6,1982

IN THE PRIVY COUNCIL No. 40 of 1981

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED — Appellants & Cross Respondent (Defendant)

- and -

MARINUS MILTENBURG — Respondent & Cross Appellant (Plaintiff)

CASE FOR RESPONDENT AND CROSS-APPELLANT MARINUS MILTENBURG

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GENERAL HEADINGS

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1.00 INTRODUCTORY

1.01 The Appeal by A.M.P. Fire & General Insurance Co. Limited ("the Appellant") arises out of serious injuries sustained by Mr. Marinus Miltenburg ("the
5(3) Respondent/Cross-Appellant") in the course of his employment with a Mr. Henry Willem Louwen ("the Employer") on 12th October, 1977. As a result of such injuries the Appellant was awarded damages in the sum of $521,030 against his Employer by His Honour Mr. Justice Toose in the Supreme Court of New South Wales on 9th November, 1979.

1.02 Prior to the entry of judgment His Honour deducted from the amount of the
5(4) damages the sum of $63,709.10 representing the amount of Worker's Compensation previously paid to the Respondent pursuant to s.63(5) of the Worker's Compensation Act (1926) as amended ("the Act").

1.03 His Honour accordingly entered a verdict in favour of the Respondent in the nett sum of $457,320.90 and ordered that the
5(8) Respondent's Employer pay the Respondent's costs which were subsequently taxed in the sum of $18,556.58.

1.04 As at the 12th October, 1977 the Employer was insured with the Appellant under the prescribed statutory Form of Policy for his liability to the
4(25) Respondent under the Act, to pay compensation and independently of the Act to pay damages up to a maximum sum of $150,000.

1.05 The question for determination in this Appeal is whether the Appellant is liable to indemnify the Employer for the maximum sum of $150,000 including

the compensation already paid to the Respondent OR whether it is liable to indemnify the Employer for his liability under the Act, in this case $63,709.10 AND the amount of any damages which the employer may be held liable to pay after deductions of the compensation already paid, up to the maximum sum of $150,000.

2.00 THE FORM OF POLICY AND PROPOSAL FORM

2.01 The relevant provisions of the Policy prescribed by the Act may be summarised as follows :-

> "WHEREAS by virtue of the Workers' Compensation Act 1926 as amended (hereinafter called "the Act") it is provided that every employer shall obtain from an Insurer licensed under the Act to carry on business in the State a policy of insurance or indemnity for the full amount of his liability under the Act to all workers employed by him and for an amount of at least $150,000 in respect of his liability independently of the Act for any injury to any such worker
>
> . . .
>
> NOW THIS POLICY WITNESSETH that in consideration of the payment by the Employer to the Insurer of the above-mentioned Premium . . . IF . . . the Employer shall be liable to pay compensation under the Act to or in respect of any person who is or deemed by the Act to be a worker of such Employer or to pay any other amount not exceeding $150,000 in respect of his liability independently of the Act for any injury to any such person,

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THEN in every such case the Insurer will indemnify the Employer against all such sums for which the Employer shall be so liable; . . . and the Insurer shall be a) directly liable to any worker . . . to pay the compensation or other amount for which the Employer is liable and in respect of which the Employer is indemnified under this Policy; and b) bound by and subject to any judgment, order, decision or award given or made against the Employer under the provisions of the Act or in respect of his liability independently of the Act and in respect of which the Employer is indemnified under this Policy."

2.02 The Policy further provides :-

"WHEREAS . . . the Employer has made a written Proposal and Declaration containing certain particulars and statements which it is hereby agreed shall be the basis of this contract and be considered as incorporated herein. "

2.03 The declaration (incorporated in the Proposal Form) in this case signed by the Employer and dated 26th June, 1972 includes the following words :-

"This Proposal and Declaration shall, subject to the terms and conditions of the Policy, be the basis for the contract, and be incorporated therein. "

2.04 The opening words of the Proposal Form are :-

"I hereby request A.M.P. Fire & General Insurance Company Limited to issue me . .. a Policy indemnifying me against my legal liability to pay to or in respect of any worker within the meaning of the Worker's Compensation Act of N S W :- a) Compensation under the Worker's Compensation Act of NSW for personal injury within the meaning of such Act and/or b) Damages independently of the said Act . . . PROVIDED ALWAYS that the liability of the

Company arising out of all claims made independently of the said Act by or in respect of any such worker for any such injury shall be limited to an amount not exceeding $40,000 in the terms of the Policy."

