insured" shall include:
>
> (a) the parties nominated in the Schedule;
>
> (b) all other principals and/or owners of the site of the Works …
>
> (c) all contractors and sub-contractors (which shall include all other lower tier sub-contractors), but only to the extent of their activities in connection with the Insured Operations and their interest therein;
>
> (d) any supplier or manufacturer of plant and materials to be incorporated in the Works, but only to the extent their activity as a contractor or sub-contractor in connection with the Insured Operations and then only to their interest, but only where the Principal contracts to insure their respective interests under this Policy;
>
> (e) …
>
> (f) any director, executive director, employee or agent of the Insured parties, whilst acting within the scope of his or her duties with such parties.
>
> (g) any unnamed party being of other category than specified under (a) and (f) above, having an insurable interest in the Insured Operations and/or Insured Property;
>
> This definition of "the Insured" shall exclude consultants but only in respect of such consultants' professional duty of care to other persons and/or parties included in this definition of "the Insured"."

[30] It should be noted (but I do not quote the clauses) that thereafter there are a number of "exclusions" from the policy. Those paragraphs define certain losses which would not give rise to a claim under any of Sections A, B, or C of the Policy.

[31] The other clause of critical importance for present purposes is found in the part of the Schedule headed: "General Conditions Applying to All Policy Sections". Paragraph 1 thereof is headed "Subrogation" and thereafter the following appears:

> "(a) Upon the payment of any claim under this Policy, subject to any restrictions imposed by the *Commonwealth Insurance Contracts Act* 1984, the Insurers shall be subrogated to all the rights and remedies of the Insured arising out of such claim against any person or corporation whatsoever.
>
> (b) …
>
> (c) In the event of the Insurers indemnifying or making a payment to any Insured(s), the Insurers shall not exercise any rights of subrogation against any other Insured(s) hereunder.
>
> (d) The Insurers agree to waive any rights and remedies or relief to which they may become entitled by subrogation against:-
>
> (i) any corporation or organisation (including its directors, officers, employees or servants) owned or controlled by the Insured named in paragraph (a) of The Insured definition herein;
>
> (ii) any Insured named or described by this Policy (including its directors, officers, employees or servants)."

[32] The evidence clearly establishes that the respondent was engaged by the appellants to provide engineering services (particularly design and drawing details) with respect to the works for which the insurance was taken out. In those circumstances there can be no doubt (there was no submission made to the contrary) that the respondent was a "contractor" or "sub-contractor" within paragraph (c) of the definition with respect to those works. The learned trial judge also found on the evidence (and this was not challenged in appeal) that the respondent was a "consultant" and therefore caught by the proviso in the last sentence. The first question to be answered is whether or not the respondent came within the definition of "the Insured" contained in the contract of insurance.

[33] It is obvious that for purposes of the insurance contract the term "the Insured" has an extended and, it may be said, peculiar meaning. In any contract of insurance the term insured is often used to describe both who is insured and what is insured. Indeed in the definition of "the Insured" here one finds words describing and delimiting both who is insured and what is insured (that is, what risks are insured against with respect to each person named or party described as an "Insured").

[34] Paragraph (a) of the definition is obviously a reference to the 17 named companies or entities at the beginning of the Schedule as being insured pursuant to the Policy. The inclusion of paragraphs (b) to (g) in the definition clearly establishes that a much wider class was insured. That also indicates that the policy covered a wider class than those persons or parties who actually paid the premium.

[35] Paragraph (c) of the definition is instructive for present purposes. It embraces "all contractors and sub-contractors" within the category of persons who constitute "the Insured", but then goes on to limit the extent to which such persons are insured by saying that they are included "only to the extent of their activities in connection with the Insured Operations and their interests therein". That of course means that

contractors and sub-contractors are extensively covered by the policy - they are covered with respect to things done in connection with the subject works. Looking at (c) alone it could not be said that contractors and sub-contractors with respect to the works were not persons or parties insured because there was some limit with respect to the risks they were insured against.

[36] Similarly when one looks at the persons or parties described in paragraph (d) it is seen there are limits on the extent to which they are insured. Broadly they are covered to a substantial extent, that being "to the extent of their activity … in connection with the Insured Operations". Again, in my view, one could not say that such suppliers and manufacturers were not within the definition "the Insured" because that limit was imposed on the extent to which they were insured. It is also significant that here there is a further limitation – only where "the Principal" has contracted (and that must mean expressly) to insure such interests of the supplier and manufacturer. The fact that such a limitation is included in (d) and not in the other paragraphs (particularly (c)) is very significant.

