SUPREME COURT OF QUEENSLAND

CITATION:	*Hamcor Pty Ltd & Anor v Marsh Pty Ltd & Anor* [2013] QCA 262
PARTIES:	**HAMCOR PTY LTD** ACN 010 141 429 (first appellant) **TERRENCE ARTHUR ARMSTRONG** (second appellant) **v** **MARSH PTY LTD** ABN 86 004 651 512 (first respondent) **OTAGO PTY LTD** ABN 90 010 161 501 (second respondent) **THE STATE OF QUEENSLAND** (not a party to the appeal)
FILE NO/S:	Appeal No 1887 of 2013 SC No 5764 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2013
JUDGES:	Margaret McMurdo P, Muir JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed, but only to the extent that:** **a. paragraph 1 of the order of 20 February 2013 is varied by deleting therefrom "and/or the ISR Policy referred to in paragraphs 50(b) and 51(h)" and "and/or the ISR Policy" and by deleting "paragraphs 37-43 and 43(d)" and substituting therefor "paragraphs 37-40 and 43(d)"; and** **b. paragraph 2 of such order is varied so that it reads as follows:** **"It is declared that the costs incurred by the Plaintiffs in remediating their own land in response to statutory notices and court orders, as**

pleaded in paragraphs 29 (and particularised) and 30 of the Further Amended Statement of Claim, were not capable of being the subject of indemnity under the renewed Primary Policy or the renewed Excess Policy referred to in paragraphs 37-40 and 43(d) of the Further Amended Statement of Claim."

2. The appellants pay the respondents' costs of the appeal unless the appellants apply for leave to make submissions as to costs within two days of the delivery of these reasons.

CATCHWORDS: INSURANCE – THE POLICY – PRINCIPLES OF CONSTRUCTION – where the appellants were required, by a notice issued pursuant to the *Environmental Protection Act* 1994 (Qld) and orders made in Planning and Environment Court proceedings, to remediate land contaminated following the application of water to a fire on the appellants' land – where the appellants contended that, had they been competently advised by the respondents, they would have been able to secure "the primary policy", "the excess policy" and "the ISR policy" – where the primary judge held that even if the appellants had been named in the primary policy, the excess policy or the ISR policy, the costs incurred by the appellants in remediating their own land in response to statutory notices and court orders were not capable of being the subject of indemnity under those policies – where the appellants submit that the primary judge erred in holding that, upon the proper construction of the primary policy, the indemnity for a claim for "liability to pay compensation" for pollution made against the insured contained an additional requirement that the compensation be paid by the insured to the claimant – where the appellants contend that, unlike damages, it is not an essential requirement of compensation that the compensation or recompense pass to the claimant – whether the primary judge erred in construing the phrase "liability to pay compensation" in the primary policy as requiring that such compensation be paid to the claimant

INSURANCE – THE POLICY – PRINCIPLES OF CONSTRUCTION – where clause 8.4 of the primary policy excludes from indemnity claims arising out of damage to the insured's own property – where clause 8.4 appears in section A public liability cover – where clause 10 of the primary policy incorporates the exclusions in section A into section B pollution liability "in so far as they can apply" – where the primary judge held that clause 8.4 applied to section B of the policy – where the appellants submit that clause 8.4 should be confined to section A public liability cover and not apply to section B pollution liability – where the appellants contend that the primary judge's construction would lead to improbable results and fails to provide any

work for the words "in so far as they can apply" in clause 10 – whether the primary judge erred in holding that, upon the proper construction of the primary policy, the exclusion in clause 8.4 applied to section B of the policy

INSURANCE – THE POLICY – PRINCIPLES OF CONSTRUCTION – where the primary judge held that, by the operation of the exclusion contained in clause 8.4 of the primary policy, section B of the primary policy "provides pollution cover for damage to property of third parties but not to the property of the insured" – where clause 8.4 excludes "claims arising out of" damage to the property of the insured – where the appellants contend that the source of the pollution is excluded not the identity of the owner of the property where the consequent pollution damage occurred – whether the primary judge erred in concluding that clause 8.4 of the primary policy excludes claims for damage to the property of the insured

