IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P12 of 2014

BETWEEN **MATTHEW MAXWELL (the authorised, nominated representative on behalf of various Lloyds underwriters)**

Appellant

and

HIGHWAY HAULIERS PTY LTD (ACN 008 863 214)

Respondent

APPELLANT'S REPLY

PART I: Internet publication

1 These reply submissions are in a form suitable for publication on the Internet.

PART II: Reply

2 The appellant's statement of facts referred to findings at first instance and below. The appellant does not seek to travel beyond those findings. In its submissions, the respondent seeks to refer the Court to primary evidence to rebut aspects of the appellant's narration of the facts. Some specific matters call for reply on the facts and it is convenient to address those by reference to parts of the respondent's argument.

3 There is no basis for the conclusion drawn by the respondent at RS [9] and RS [29] that the lack of reliance by the appellant on sub-sec 54(2) of the Act connotes that "PAQS had no relevant value for driver or operating safety". The opposite is true. This matter is dealt with at AS [36]ff – it is the difficulty of proving causation in any particular instance that leads to insurance contracts defining the scope of the risk with safety requirements such as the PAQS score.

4 That is a matter that permeates the respondent's submissions – namely that the absence of reliance on sub-sec 54(2) of the Act, or to put it another way, the "failure" by the appellant to rely on prejudice in respect of the actual claims somehow defeats the appellant's case. Were this a simple matter of causation, there would be no occasion for the grant of special leave. The appellant's concession as to the inability to prove causation is a matter that gives rise to the appeal, not one that defeats it. The respondent's submissions illuminate why, rather than this being a case where there is, by the insurer, an adventitious seizing upon contractual

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28 May 2014
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provisions where there is no relevant prejudice, this is a case where there is an attempt by the respondent to adventitiously deny the substance of the insurance contract. That is why the respondent seeks to present the case as being a simple matter of liability for accidental damage occurring to insured vehicles.

5 Contrary to RS [10], the finding at TJ [98] is only consistent with the acceptance of the evidence at TJ [95] that the requirement of the PAQS test was industry practice because the east-west runs were "high risk". Similarly, contrary to RS [17], the appellant does not submit that "...the respondent made a false representation to secure insurance...". The appellant submits that the respondent made a representation that secured insurance, which in the events, was false. There is no need to impute a particular motive to the respondent. The facts are that the respondent made representations about PAQS testing, important to the insurer, in light of a poor claims history, and the representations were false. The appellant agrees that why the respondent made them and how they came to be false are facts that are, indeed, irrelevant. What is relevant is whether the respondent's failure to honour the representations and comply with the contract, can be, in practical terms, excused by sec 54.

6 The thrust of the respondent's submissions is to deny that there is any limitation on the operation of sec 54 in circumstances where actual prejudice in respect of the particular claim can be shown, and thereby to effectively deny the reasoning of the joint judgment in *FAI v Australian Hospital Care*. The respondent's case is oft repeated but boils down to the following stark contention - so long as there is accidental damage to a vehicle from an act that occurred after the entry into the contract and the insurer cannot prove prejudice in respect of the actual claim then sec 54 "operates according to its terms" (namely, in the respondent's view, to relieve it of its conduct): see e.g. RS [24]-[25], [45], [48], [50.14], [52], [53], [55].

7 That is why the respondent concentrates on examples that don't involve PAQS testing that would lead to indemnity – e.g. that the policy would respond if the vehicles were stationary: RS [53.1]. The approach, and the examples in support of it, beg the question. Or perhaps, more correctly, they prove too much. They highlight why the appellant's case is not a wide-ranging attempt to limit the "remedial" effectiveness of sec 54, but to recognise that the provision does not apply where there is an inherent limitation on the claim. Indemnity lies where there is damage to stationary vehicles because it was no part of the bargain between the parties to limit its operation in those circumstances. This is shown by the further non-sequitur at RS [53.6]. It is not a question of whether Qantas only insures its planes when they are in the air, it is a question of what bargain the insurer and Qantas struck in respect of various events and whether when, in the air, Qantas' insurer would require qualified pilots at the controls.

That matter would be irrelevant to, say, accidental damage that occurs when a stationary plane is damaged by an airport employee loading baggage. That is the point made at AS [36]ff and is the substance of this appeal. Who knows whether Qantas's insurers would require PAQS testing? What is known is that there was requirement for PAQS testing in the present case and the appellant submits that it meant that the respondent was not insured for damage that occurred when its vehicles were being driven by people who were not appropriately qualified. Cover was not restricted in other circumstances.

8 This Court, in *FAI v Australian Hospital Care*, addressed the need to consider limitations imposed by the substance of the contract before considering the operation of the further sub-sections of sec 54. It is not a matter of putting a gloss on the statutory language; it is recognition that there is an elementary question of whether the policy responds. Although in dissent, it is precisely why Gleeson CJ fastened on the inability for an insurer to prove prejudice in particular circumstances. In other words, a contract may not extend to the claim, *regardless* of whether prejudice could be proved in the actual case. It is a different inquiry. Certain provisions, whether termed conditions or exclusions, cf RS [49], are drafted and agreed precisely to deny indemnity in respect of an "act" or "omission" that is considered to cause prejudice to the insurer even though it would be impossible to prove in respect of a particular claim. Alternatively, if the insured wishes to extend the scope of cover to include the additional risk, it pays a higher premium or finds a different insurer.

Indemnity Costs – RS [60]

9 The respondent seeks an order for payment of the costs of its appeal on an indemnity basis "...in order to maintain the efficacy of the order for indemnity costs made by the Court of Appeal". There is no question about the "efficacy" of the order below. First, the respondent sought this order on the special leave application and it was not granted. Instead, it received the benefit of the undertaking of the appellant that the appellant will pay the ordinary costs of the appeal whatever the result. Secondly, it is worth recalling that indemnity costs were not ordered at first instance because of any conduct on the part of the appellant. A special costs order was made pursuant to sub-sec 215(2) of the *Legal Practice Act* 2003 (WA) and sub-sec 280(2) of the *Legal Profession Act* 2008 (WA) which permit the "Court" or a "judicial officer" to make a special costs order in matters of "unusual difficulty, complexity or importance". Those provisions are obviously not directed to this Court, and, even if they were, they could not, or would not, be picked up by s 79 of the *Judiciary Act* particularly in light of the *Judiciary Act* itself, which otherwise provides generally, and specifically, as their operation would extend to every case that was granted special leave from Western Australia as a matter

of unusual "importance". Thirdly, the basis for the special costs order below, a *Calderbank* letter dealing with those proceedings, does not apply to the proceedings in this Court.

Dated 28 May 2014

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