[37] One then comes to the last sentence in the definition which is more in the nature of a proviso. The effect thereof is to further limit the extent to which an Insured described in the preceding paragraphs (particularly but not necessarily (c)) of the definition is covered by the policy; that is, the risk insured against with respect to certain parties described as an Insured is further limited.

[38] The fact that the last mentioned limitation is contained in a separate sentence does not mean, in my view, that it should be treated any differently to a limitation found in one of the preceding paragraphs. All that it means is that if a contractor or sub-contractor within paragraph (c), or indeed a supplier within paragraph (d), is correctly categorised as a "consultant", there is a further limitation with respect to the risk the subject of the insurance with respect to that insured party. If the limitation of risk in the proviso was expressed as being an exclusion of liability with respect to personal injury there would, in my view, be little doubt that such limitation did not affect the fact that the contractor-consultant was caught by the definition of the "the Insured". Such a party would clearly be an Insured though there was some, not insignificant, limitation on the risks the subject of the insurance. I suspect that a lot of the difficulty in the present case arises from the fact that an exclusion of losses arising "in respect of such consultants' professional duty of care to other persons and/or parties included in this definition" means that much (perhaps almost all) potential liability is excluded. In the course of argument it was suggested that any residual liability could only be to an officious bystander (farmer Brown) or some other person on site who suffered personal injury or property damage as a result of negligence of the contractor-consultant. But the fact that the extent of risk covered by the policy is in small compass cannot mean that the party described as an "Insured" loses that character simply because liability of the insurer is so limited. There is no difference, in principle, in my view, between that situation and that where, as noted above, the exclusion was of personal injury damage.

[39] The definition of who is an "Insured" is not concerned with the extent of the interest insured, but rather with who is an insured. Certainly as long as there is some liability insured against the definition operates to encompass the party described as an "Insured". For purposes of the policy the term is not limited to a

person the insurer is obliged to indemnify in the particular circumstances which have arisen.

[40] Given that the definition is one which is said to apply for purposes of the policy it must be adopted throughout (particularly where the reference is to "the Insured") unless the context clearly indicates otherwise. I acknowledge that there might be a context where the use of the expression "the Insured" could only relate to a situation where the policy operated to actually insure that party with respect to an identifiable loss. But unless the context demanded that such an interpretation be adopted, the definition in the policy must be applied; that is, unless the context clearly demands the adoption of some other interpretation the expression "the Insured" means any party caught by the definition provided such party had the right to claim indemnity pursuant to the policy with respect to some loss.

[41] It is against that background that one must consider the subrogation clause quoted above. The first thing to note is that it really deals with two matters; firstly, the insurer's right of subrogation, and secondly, the insurer's waiver of certain rights which it might otherwise have. It is clear because of the reference in (d)(i) to "paragraph (a) of The Insured definition herein" that the provision in question is to be read with the definition of "The Insured" found in the Schedule and quoted above. It is equally clear that the consequence of (d)(ii) is that the waiver applies to insured parties not named in paragraph (a) of the definition of "the Insured".

[42] An insurer's right to subrogation can be specified or modified by the terms of the contract of insurance. Here, by operation of paragraph (a) of the subrogation provision the insurer's right arises upon payment "of any claim" under the policy. It follows that, at least so far as this policy is concerned, an insured's claim does not have to be paid in full before the insurer's right to subrogation arises.

[43] Further, given the state of the pleadings, this was a case where the insurer was exercising rights of subrogation because of the payment of $418,716. The fact that that was $40,890.65 less than the actual amount of the loss sustained by the appellants is immaterial. If the only relevant provision was paragraph (a) of the subrogation clause then it could be said that the insurer was entitled to be subrogated to all the rights and remedies of the appellants with respect to the claim paid to the extent of $418,716. But it is paragraphs (c) and (d) of that clause which are of critical importance for present purposes.