INSURANCE – THE POLICY – PRINCIPLES OF CONSTRUCTION – where the appellants alleged that the respondents had breached their duty of care by failing to identify that an ISR policy, the terms of which were detailed in their further amended statement of claim, would have been reasonably available – where paragraph (f)(i) of the ISR policy provided indemnity in respect of costs and expenses necessarily and reasonably incurred in respect of "the removal, storage and/or disposal of debris" – where the primary judge held that the term "debris" was inconsistent with an indemnity for the costs of remediation of polluted property – where the appellants contend that the term "debris" is not inconsistent with an indemnity for the costs of remediation of polluted property – where the appellants contend that the exclusion in relation to the liability incurred by the insured as a consequence of pollution of any kind does not apply to paragraph (f)(i) of the ISR policy – whether the primary judge erred in holding that the costs incurred by the appellants in remediating the premises in relation to the pollution were not capable of being the subject of indemnity under the identified ISR policy

Uniform Civil Procedure Rules 1999 (Qld), r 483

Australian Casualty Co Ltd v Federico (1986) 160 CLR 513; [1986] HCA 32, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
Dornoch Ltd v Royal and Sun Alliance Insurance Plc [2005] 1 All ER (Comm) 590; [2005] EWCA Civ 238, cited
Hamcor Pty Ltd and Anor v The State of Queensland and Ors [2013] QSC 9, related
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65, cited

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited
Western Export Services Inc v Jireh International Pty Ltd (2011) 86 ALJR 1; [2011] HCA 45, cited

COUNSEL: P J Dunning QC, with P W Telford, for the appellants
I Faulkner SC for the respondents

SOLICITORS: Everingham Lawyers for the appellants
Thynne & Macartney for the respondents

[1] **MARGARET McMURDO P**: I agree with Muir JA's reasons and orders.

[2] **MUIR JA: Introduction** The appellants appeal against orders made on 20 February 2013 by the primary judge in separately determining issues in the proceedings pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR). It is unnecessary for present purposes to identify the full extent of the issues determined by the primary judge as the resolution of this appeal depends on the construction of policies of insurance, referred to in the primary judge's reasons for judgment and in argument as "the primary policy", "the excess policy" and a form of policy referred to as "the ISR policy", which the appellants contended they would have been advised was available to them had they been competently advised by the respondents.

[3] The appellants owned land at Narangba on which another company, Binary Industries Pty Ltd, of which the second appellant was a director, operated a chemical manufacturing plant. The primary judge explained other relevant background facts as follows:[1]

> "[6] On 25 August 2005, the plant building and its contents were destroyed by fire. Queensland Fire and Rescue Services attended and brought the fire under control. In the course of doing so, large quantities of water became contaminated with chemicals. This water overflowed bungs and dams on the land, and escaped to surrounding State-owned properties and a creek, severely contaminating these places. A large quantity of contaminated water also remained on the land.
>
> [7] By notice dated 20 October 2005, issued pursuant to the provisions of the *Environmental Protection Act* 1994 ('the Act'), the Environmental Protection Agency ('the EPA') required the [appellants], as owners of the land 'to conduct or commission work to remediate the contaminated land ... and nearby affected land'…
>
> [8] By originating application filed in the Planning and Environment Court on 25 October 2006, the EPA successfully applied for orders requiring the [appellants] to remove the contaminated substances and clean relevant structures. As part of these requirements the [appellants] were required to use suitably qualified professionals and undertake appropriate investigations and precautions.

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1 *Hamcor Pty Ltd and Anor v The State of Queensland and Ors* [2013] QSC 9 at 2–3.

> [9] Between 25 October 2006 and the present time, the [appellants] expended well in excess of $10 million in performing the remediation works …
>
> [13] The [appellants] claim, as against the [respondents], that they owed them a duty of care in obtaining appropriate policies of insurance, which duty was breached, and that but for this breach of duty … the [appellants] would have been able to secure, for their benefit, appropriate insurance cover for pollution and environmental risks associated with the land in an amount of not less than $10 million by either becoming insured or interested parties on specified policies.
>
> [14] The [appellants] allege they have suffered damage as a consequence of the [respondents'] negligence in that they had no insurance cover for liability to pay compensation arising from pollution and environmental risks associated with the land, and have become liable to pay compensation, being the costs to remediate their own land pursuant to the EPA's notice and subsequent Court order.
>
> [15] The [appellants] claim the steps they were required to take pursuant to the statutory notices issued by the EPA and the Court order, and the consequent costs incurred by them in taking those steps, constituted an event which would properly fall within the insuring clauses of the specified policies."

