IN THE SUPREME COURT OF QUEENSLAND No. 3150 of 1998

IN THE MATTER of an Application pursuant to Order 64 rule 1A of the *Rules of the Supreme Court*

- and -

IN THE MATTER of the construction of an insurance policy between FAI GENERAL INSURANCE COMPANY LIMITED and FLETCHER CONSTRUCTION AUSTRALIA LIMITED

**CATCHWORDS:**

**Insurance - interpretation of policy - exclusion clause - excepting injury to employees of "the insured" - several insured.**

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|---|---|
| Counsel: | Mr R Morton for applicant. |
| | Mr M Bland for respondent. |
| Solicitors: | Bain Gasteen for applicant. |
| | Jensen & Co. for respondent. |
| Hearing Date: | 18 June 1998. |

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JUDGMENT - WHITE J

Delivered 25 June 1998

The applicant, Workcover Queensland ("Workcover"), seeks a declaration that Workcover and the respondent, FAI General Insurance Company Limited ("FAI"), are each equally obliged to indemnify Fletcher Construction Australia Limited ("Fletcher") against any amount it may be ordered

to pay to Poul Jan Poulsen in an action commenced by him in the Supreme Court in Writ No. 7085 of 1996 for damages for personal injury sustained by him in the course of his employment. The equal obligation arises if the policy of insurance in respect of which FAI is the insurer is construed to require FAI to indemnify Fletcher. That is because Workcover must indemnify Fletcher against Poulsen's claim by virtue of s.47 of the Workers' Compensation Act 1990 which extends a principal's cover to employees of sub-contractors.

The parties have agreed on a statement of facts for the purposes of hearing this summons.

On 14 May 1994 Poulsen:

- was employed by Richard Flanagan & Company Pty Ltd ("Flanagan");
- was not employed by Fletcher and did not have a contract of service with Fletcher;
- was injured in the course of his employment with Flanagan.

On that day Flanagan held a policy with the former Workers' Compensation Board of Queensland pursuant to the Workers' Compensation Act 1990 indemnifying Flanagan against any liability to Poulsen.

At the time that Poulsen sustained his injuries:

- Fletcher was the principal contractor undertaking renovation of the Treasury Casino site in Brisbane;
- Fletcher had sub-contracted part of the renovation work to Flanagan;
- Flanagan was "a contractor" and Fletcher "a principal" within the meaning of s.47 of the Workers' Compensation Act 1990.

Poulsen has sued, *inter alia*, Flanagan and Fletcher for injuries sustained by him in the course of his employment on the site. As mentioned Workcover (the successor to the Workers' Compensation Board of Queensland) is obliged to indemnify Fletcher against any liability it may have to Poulsen. Prior to 14 May 1994 Fletcher had effected a policy of insurance with FAI.

The question is a narrow one and is whether the phrase "the Insured" where it appears in cl.2(a) of the exclusions to the policy should be construed to exclude from coverage a claim against Fletcher arising out of injury to Poulsen who was employed by Flanagan, another insured under the policy. The following provisions in the policy are relevant for the consideration of this question:

> "The Insurer agrees (subject to the terms, Conditions, Exclusions, Definitions, Memoranda and other provisions contained herein or endorsed hereon) to indemnify the Insured in respect of all amounts which the Insured shall become legally liable to pay for:—
>
> (1) Personal Injury (as defined herein);
>
> ...
>
> arising directly or indirectly out of an occurrence in connection with the Insured's Business ..."
>
> "INSURED:
>
> Fletcher Construction Australia Limited (as contractor) and/or the Treasurer and Crown in Right in [sic] the State of Queensland (as owner); Jupiters Limited and subsidiary and associated companies (as permittee and developer); Conrad International Hotel Corporation and Associates; Australia and New Zealand Banking Group Limited and/or sub-contractors, suppliers and/or Principals of the insured all for their respective rights and interests including suppliers in respect of equipment/work provided or to be provided to Fletcher Construction Australia Limited."
>
> "EXCLUSIONS

This policy shall not apply to liability:—

...

2(a) for bodily injury sustained by any person arising out of and in the course of such person's employment by the Insured under a contract of service or apprenticeship with the Insured.

(b)..."

"DEFINITIONS

INSURED

Each of the following is an Insured to the extent set forth hereunder:—

(a) the corporation or other entities specified in the Schedule as the Insured;

(b) all subsidiary corporation or entities ... of the insured ...;

(c) any director, partner ...

...

There is no dispute that Poulsen suffered personal injury within the meaning of the policy and that injury arose directly out of an occurrence which was in connection with Fletcher's business within the limits of the policy and during the period of insurance. Accordingly Fletcher's liability to Poulsen is covered by the policy "subject to the terms, Conditions, Exclusions, Definitions, Memoranda and other provisions" in the policy. As appears from the statement of agreed facts Flanagan was a sub-contractor of Fletcher and fell within the definition of "Insured" within the terms of the policy.