2.05 The words of the Policy set out in Paragraph 2.01 requiring the Appellant to indemnify the Employer "in every such case" against "all such sums for which the Employer shall be so liable" are only consistent with a construction that the Appellant is liable to the Respondent for :-

a) His compensation benefits AND

b) The amount of his damages up to $150,000.

The words used are inconsistent with an indemnity for damages including or after deducting the indemnity for compensation.

2.06 The Policy thus provides for a dual indemnity firstly in respect of compensation and secondly for damages up to the specified maximum.

2.07 This construction is greatly assisted by the words incorporated in the Policy from the Proposal Form, which provide for an indemnity for compensation benefits "and/or" damages. If the indemnity for the latter was to include the amount paid for the former the words "and/or" would not have been used.

2.08 The further words appearing in the proviso to the Proposal make the intention even clearer by providing that the limitation of liability applies only to "all claims made independently of the Act." There is no limitation for claims under the Act, nor is the limitation of liability expressed to cover "all claims" both under the Act and independently of the Act. It is expressly limited to the second indemnity provided, namely the liability independently of the Act.

3.00 STATUTORY PROVISIONS

3.01 The same meaning may be derived from s.18(1) of the Act prior to its recent

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amendment which statutorily prescribed the form of policy which the employer is required to obtain for "the full amount of his liability under this Act and for an amount of at least $100,000 in respect of his liability independently of this Act."

3.02 In addition s.18(3)(a) of the Act contains a definition of "the other amount" for which the employer and thus the insurer may be directly liable independently of the Act in the following terms :-

> "In this paragraph the expression "the other amount" means an amount not exceeding the amount for which the employer has obtained a policy of insurance or indemnity in respect of his liability independently of this Act for any injury to any such worker. "

3.03 The terms of s.18(3)(a) are strongly supportive of a separate indemnity for liability independently of the Act and are inconsistent with the existence of a right to indemnity up to the specified maximum including and after deducting the amount of compensation.

3.04 The question of an employer's concurrent liability for both compensation and damages at common law is expressly dealt with in Part VIII of the Act wherein s.63(1) provides :-

> "S.63(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible."

3.05 The Act goes on to provide that after judgment against his employer in proceedings independently of the Act the worker is no longer entitled to compensation under s.63(2) and that any payment of compensation shall to the extent of such payment be a defence to proceedings against the employer independently of the Act. s.63(5).

3.06 The Act thus seeks to preserve intact the

worker's common law remedies, but precludes him from retaining a double benefit if he has been paid compensation and subsequently recovers damages. The payments of compensation are thus treated as pro tanto satisfaction of the amount which the employer would otherwise be liable to pay as damages. D'Angola v. Rio Pioneer Gravel Co.Pty. Ltd. (1977) 2 NSWLR 227.

3.07 The fact that the worker has received compensation doesn't relieve the tort-feasor of his liability Batchelor v. Burke (1981) 35 ALR a5 @ p.19. The Act merely precludes the worker from receiving that part of his damages which he has already been paid by way of compensation.

3.08 The dual liability in the employer for compensation and/or damages is not interfered with and the employer's right to be indemnified in respect of both is preserved.

3.09 As GlassJ.A. says in Australian Iron & Steel Pty. Ltd. v. G.I.O. (1978) 2 NSWLR 59 the liabilities are inter-related but nevertheless referable to independent heads of liability (at pages 63-4).

4.00 HISTORICAL ANALYSIS

4.01 The statutory form of Policy was not amended to incorporate any requirement for the employer to obtain a minimum cover for liability independently of the Act until 1953 when s.18(1) was amended by the Worker's Compensation (Amendment) Act 1953 No.21.