The relevant policies of insurance

[4] The primary policy relevantly provided:

> "NOTE: This is a 'Claims Made' Policy with defence costs included in the Indemnity Limits …
>
> BUSINESS: All activities of the Insured …
>
> including:
>
> (i) chemical manufacturer …
>
> INDEMNITY LIMITS: AUD 2,000,000 each and every claim and in the aggregate separately in respect of Products Liability and Pollution Liability …
>
> 1. OPERATIVE CLAUSE
>
> **The Insurers will indemnify the Insured against their liability to pay compensation for and/or arising out of** Injury and/or **Damage** (including claimants' costs, fees and expenses), occurring within the Territorial Limits …
>
> The indemnity only applies to claims first made against the Insured during the Period of Insurance arising out of the Business specified in the Schedule.

For the purpose of determining the indemnity granted: –

1.1 'Injury' means death, bodily injury, illness or disease of or to any person

1.2 'Damage' means loss of possession or control of or actual damage to tangible property

1.3 'Pollution' means pollution or contamination of the atmosphere or of any water, land or other tangible property …

SECTION A – PUBLIC LIABILITY

7. SECTION A – INDEMNITY

The Insured are indemnified by this Section in accordance with the Operative Clause but not against claims for and/or arising out of:

(a) Pollution

(b) any Product.

8. SECTION A – EXCLUSIONS

This Section does not cover liability for claims arising out of: …

8.4 damage to property owned [by], leased or hired or under hire purchase or on loan to the Insured or otherwise in the Insured's care, custody or control other than:

8.4.1 premises (or the contents thereof) temporarily occupied by the Insured for work therein, or other property temporarily in the Insured's possession for work thereon (but no indemnity is granted for damage to that part of the property on which the Insured is working and which arises out of such work)

8.4.2 employees' and visitors' clothing and personal effects

8.4.3 premises tenanted by the Insured to the extent that the Insured would be held liable in the absence of any specific agreement.

SECTION B – POLLUTION LIABILITY

9. SECTION B – INDEMNITY

The Insured are indemnified by this Section in accordance with the Operative Clause against claims arising out of Pollution.

10. SECTION B – EXCLUSIONS

This Section is subject to the Exclusions to Section A in so far as they can apply, and also does not cover liability for:

10.1 claims arising out of or in connection with any Product

10.2 Injury or Damage caused by seepage, pollution or contamination, provided always that this exclusion shall not apply where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the Period of Insurance

10.3 the cost of removing, nullifying or cleaning-up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the Period of Insurance

10.4 fines, penalties, punitive or exemplary damages

(Nothing contained in exclusions 10.2, 10.3, and 10.4 shall extend this insurance to cover any liability which would not have been covered under this insurance had these exclusions not have been applied)

10.5 Pollution which was the direct result of the Insured failing to take reasonable precautions to prevent such Pollution." (emphasis added)

[5] No criticism was made of paragraphs [24] and [25] of the primary judge's reasons which state:[2]

"[24] The excess policy referred back to the primary policy. Its limiting clause provided that liability only attached after the primary insurers had paid or been held liable to pay the full amount of their respective liability. The underwriters were then only liable for a further amount in excess of the primary limit up to the excess limit.

[25] The insuring clause of the excess policy provided:–

'Subject to the exclusions, conditions and other terms of this policy, the underwriters agree to indemnify the assured in respect of their liability to pay compensation (including claimants' costs, fees and expenses) for claims first made against the assured during the period of insurance for and/or arising out of injury and/or damage and occurring within the territorial limits specified in the schedule all as covered by and fully defined in the policy issued by the "primary insurers" stated in the schedule.'"