Mr Morton for Workcover submits that in the exclusion clause "the Insured" in cl.2(a) must refer to an insured who makes a claim against the policy. Mr Bland for FAI contends that the expression should be construed to refer

to any of the persons identified in the Schedule under the heading "Insured". This construction, he submits, gives effect to the purpose of clause 2(a) which was designed to prevent overlap with the cover provided by Workcover.

The policy document should be read as a whole, apart from the ordinary canons of construction, because the governing clause specifically provides that the insurer's obligation is subject to all the terms etc. I mention this because Mr Bland submits that the construction of the particular words in cl.2(a) should not be coloured by other provisions in the policy but should be construed in the context of the clause itself, and although he referred to various observations of Sir Wilfred Greene MR in General Accident Fire & Life Assurance Corporation Limited v Midland Bank Limited [1940] 2 KB 388 at pp. 407,409,410 they do not displace the comment of the Master of the Rolls that a document must be read as a whole, at p. 406.

The insured specified in the Schedule are covered "for their respective rights and interests". What is expressly excluded from the coverage under the policy is liability for injury to the insured's employee. The arguments are, in my view, quite finely balanced, but the reference to "their respective rights and interests" suggests that the exclusion applies when the employer of the injured employee makes the claim. (It was not contended by Mr Bland that s.47(3) of the Workers' Compensation Act which declares that the principal (Fletcher) is the employer of every sub-contractor's employee operates outside the cover provided to an employer by the Workers' Compensation Board).

There are passages in General Accident which tend to support this approach. At p. 406 the Master of the Rolls said:

> "The description of the insured by name, followed by the words, "for their respective rights and interests," in my judgment, read in its natural sense, indicates that these three persons, having interests which it is not material to investigate for the purposes of the document, are

> minded to combine in one policy and each of them to obtain cover from the underwriters in respect of his right or interest, whatever it may be - and it may vary from time to time."

And at p. 408:

> "The printed words "the insured" must be construed and qualified by the words "for their respective rights and interests", and those printed words must be given a construction which will fit in with the essential nature of the contract which is being undertaken."

Support for this approach is found in Stolberg v Pearl Assurance Co Ltd [1971] 19 DLR (3d) 343. An insurance company issued a comprehensive liability insurance policy insuring Stolberg Mill Construction Ltd and/or Stolberg Construction (1957) Ltd and/or Stolberg Installation Ltd being three related companies carrying on business in British Columbia. The policy was renewed and extended to include in addition to those named companies "... and/or John Stolberg, as their interests may appear". The coverage was to "pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed by law upon the Insured..." The policy had an exclusion that the insurer would not provide cover against liability arising out of bodily injury including death resulting therefrom "sustained by any employee of the Insured while engaged in his duties". John Stolberg was supervising the erection of a warehouse on behalf of Stolberg Mill Construction Ltd when it collapsed and killed one King an employee of Stolberg Mill Construction Ltd. His widow sued John Stolberg for negligence and judgment was obtained against him. The insurer refused to indemnify John Stolberg relying on the exclusion clause. The question for decision was whether the words "by any employee of the Insured" excluded from the coverage claims against John Stolberg arising out of the death King who was employed by another named insured. The positions taken by the parties before the Supreme Court of Canada were similar to those taken here. The insurer argued that the words meant an employee of any one of the four named insured even though

not an employee of the insured claiming indemnity. John Stolberg submitted that the clause was meant to exclude only claims by an employee against his own employer. The dissenting judgment of Davey CJ in the Court of Appeal for British Columbia was approved by the Supreme Court. He considered that the words "as their interests may appear" after the specification of the insured indicated that those of the named insured whose interests were involved in a particular claim were the insured in respect of it:

> "... which is equivalent to saying that the person who seeks the indemnity is the insured in respect of that particular claim. If that is so he is also the insured for the purpose of the exclusion clause, and it is only his liability to his own employee that is excluded ..." p.346 of the Supreme Court judgment.

Hall J who delivered the judgment of the Supreme Court said at p. 346-7:

> "To deny a recovery by [Stolberg] it would, in my opinion, be necessary to read the phrase "sustained by any employee of the Insured" as if it read "sustained by any employee of any of the Insured". The "Insured" under the terms of the policy, as amended by the endorsement, is any one or more of four persons named in the endorsement. The policy ensures the insured against liability imposed by law upon "the Insured", i.e. any one or more of the four persons.
>
> ...
>
> The exception, in respect of any claim under the policy, must be construed in the same manner as the clause defining the coverage in respect of that claim, as it is an exception from that coverage. The "Insured" for the purpose of that exception must, in respect of such claim, be the same "Insured" as the one or the ones who rely upon the coverage. In respect of the present claim only the appellant is the "Insured" who has coverage under the policy. Consequently, in respect of this claim, he must be the "Insured" who was referred to under the exception clause, and, that being so, the exception only applies if indemnity is sought by a person covered by the policy in respect of liability imposed upon him as a result of a

> claim made by his employee in respect of injuries sustained while engaged in his duties as such employee. That was not the situation in this case."