4.02 From the date of its enactment, the Act and Policy provided for the insurer to be directly liable to the worker for any judgment, order, award etc. and worker's compensation payments were since 1938 expressed to be "to the extent of such payments a satisfaction of the judgment."

4.03 It is therefore likely that at least one of the reasons why the Act was amended by the Supreme Court Act 1970 to alter the terms of s.63(5) to read "a defence to proceedings against the employer" may have been to preclude the very argument

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sought to be raised by the Appellant in this case.

4.04 An insurer could have argued that as the Policy fixed its maximum liability independently of the Act and the Act provided for it to be directly liable to the worker for any judgment or order against the employer, the terms of s.63 (5) could be invoked to set-off the amount of the compensation which it had paid in satisfaction of the judgment and thus reduce its liability below the specified maximum.

4.05 The 1970 amendment made it clear that the compensation payments could only be pleaded as a defence in proceedings against the employer to reduce his liability for damages but could not be availed of as the Appellant here seeks to do, to reduce the insurer's maximum liability independently of the Act.

4.06 It is interesting to note that the 1970 amendments were introduced a relatively short period after the case of South British Insurance Co.Ltd. v. Brown's Whart Pty. Ltd. (1966) 1 NSWR 80 which clearly identified the two separate areas of indemnity under the statutory form of Policy.

4.07 The historical basis for the provisions now appearing in s.63(5) was to avoid the worker being able to obtain a dual benefit from his employer see Harbon v. Geddes (1935) 53 CLR 33 and Latter v. The Council of Shire of Muswellbrook (1936) 56 CLR 422. It was not intended to allow an Insurer a set-off against its maximum liability in addition to that already allowed to the employer for the same amount.

5.00 NATURE OF INDEMNITY

5.01 The terms of the Policy which refers to a liability arising during the period of risk covered by the Policy make it clear that the Appellant's obligation to indemnify the employer and thus its liability to the Respondent attaches as soon as the compensable injury occurs. State Mines Control Authority v. G.I.O. (1964) 72 WN (Part 2) 287 per Walsh J. @

p.296. See also Fisher v. Hebburn Limited (1960) 105 CLR 118 at p.207 and Dillingham Engineering Pty. Ltd. v. National Employers Mutual General Insurance Association Ltd. (1971) 1 NSWLR 578.

5.02 It is at the date of injury that the Appellant's liability for damages accrues. That liability is not to be affected by anything in the Act or Policy (see Para. 3.04).

5.03 The Appellant's liability to the Respondent for damages therefore affixes at the date of injury and that liability is not affected by the payment of any compensation (Batchelor v. Burke (supra) except to the extent that it is paid on account of the damages which the Respondent may ultimately obtain.

5.04 The Appellant is not entitled to deduct from its own maximum liability under the second head of indemnity an amount which, when subsequently ascertained, it alleges it has paid under the first head of indemnity.

6.00 POLICY OF ACT

6.01 The legislature intended that the inpecuniosity of his employer should not preclude the worker from obtaining the benefits of compensation. See s.18C of the Act and McNellee v. Co-Operative Insurance Co. of Australia Ltd. (1964) 64 SR 295 at p.300. The worker is entitled to be paid the fruits of his verdict. Dillingham Engineering Pty.Ltd. v. National Employers' Mutual General Insurance Association Ltd. (1971) 1 NSWLR 578 at p.582.

6.02 The Act requires the Appellant to meet the full extent of the employer's liability under the Act which may foreseeably exceed $100,000 being the statutory minimum cover applicable at the date of the Respondent's injury.

6.03 If the Appellant's argument is correct its total liability must be limited to the maximum specified in the Policy even if the worker's compensation benefits ultimately exceed the fixed amount. This

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25(2-5)
26 (9-10)

is clearly contrary to s.18(1) and the intention of the Act. (See Judgment of Samuels J.A.).