The ISR policy

[6] This instrument provided:

"Subject to the liability of the Insurer(s) not being increased beyond the Limit(s) of Liability already stated herein, the Insurer(s) will also indemnify the Insured for: …

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2 *Hamcor Pty Ltd and Anor v The State of Queensland and Ors* [2013] QSC 9 at 5–6.

(f) costs and expenses necessarily and reasonably incurred in respect of:

(i) the removal, storage and/or disposal of debris or the demolition, dismantling, shoring up, propping, underpinning or other temporary repairs consequent upon damage to property insured by this Policy and occasioned by a peril insured against;

(ii) the Insured's legal liability in respect of removal, storage and/or disposal of debris, notwithstanding Excluded Peril 8 in relation to premises, roadways, services, railway or waterways of others, consequent upon damage to the Property Insured by a peril hereby insured against, for such costs together with the cost of cleaning provided that such liability was not assumed by the Insured under an agreement entered into after the commencement of the Period of Insurance or any renewal thereof unless liability would have attached in the absence of such agreement.

Provided that the insurance under this section does not extend to any liability that the Insured may incur as a consequence of pollution of any kind;

(iii) the demolition and removal of any property belonging to the Insured which is no longer useful for the purpose it was intended, providing such demolition and removal is necessary for the purpose of the reinstatement or replacement of Property Insured under this section and is consequent upon damage to the Property Insured by a peril hereby insured against;" (emphasis added)

[7] It is now convenient to turn to the grounds of appeal.

Ground 1 - The learned primary judge erred in holding that upon the proper construction of the Primary Policy the indemnity for a claim for liability to pay compensation for pollution made against the insured contained an additional requirement that the claimant seek that such compensation be paid by the insured to it. In so doing the learned primary judge misapprehended the significance of an indemnity for liability to pay compensation rather than damages. Thus the learned primary judge correctly stated at Reasons [46] and [51] that the policy was concerned with claims for compensation made against the insured, but misapplied that proposition in holding also that the claimant seek that that compensation be paid to it, when the policy contained no such restriction

[8] In their outline of submissions, the appellants stated, and it may be accepted, that it was uncontroversial that:

1. the water applied to the fire on the land, which caused the land to become contaminated and require remediation, was undoubtedly "pollution" within the definition of that expression in clause 1.3 of the Primary Policy; and

2. the issue of the *Environmental Protection Act* notice by the regulatory authority to the appellants and the orders made in the Planning and Environment Court proceedings were each a "liability" of the appellants.

> "Liability" is defined as "being answerable, chargeable or responsible; under legal obligation".[3] It is also defined as "the condition of being liable or answerable by law or equity", with "liable" in turn being defined as "bound or obliged by law or equity; answerable (*for*, also *to*); legally subject or amenable *to* … exposed or subjected to or likely to suffer from (something prejudicial)".[4]

[9] It was submitted, and I accept, that whether the primary policy responds in the circumstances under consideration turns on the liability of the insured to "pay compensation". Reference was made to dictionary definitions defining "compensation" variously as "making things equivalent, satisfying or making amends"[5] and to "make up for … redress, make amends, make good … nullify … neutralise".[6]

[10] The appellants' argued that it is not an essential requirement of compensation, unlike damages, that the compensation or recompense pass to the claimant or plaintiff. The focus is on what the compensator (who may or may not be a wrongdoer) must pay or provide to restore a state of affairs to what they were prior to the event giving rise to the obligation to compensate. The *Environmental Protection Act* notice and the court orders rendered the appellants liable in respect of the pollution and what was spent, except in the employment of the appellants' own workforce, to comply with the notice and the court orders constituted "compensation".

Consideration

[11] A policy of insurance is a commercial contract and should be given a businesslike interpretation.[7] The ordinary rules of contractual interpretation apply.[8] The construction of policies is to be determined by what a reasonable person in the position of the parties to the policies would have understood by the language in which the parties expressed their agreement:[9]

> "That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." (citations omitted)

[12] In *Australian Casualty Co Ltd v Federico*,[10] Gibbs CJ, speaking of policies of insurance, said:

> "As in the case of any other commercial contract, a court may depart from the strictly literal meaning of a particular expression to place upon it an alternative construction which is more reasonable and more in accord with the probable intention of the parties if the words will bear that construction ... Further 'the trend is, if anything, to adopt a liberal interpretation in favour of the assured, so far as the ordinary and natural meaning of the words used by the insurers permits this to be done'."