[44] If A and B were each insured under the same policy of insurance with respect to a loss, it would be meaningless for the insurer to think in terms of subrogation with respect to a claim against B consequent upon paying out a claim made by A. B would be entitled, if such a claim was made, to say that the insurer was obliged to indemnify it with respect to the loss. Paragraph (c) in the clause is therefore of no practical effect (if not meaningless) in the situation where both parties were insured against the same loss. When the clause speaks of not exercising any rights of subrogation "against any other Insured(s)" it must realistically be referring to a situation where the "Insured" is not insured by the policy with respect to the particular loss in question. Paragraph (c) can only have operation where, as is the situation here, the respondent is caught by the expression "the Insured" but the loss in question is one in respect of which it is not covered by the policy. It would

follow that the insurer is not entitled to bring this action against the respondent relying on the principle of subrogation.

[45] At first blush that may be thought to be rather unusual, but one can see reasons why the large number of parties affected by a works undertaking such as involved here and an insurer might consider that such a position had commercial advantages (cf *Petrofina (UK) Ltd v Magnaload Ltd* (1984) QB 127 at 136).

[46] I now turn to consider paragraph (d). As noted above an insurer's rights to subrogation are regulated by contract, and an insurer may by the contract of insurance waive any rights and remedies to which it may be entitled by subrogation. Here it has done so to at least some extent. The critical waiver for present purposes is that found in sub paragraph (ii). For the reasons given above I am satisfied that the respondent is an "Insured … described by this Policy". The only issue can be whether or not the expression "Insured" in paragraph (d)(ii) means something other than a party caught by the definition of "the Insured" appearing in the Schedule. The use of the phrase "described by this Policy" indicates to my mind that the reference is to that definition, and there is no basis for concluding that the expression "Insured" in paragraph (d)(ii) has some other meaning and is limited to an insured with respect to the loss alleged to give rise to the insurer's right of subrogation.

[47] To adopt the phraseology of senior counsel for the respondent, "if the waiver of subrogation is commensurate only with cover, all you are doing is stating the general law position." The position under paragraph (d) is essentially the same as that under paragraph (c); if the party against whom the insurer seeks to enforce rights of subrogation is insured under the policy the exercise of the right is pointless. The waiver must extend to parties described in the definition as "Insured" even though not issued against the particular loss in question.

[48] In the circumstances I do not see any need to discuss the authorities at length. I agree with Pincus JA that the learned trial judge was correct in not applying the reasoning in *National Oilwell (UK) Ltd v Davy Offshore Ltd* (1993) 2 Lloyds Rep 582 to the circumstances which exist here.

[49] Pincus JA has also analysed briefly *Marathon Oil Company v Mid-Continent Underwriters* 786 F 2d 1301 (1986), *Wiley v Offshore Painting Contractors Inc* 711 F 2d 602 (1983), and 716 F 2d 256 (1983), *Agip Petroleum Co Inc v Gulf Island Fabrication Inc* 920 F Supp 1318 (1996), and *Woodside Petroleum Development Pty Ltd v H & R-E and W Pty Ltd* (1999) 20 WAR 380. Those cases demonstrate that problems such as those here are to be resolved by construing the policy of insurance in question and applying the terms thereof to the proven facts. Those cases demonstrate that clauses providing for waiver of subrogation rights should be given their ordinary meaning and should not be read down to achieve what may be regarded as a more acceptable commercial result. I agree with Pincus JA that "in determining the scope of a clause waiving subrogation rights, it would seem sounder, as a matter of policy, to favour a construction enhancing, rather than restricting, the scope of the waiver."

[50] Provided the respondent came within the definition of an "Insured" for purposes of the subrogation clause here, those cases indicate that the clause, properly construed,

would result in a conclusion that there had been a waiver by the insurer of relevant rights with respect to the respondent.

[51] Thus one comes back to the critical question whether or not the respondent is an "Insured" for purposes of the subrogation clause. For the reasons given above I am of the view that, properly construed, the definition of "the Insured" encompasses the respondent because it was insured against some risks, albeit limited ones, by the contract of insurance. If the insurer wished the definition of "the Insured" to encompass only the parties described therein in so far as they were insured against a particular risk it would have been easy for the definition to say so in express terms. Rather, in my view, the definition has defined "the Insured" by naming and describing certain persons and parties as constituting "the Insured" even though in certain circumstances they were insured against fewer risks than other persons and parties named and described therein.

[52] There is, in my view, an advantage in construing the definition of "the Insured" as I have done. It leads to certainty; one knows clearly who is an "Insured". One is not left to await the happening of events (and perhaps the judicial unravelling of complicated facts) before being able to conclude whether or not a particular party described in the definition is an "Insured".

[53] It follows that in my opinion the appeal should be dismissed with costs.