Mr Bland submitts that Stolberg could be distinguished because the policy in Stolberg did not include a definition clause similar to the one contained in this policy where "Insured" includes, *inter alia*, "Each of the following is an Insured to the extent set forth hereunder:—

(a) The corporation or other entity specified in the Schedule as the Insured".

That, in my view, is not a point of distinction but emphasises the separateness of each entity covered by the policy. Mr Bland submitts that John Stolberg had already been found liable for the death of the co-insured's employee, but again that is a distinction without a difference since the obligation is to indemnify. His final argument was that in Stolberg only John Stolberg had been sued in respect of the death to the other insured's employee whereas in the present case both Fletcher and Flanagan are joined as defendants to Poulsen's action. That simply means that FAI will be obliged to indemnify only Fletcher if it is held liable.

Mr Morton referred to Richards v Cox [1943] 1 KB 139. Dickerson Brothers, employed the plaintiff who was a passenger in a motor van belonging to the employer driven by their authorised driver, one Robson. She was injured in an accident caused by the negligence of Robson. Dickerson Brothers had a policy of motor vehicle insurance which provided that the insurer would indemnify the insured against liability for compensation etc. in respect of bodily injury to any person caused by or arising out of the use of any vehicle [described in the schedule] "provided always that the company shall not be liable in respect of... bodily injury to any person in the employ of the insured arising out of and in the course of such employment". The policy extended cover to any person who was driving a vehicle for the insured. The action was one

for damages for professional negligence and the court considered whether the cover extended to Robson. It was argued that the insurer would not be liable to any person in the employment of the insured and since both Robson and Dickerson Brothers were the insured there would be no recover. MacKinnon LJ said at p. 143:

> "The fact that she was in the employment of Dickerson Brothers, who were not making the claim, would be irrelevant and immaterial."

Goddard LJ agreed and at p. 145 said:

> "She [the plaintiff] was not the servant of Robson, who alone is to be regarded as the policy holder for the purpose of this claim."

Derrington & Ashton: The Law of Liability Insurance (1990) observe at p. 475:

> "This exclusion [where there is compulsory workers' compensation insurance] has no application in a case where there are a number of insured included in the one policy "as their interests may appear" or where the insured's cover is extended to another person and a claim is made against one of the insured by an employee of the other."

Mr Bland argues that clause 2(a) should be read as if the words "any of were inserted between "employment by" and "the Insured", that is:

> "This policy shall not apply to liability for bodily injuries sustained by any person arising out of and in the course of such persons employment by any of the Insured under a contract of service or apprenticeship with Insured."

He seeks support from a number of cases where the expression "the Insured" or similar has been construed to refer to each or several insured. Those cases have few features in common with the present. Mr Bland submitts that the policy must be construed against the background of the legislative scheme established by the Workers' Compensation

Act 1990 for the insurance of employers in respect of personal injury claims by employees and particularly the provisions of s.47 of the Act which has the effect that policies maintained under the Act cover a head-contractor against claims by its sub-contractors' employees. He submits that clause 2(a) should be read as specifically intending to exclude such claims. Clause 2(b) in terms excludes payments "under any Workers, or Workmens or accident, compensation legislation to any person in the service of the Insured", but it is not suggested that anything in that clause should or could be incorporated into 2(a). He referred to Snowlife Pty Ltd v Robina Land Corporation Ltd [1992] 1 Qd R 564, where a special condition in a written vendor and purchaser contract fell for construction and which made reference to the Local Government Act (1936). The special condition did not accurately reflect the statutory procedure for rezoning. Shepherdson J held at p. 568, that the whole of the special condition was intended by the parties to be construed against the background of the provisions of the Local Government Act affecting rezoning of land and his Honour and McPherson ACJ construed the condition in the light of the statutory procedure. Williams J dissenting held that the parties' intention was clearly expressed in the special condition notwithstanding that it did not reflect ordinary procedures on a rezoning... His Honour observed at p.576:

> "In construing the terms of this contract the court must, in my view, primarily have regard to the words used by the parties. If the words used have a clear meaning and provide for a certain consequence then it is not to the point to say that such a provision in the contract does not mesh well with the provisions of the statutes. If a contractual provision was so in conflict with the statutory procedure as to make the agreement unworkable then it may well be that there is no enforceable contract between the parties. But before arriving at such a conclusion a court would be justified in considering whether or not there was a construction open, although not the most obvious or the most grammatically accurate, which would render the agreement compatible with the statutory provisions."

That is not the situation here. The construction contended for by Mr Bland is not necessary to avoid rendering the agreement unworkable between the parties. There is nothing, in my view, in the words of the policy to the effect that where cover would be provided under a Workers' Compensation scheme in respect of any insured there will be no cover under the policy.

I have therefore concluded that the clause 2(a) of the policy between FAI and Fletcher does not exclude cover to Fletcher in respect of any amount for which it may be held liable to Poulsen arising out of his action.

Declarations should be made accordingly and I will hear submissions as to the appropriate formulation.

I will hear submissions as to costs.