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3 Nygh & Butt (eds), *Australian Legal Dictionary*, Butterworths, 1997 at 687.
4 Friedrichsen, *The Shorter Oxford English Dictionary*, Clarendon Press, 1992 at 1204–1205.
5 *The Dictionary of English Law*, 2nd ed, Sweet & Maxwell, 1965.
6 Statsky, *West's Legal Thesaurus/Dictionary*, Special Deluxe Edition, West Publishing Company.
7 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 per Gleeson CJ.
8 *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520, cited with approval by Callinan J in *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 642.
9 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 176.
10 (1986) 160 CLR 513 at 520.

[13] Although evidence of surrounding circumstances is admissible to assist in the interpretation of a contract, it is not admissible to contradict the language of a contract where it has a plain meaning.[11]

[14] The appellants' proposed construction fails to have due regard to the language of the operative clause. The "insured" are to be indemnified "against their liability to pay compensation". The appellants' argument accepts that "liability" means being under a legal obligation of some form or another. That obligation is of a particular kind. It is not a liability to comply with court orders or other statutory requirements regarding the land; it is a liability to "pay compensation". Those words, necessarily, contemplate the recompensing of a third party in respect of the insured's liability to that third party or otherwise by legal compulsion. The appellants sought to overcome this difficulty by asserting that, where remediation work was done, there was a liability to pay or recompense the contractors who performed the work. This, it was said, was a "liability to pay compensation". Such a construction gives an unnecessarily contrived, not to say improbable, meaning to the word "compensation". The words "liability to pay compensation" have their ordinary, everyday meaning.

Ground 2 – The learned primary judge erred in holding that upon the proper construction of the Primary Policy the exclusion in Clause 8.4 applied to Section B of the policy, when upon its proper construction Clause 8.4 could not apply to the pollution liability cover contained in Section B

[15] The primary judge's reasons relevant to this ground are:[12]

> "[47] Clause 8.4 of the primary policy excludes from indemnity claims arising out of damage to the insured's own property. Whilst that exclusion appears in Section A, which relates to public liability, clause 10 of the primary policy incorporates the exclusions in Section A of the policy into Section B, which relates to pollution liability, 'insofar as they can apply'.
>
> [48] There is no reason why that designated exclusion cannot, and should not, apply to claims for damages to the [appellants'] own property caused by pollution. It is not inconsistent with the terms of the exclusions in clauses 10.2 or 10.3. This is particularly so having regard to the words which appear after clause 10.4, namely, that there is nothing in these exclusions which 'shall extend this insurance to cover any liability which would not have been covered' had the exclusions not been applied.
>
> [49] Further, the incorporation of the exclusions in Section A does not render nugatory the pollution cover provided in Section B. Section B of the primary policy provides pollution cover for damage to property of third parties but not to the property of the insured.

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11 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352, reaffirmed in *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1 at [3]–[5].

12 *Hamcor Pty Ltd and Anor v The State of Queensland and Ors* [2013] QSC 9 at 9.

> [50] The exclusion of claims arising out of damage to property owned by the insured is entirely consistent with the intention of the policy being that it not include coverage in respect of any claims for compensation arising out of damage to the insured's own property."

[16] The appellants argued that the primary judge's construction fails to provide any work for the words "in so far as they can apply" in clause 10 of section B of the primary policy. It was contended that if the exclusion in clause 8.4 applied, it would lead to improbable results. For example, were a truck to run into the insured's tank of chemicals on-site and cause the chemicals to spill both on-site and onto adjoining land, there would undoubtedly be a liability for pollution that arose out of the damage to the insured's property (that is, the tank). On the primary judge's construction, the liability for the pollution on the neighbour's allotment would be excluded. The "pollution cover would count for nothing because damage to the insured's property would so often be the cause of such pollution".

[17] The solution to the problem, according to the appellants' argument, is to confine clause 8.4 to the section A public liability cover and not apply it to the pollution cover detailed in section B. Reliance was placed on the principle that "a party who relies on a clause exempting him from liability can only do so if the words of the clause are clear on a fair construction of the clause".[13]

[18] Section B commences by stating under the heading "Section B – Indemnity":

> "The Insured are indemnified by this Section in accordance with the Operative Clause against claims arising out of Pollution."

