MAXWELL v. HIGHWAY HAULIERS PTY LTD (P12/2014)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2013] WASCA 115
Date of judgment:	6 May 2013
Date of grant of special leave:	14 March 2014

The primary issue in this appeal is the proper construction of s 54 of the *Insurance Contracts Act* 1984 (Cth) ("the Act").

The respondent, Highway Hauliers Pty Ltd ("the Insured"), carried on a trucking business and operated a fleet of trucks and trailers that transported freight between the Eastern and Western states of Australia. The appellant, Maxwell, is the authorised and nominated representative of various Lloyds underwriters. The Insured had a contract of insurance with Maxwell that covered accidental loss or damage to all vehicles owned, leased or acquired by the Insured. The contract of insurance also included a provision which stated that no indemnity was to be provided under the policy, unless all drivers met certain conditions, including obtaining a People and Quality Services driver profile score of at least 36 ("PAQS test").

In June 2004 and April 2005, two trucks were damaged in separate incidents, and the Insured made two claims under the relevant insurance contract. Maxwell rejected the claims on the basis that at the time of the accidents each vehicle was being driven by a driver who had not met the requirements of the PAQS test. The Insured sued Maxwell for indemnity against repair costs for the trucks and trailers involved, and also claimed damages for breach of the contract of insurance for the loss of profits for not being able to use the damaged trucks.

At first instance, Corboy J found that Maxwell was obliged to indemnify the Insured by reason of s 54(1) of the Act. Section 54 relevantly provides that where the effect of the policy would be that the insurer may refuse to pay a claim (in whole or in part) by reason of some act of the insured or of some other person, being an act that occurred after the policy was entered into, the insurer may not refuse to pay the claim by reason only of that act, but its liability is reduced by the amount that fairly represents the prejudice to the insurer's interests. However, if the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided, the insurer may refuse to pay the claim. It was accepted at trial that the failure of the drivers to complete a PAQS test had not caused or contributed to any losses incurred by the Insured, and so s 54(2) was not considered.

Maxwell's appeal was dismissed by the Court of Appeal (McLure P, Pullin and Murphy JJA). In considering the appropriate statutory construction of s 54(1) the Court arrived at a different result to the Queensland Court of Appeal when applying it to a similar scenario.

The grounds of appeal include:

- The Court below erred in holding that the appellant must indemnify the respondent as the failure of the respondent (or its employees) to comply with the relevant endorsement to the insurance contract was an omission for the purposes of sub-s 54(1) of the Act and that the appellant was not entitled to refuse to pay the claim of the respondent by reason of that omission.

- The Court below erred in its construction of sub-s 54(1) of the Act in giving the provision an operation that extended the scope of cover provided by the insurance contract.