HIGH COURT OF AUSTRALIA

Manager, Public Information

2 December 2009

ZURICH AUSTRALIAN INSURANCE LTD v
METALS & MINERALS INSURANCE PTE LTD & ORS [2009] HCA 50

HAMERSLEY IRON PTY LTD v
SPENO RAIL MAINTENANCE AUSTRALIA PTY LTD & ORS (Matter P29 of 2009)

METALS & MINERALS INSURANCE PTE LTD v
SPENO RAIL AUSTRALIA PTY LTD & ORS (Matter P30 of 2009)

Provisions in general insurance contracts which limit or exclude the liability of an insurer to indemnify the insured party against loss by reason that the party has entered into another contract of insurance in relation to the same risk are rendered void by s 45 of the *Insurance Contracts Act* 1984 (Cth). The High Court held today, however, that s 45 does not render void provisions which exclude or limit liability where the insured is not a party to the other insurance contract, although named in it as an insured person. Neither does s 45 render void an entire clause of an insurance contract merely because it includes a provision to which s 45 applies. That part of the clause to which s 45 does not apply maintains its effect.

Hamersley Iron Pty Ltd entered into a contract with Speno Rail Maintenance Australia Pty Ltd in March 1992 for rail-grinding services. A term of the contract required Speno to indemnify Hamersley and to insure itself against all claims resulting from anything done in performance of the contract which resulted in death or injury to any person. In accordance with the relevant term, Speno entered into an insurance policy with Zurich Australian Insurance Ltd. The policy named Hamersley as insured under the policy, though Hamersley was not a party to it. Hamersley entered into its own insurance contract with Metals & Minerals Insurance Pte Ltd. That contract contained a clause - the "underlying insurance" clause - to the effect that, if Hamersley was indemnified under another insurance contract (whether effected by Hamersley or by another party on Hamersley's behalf), then MMI would only be liable for excess insurance over the limit of the indemnity provided for in the underlying insurance.

Two employees of Speno were injured while performing work under the contract between Hamersley and Speno, and Hamersley became liable to pay monies to each of the injured employees. Zurich paid the amounts due, in accordance with the terms of its insurance contract with Speno. Zurich subsequently sought contribution from MMI in relation to MMI's liability to indemnify Hamersley under the Hamersley/MMI insurance contract. MMI relied on the underlying insurance clause to limit its liability to the provision of excess insurance, whereas Zurich contended that s 45 of the Insurance Contracts Act rendered the underlying insurance clause void. The primary judge in the Supreme Court of Western Australia agreed with Zurich, but the Court of Appeal allowed MMI's appeal. The High Court granted special leave to Zurich to appeal from the decision of the Court of Appeal.

The High Court considered that the ordinary meaning of "enter into" is "take upon oneself; bind oneself by; subscribe to". The Court concluded that s 45 was concerned with "other insurance" provisions affecting double insurance only where the insured is a party to the relevant contract of insurance. On its proper construction s 45 did not include a "non-party insured" among the ranks of

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those who had "entered into" a contract of insurance. Thus s 45 did not render void the "underlying insurance clause" in the Hamersley/MMI insurance contract.

Further the High Court held that the term "provision" in s 45 did not operate to render void an entire clause of a contract, of which only one aspect was offensive to s 45. There was no requirement that s 45(1) be construed so that its operation depended entirely upon the way in which a particular contract had been drafted. In the result, only that aspect of the underlying insurance clause which defined coverage by reference to an "other insurance" contract to which the insured was actually a party was rendered void by s 45.

For these reasons the High Court dismissed Zurich's appeal.

Having dismissed Zurich's appeal, the Court considered it unnecessary to determine Hamersley Iron's appeal or Metals and Minerals' appeal. The High Court dismissed both appeals.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*