[19] As discussed earlier, the indemnity provided by that clause is against a liability to pay compensation to third parties.

[20] The exclusions to section A apply to section B only "in so far as they can apply". Clause 8.4 of section A can apply. Its application does not render the protection afforded by the operative clause nugatory. As the primary judge noted, the exclusion effected by clause 8.4 is not inconsistent with the exclusions in 10.2 and 10.3, particularly when read together with the words in parenthesis after clause 10.4. The exclusions in each of 8.4, 10.2 and 10.3 are all in respect of **liability** for specified matters.

Ground 3 - The learned primary judge erred in concluding, in particular at Reasons [49], that by the operation of the exclusion contained in Clause 8.4 of the Primary Policy that policy " ... provides pollution cover for damage to property of third parties but not to the property of the insured". By the terms of the Primary Policy the peril excluded was liability for pollution " ... arising out of ... damage to property owned ... [by] the insured ...". That is, the source of the pollution is what is excluded, not the identity of the owner of the property where the consequent pollution damage occurred

[21] Section B provides an indemnity "in accordance with the Operative Clause against claims arising out of Pollution". The operative clause restricts the indemnity to the insurers' "liability to pay compensation for and/or arising out of … Damage". As

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13 *Dornoch Ltd v Royal and Sun Alliance Insurance Plc* [2005] 1 All ER (Comm) 590 at [19].

stated above, this contemplates the payment of compensation to a third party in consequence of a liability to pay compensation to that party.

[22] By virtue of the application of clause 8.4, "claims arising out of … damage" to the property of the insured are also excluded. Consequently, the statement in the second sentence of paragraph [49] of the reasons, of which the appellants complain, is not entirely accurate. This conclusion, however, does not affect the validity of the primary judge's finding that the exclusion in clause 8.4 applies and nor does it affect the critical finding as to the construction of the operative clause.

Ground 4 - The learned trial judge erred in holding that the expression "the removal ... and/or disposal of debris" in the ISR Policy was "inconsistent with indemnity being given for the costs of remediation of pollution in respect of the insured's own property"; Reasons [54]. That expression was concerned with, relevantly, indemnity for the removal and disposal of material of a certain kind, rather than the identity of the owner of the property where it was located

Ground 5 - The learned trial judge erred in holding that upon the proper construction of the ISR Policy the exclusion in relation to liability of the insured as a consequence of pollution of any kind applied to the indemnity in respect of the removal and/or disposal of debris

[23] It is convenient to deal with these grounds together. In paragraph 51(h) of their further amended statement of claim, the appellants alleged that the respondents had breached their duty of care to the appellants by, amongst other things:

> "… failing to identify, adequately or at all, that an ISR Policy would have been reasonably available and appropriate to [the appellants] … on terms the same or similar to the following: …"

There was then set out: "Subject to the liability of the Insurer(s) not being increased beyond the Limit(s) of Liability already stated herein, the Insurer(s) will also indemnify the Insured for: …" Disregarding repetition and an error in setting out, section 1(f) of the ISR policy, quoted in paragraph [6] above, was then quoted.

[24] On 20 February 2013, the primary judge gave the answer and made the declaration below:

> "1. In respect of the Question:
>
> In the event that the [appellants] had been named as insured or as interested parties in the renewed Primary Policy and/or the renewed Excess Policy referred to in paragraphs 37-43 and 43(d), and/or the ISR Policy referred to in paragraphs 50(b) and 51(h), of the Further Amended Statement of Claim, were the costs incurred and pleaded in paragraphs 29 (as particularised) and 30 of the Further Amended Statement of Claim capable of being the subject of indemnity under the renewed Primary Policy and/or the renewed Excess Policy and/or the ISR Policy?
>
> The Answer is: No
>
> 2. It is declared that the costs incurred by the [appellants] in remediating their own land in response to statutory notices and

> court orders, as pleaded in paragraphs 29 (and particularised) and 30 of the Further Amended Statement of Claim, were not capable of being the subject of indemnity under the renewed Primary Policy, the renewed Excess Policy or the ISR Policy referred to in paragraph 1 above."