6.04 Between the 12th October, 1977 and 9th November, 1979 the Respondent had been paid the sum of $63,709.10 as Workers Compensation benefits. If he had chosen to remain on Workers Compensation it is highly likely that he would have been entitled to payments in excess of $150,000 before his death. Yet the Appellant's argument results in him being denied not only the difference between $86,290.90 and $457,320.90 but denies him also his entitlement to Workers Compensation payments beyond the limit specified in the policy which may be as low as $100,000 and was in this case $150,000.

6.05 If the Appellant's argument is correct the legislature must have intended that in no circumstances could the worker be entitled to any amount in excess of $100,000 including compensation and damages. Putting it another way - whenever the compensation and/or damages exceeded $100,000 the workers' only recourse for the balance above that figure was to the employer personally.

6.06 The Appellant's argument results in the worker having to allow credit twice to the tortfeasor for the sum of $63,709.10. The first occasion when it is deducted from his damages to produce the nett verdict and the second when the insurer seeks to deduct it from its maximum liability.

6.07 It is not disputed by the Appellant that His Honour Mr. Justice Toose acted correctly in deducting the compensation benefits from the verdict at first instance. It is at that point the liability which accrues at the time of injury is quantified. The amount of the employer's and thus the Appellant's liability is then ascertained and the Appellant is liable to the Respondent to meet the full amount of such liability up to the maximum of $150,000.

6.08 The fact that the Policy and the Act also render the Appellant directly bound

by any order or judgment against the employer is no different from a situation of statutory agency. It is nevertheless the liability of the employer or agent for which the appellant/principal is answerable. The appellant cannot seek to have set-off against his liability, an amount which has already been deducted from the employer's liability.

6.09 The payment of compensation may properly be described as "payment on account of damages" Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of NSW (1978) 2 NSWLR 59 at p.63 but only in respect of the employer's total liability for damages. As a result of the dual indemnity under the Policy and the provisions of s.63(5) it is against the employer's liability to his worker that the amount is set-off. It is only after that deduction has been made that the employer's liability is finally quantified and it is that nett liability which the appellant is required to indemnify within the terms of the Policy.

6.10 The Act has now been amended to require the employer to obtain and the Insurer to provide unlimited indemnity for liability independently of the Act. The Legislature thus intends the injured worker to obtain his full benefits of both Workers Compensation and damages. The Policy of the Act has remained unaltered but the intention of the Legislature to provide full insurance cover for his employer has been rendered more complete.

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CASE FOR THE CROSS-APPELLANT

7.00 GENERAL NATURE OF CROSS APPEAL

7.01 The Cross-Appeal is brought by the Respondent to the Appeal Mr. Marinus Miltenburg, seeking payment to him by the Appellant of :-

(a) His taxed costs in the proceedings at first instance against Mr. Henry Louwen amounting to $18,556.58.

(b) The full amount of his costs in the proceedings appealed from before the New South Wales Court of Appeal.

(c) The costs of this Appeal and Cross-Appeal.

7.02 In its judgment of 22nd June, 1981 as incorporated in Short Minutes of Orders on 29th June, 1981, the New South Wales Court of Appeal entered a verdict for the Cross-Appellant in the sum of $63,709.10 together with interest. The Court declined to order payment by the Appellant of the additional sum of $18,556.58 representing the Cross-Appellant's taxed costs in the proceedings at first instance against Mr. Henry Louwen.

7.03 In addition the New South Wales Court of Appeal made a special order for costs whereby the Appellant was ordered to pay only seven-tenths of the Cross-Appellant's costs.

8.00 THE TERMS OF THE POLICY RELEVANT TO COSTS

8.01 The terms of the Statutory Form of Policy relevant to the question of costs may be summarized as follows :-

> "THEN, and in every such case the Insurer will indemnify the Employer against all such sums for which the Employer shall be so liable; the Insurer will also pay all costs and expenses incurred with the written consent of the Insurer in connection with the defence of any legal proceedings in which such liability is alleged.