[25] The costs "pleaded in paragraphs 29 (as particularised) and 30 of the Further Amended Statement of Claim" were costs incurred by the appellants as respondents in Planning and Environment Court proceedings arising out of the subject pollution and costs the appellants "have paid and will pay in remediating the Premises in relation to pollution from runoff of the water used to the fight the fire". These costs included engaging environmental consultants and contractors and complying with orders made and agreements entered into in the Planning and Environment Court proceedings.

[26] The "Premises" were defined in paragraph 1 as including the land owned by the appellants and the industrial buildings erected on it. Paragraph 29 of the amended statement of claim alleged that "the bunds and dams on the Premises were unable to contain the volume of water used by the [Queensland Fire and Rescue Service] in fighting the Fire" and that the resulting water run off contaminated the land "and entered the environment surrounding the Premises".

[27] The primary judge relevantly found:[14]

> "[53] Those costs were also not capable of being the subject of indemnity under the ISR policy identified by the [appellants].
>
> [54] That policy provided indemnity in respect of costs and expenses necessarily and reasonably incurred in respect of 'the removal, storage and/or disposal of debris'. The use of the term 'debris' is consistent with a requirement that any indemnity relate to the cost of the removal storage and/or disposal of accumulated physical items. It is inconsistent with indemnity being given for the costs of remediation of pollution in respect of the insured's own property.
>
> [55] This interpretation is supported by the express exclusion contained within the pleaded clause that the insurance 'does not extend to any liability that the Insured may incur as a consequence of pollution of any kind'. The position of those words is consistent with the intention of the parties being that clauses (f)(i) and (f)(ii) of the policy not extend to any liability the insured may incur as a consequence of pollution."

[28] I accept the appellants' contention that the use of the term "debris" is not inconsistent with an indemnity for the costs of remediation of polluted property. The word "debris" is capable of describing various forms of residue from the destruction by fire of premises: plant and goods such as ash; charred, melted, or heat damaged materials; and water damaged materials.

[29] The principal difficulty facing the appellants is the proviso which appears under paragraph (f)(ii). The appellants contended that it applies only to sub-paragraph (ii)

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14 *Hamcor Pty Ltd and Anor v The State of Queensland and Ors* [2013] QSC 9 at [53]–[55].

because that is the only relevant provision in section 1 of the policy, which "speaks of an indemnity against a 'liability'". The setting out of paragraph (f) suggests that the proviso applies to sub-paragraphs (i) and (ii). The words "the insurance **under this section**", however, on their face, indicate that the proviso was intended to apply not merely to paragraph (f) or, as the appellants contended, paragraph (f)(ii), but to the whole of section 1 or, at least, to sub-paragraphs (a) to (g) listed under the heading "The Indemnity" in Section 1. The words "this section" are quite inapt if the proviso was intended to apply only to a paragraph or sub-paragraph within section 1.

[30] The word "section" is used in the heading "Section 1 – Material Loss or Damage" and in the introductory words under the subheading "The Indemnity". It is next used on page 8 of the policy in the heading "Memoranda to Section 1".

[31] Exclusions from the ambit of the policy are dealt with on pages 20–23 of the policy. Exclusions include property whilst in transit, money in certain circumstances, jewellery, locomotive spare parts and, of particular relevance:

> "8. land, provided that this exclusion shall not apply to structural improvements on or in the land if such structural improvements are not otherwise excluded in this Policy.
>
> 9. … dams and reservoirs (other than tanks) and their contents."

[32] The next category of exclusions is "Perils Exclusions". It is provided under that heading that, "The Insurer(s) shall not be liable under Sections 1 and/or 2 in respect of". There is then a long list of exclusions including loss, destruction or damage to the property insured resulting from, to put it broadly, war, revolution, confiscation, radioactivity, flood, termites, or other insects, and error or omission in design.

[33] Paragraphs (a) to (g) inclusive, under the indemnity heading of section 1, are all concerned with the identification of specific instances of costs, expenses or outgoings and it would be surprising to find a general exclusion from liability inserted at the foot of one of paragraphs (a) to (g) rather than under the heading "Exclusions to All Sections" and, in particular, in the "Perils Exclusions" part of the policy.

[34] I do not find it necessary or desirable to answer this question of construction. There is a degree of artificiality in attempting to construe a document which has not, in fact, been entered into but which, as pleaded, is merely a part of a policy of insurance and a small part at that. In construing part of a policy of insurance, regard must normally be had to other parts of the instrument, particularly related parts. I accept that, in this case, the parties argued the matter before the primary judge on the premise that the pleaded provisions were part of an identified document, the ISR policy. A standard form wording for a mark IV ISR policy was attached to the appellants' outline of submissions before the primary judge.

[35] The determination of the questions under consideration, entirely by reference to a particular form of ISR policy, arguably lacks utility and is hypothetical in nature. One of the breaches of duty alleged in paragraph 51 of the appellants' further amended statement of claim is the more general breach of failing to secure "insurance cover, including cover for liability to pay compensation arising out of pollution and/or environmental liability". If the appellants failed to succeed on the

paragraph 51(h) allegation, set out in paragraph [23] above, it would be open to them to attempt to prove that, had they been properly advised, some other form of policy would have been available and entered into.

[36] There are other difficulties. The answer to question 1 and the declaration appear to me to be too absolute in their terms in relation to the possible application of the ISR. Even if the proviso were treated as applicable to the whole of section 1, it would not follow, necessarily, that the costs and expenses referred to in paragraph (f)(i) would not be covered. The proviso relates only to "**liability** that the Insured may incur as a consequence of pollution". That may not extend to activities undertaken as a result of the fire which are unaffected by any such liability incurred as a consequence of pollution. There may also be a question about whether the proviso removes from the ambit of section 1 work which the insured would have undertaken as a consequence of damage to the property insured irrespective of any liability "the Insured may incur as a consequence of pollution". The meaning of those words is not entirely clear. Plainly, they are not synonymous with an exclusion covering all loss and damage, costs and expenses arising from pollution.

[37] The respondents relied on the exclusion in the ISR policy of "land" and "dams". Those exclusions, however, could only provide a partial exclusion of the appellants' claims which extend beyond loss and damage to the land and dams. The "land" exclusion does not apply to "structural improvements". The exclusion of "dams … and their contents" is limited, like the land exclusion, to "physical loss, destruction of or damage to [the subject property] or loss under Section 2 resulting therefrom".

[38] The respondents contended that the ISR policy contemplates the completion of a statement of "limits of liability" and "declared values". It was argued that where the appellants' land, buildings and contents were completely destroyed by fire, "that event would enable a first party property claim by the Appellants under the ISR Policy for indemnity of the full declared value of the property destroyed, pursuant to the Section 1 indemnity". Paragraph (f), of section 1, is a qualified indemnity and cannot be activated if the insurer has already indemnified the appellant to the limit of liability. It was submitted that, on the facts pleaded, the policy could not respond. This contention provides a further illustration of the problems which an attempt to determine matters such as those under consideration on a partly hypothetical basis can give rise.

Conclusion

[39] For the above reasons, I would order that the appeal be allowed, but only to the extent that:

(a) paragraph 1 of the order of 20 February 2013 is varied by deleting therefrom "and/or the ISR Policy referred to in paragraphs 50(b) and 51(h)" and "and/or the ISR Policy" and by deleting "paragraphs 37-43 and 43(d)" and substituting therefor "paragraphs 37-40 and 43(d)"; and

(b) paragraph 2 of such order is varied so that it reads as follows:

> "It is declared that the costs incurred by the Plaintiffs in remediating their own land in response to statutory notices and court orders, as pleaded in paragraphs 29 (and particularised) and 30 of the Further Amended Statement of Claim, were not capable of being the subject

> of indemnity under the renewed Primary Policy or the renewed Excess Policy referred to in paragraphs 37-40 and 43(d) of the Further Amended Statement of Claim."

[40] As the respondents have been substantially successful, I would order that the appellants pay the respondents' costs of the appeal unless the appellants apply for leave to make submissions as to costs within two days of the delivery of these reasons.

[41] **ATKINSON J:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.