. . . and the Insurer shall be a) directly liable to any worker . . . to pay the compensation or other amount for which the Employer is liable and in respect of which the Employer is indemnified under this Policy; and b) bound by and subject to any judgment, order, decision or award given or made against the Employer under the provisions of the Act or in respect of his liability independently of the Act and in respect of which the Employer is indemnified under this Policy. "

8.02 The Cross-Appellant submits that upon a proper construction of the Policy the Appellant is obliged to indemnify the Insured Employer and thus the Cross-Appellant in respect of :-

(a) The full amount of the employer's liability under the Worker's Compensation Act 1926 (as amended).

(b) The amount which the employer may be held liable to pay independently of the Act up to a maximum sum of $150,000, after deducting from the amount of such liability the amount paid to for or on behalf of the worker under a).

(c) The amount of costs and expenses properly incurred in the defence of the proceedings at first instance as taxed in the sum of $18,556.58.

8.03 The indemnity referred to in Paragraph 4(a) has been paid and is not disputed by the Appellant. The indemnity referred to in Paragraph 4(b) has been fully canvassed earlier in this Case.

8.04 The Cross-Appellant submits it is entitled to payment by the Appellant of the costs as taxed in addition to the sum of $63,709.10 because the words employed in the Policy clearly prescribe a liability in the Appellant for costs and expenses in addition to the sum or sums which the insured may be held liable to pay either under the Act or independently of the Act up to the maximum amount of cover provided. The words "will also

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pay all costs and expenses" are inconsistent with the Appellant's argument that its liability independently of the Act is limited to $150,000 including the compensation paid and the costs and expenses incurred.

8.05 The intention of the Legislature in providing the statutory form of policy is to enable the worker to obtain the fruits of his verdict Dillingham Engineering Pty. Limited v. National Employers' Mutual General Insurance Association Ltd. (1971) 1 NSWLR 578 per Asprey J.A. @ p. 582. It could not have been intended by the draftsman, that the costs which the Court may order to be paid to the successful Plaintiff, could be deducted from the amount of the verdict which the insurer would otherwise be liable to pay up to the specified maximum.

8.06 The Policy has the same meaning in respect of the Worker's Compensation proceedings and proceedings independently of the Act. If the employer is insolvent, as in the present case and the insurer is only liable for costs expressly incurred with its consent and not liable for costs which the employer is ordered to pay, the successful applicant will be unable to recover any of his costs even in Worker's Compensation proceedings.

8.07 The Act specifically precludes the deduction of any amount by way of costs from the compensation which the injured worker is awarded (see s.56(2)) and the Policy does not seek to distinguish between costs in Worker's Compensation proceedings and costs in proceedings independently of the Act. The Policy requires all such costs and expenses to be paid in addition to the amount for which the Employer shall be held liable to pay to the worker.

8.08 The solicitor acting for the applicant is also precluded from recovering such costs from the applicant. See s.56(2). If the Appellant's construction be correct, he will altogether be precluded from any payment of his costs unless he is able to recover them from the employer who may well, as in the present case be insolvent or may have gone into liquidation

or out of business. Thus the clear and uncontested legislative intent of providing a full indemnity for liability under the Act will be thwarted.

8.09 The Solicitors on the record as Solicitors for the Defendant in the proceedings at first instance were instructed to defend such proceedings by the present Appellant (see letter of instructions from the Appellant to Leigh M Virtue, Solicitor, 20th February, 1978). The proceedings were accordingly defended pursuant to the Appellant's instructions and the costs of the proceedings (including such costs as the Defendant may be ordered to pay to a successful Plaintiff) were thus "incurred with the written consent of the insurer." 11 & 12

8.10 The provision of written instructions by the Appellant to defend the proceedings on its behalf in the name of the insured carried with it the obligation in relation to costs:

(i) On a solicitor/client basis to pay all reasonable costs incurred by the solicitors acting on the Appellant's behalf;

(ii) On a party/party basis to pay all such costs as it may be ordered to pay a successful Plaintiff.

Having given its written consent to the proceedings being defended on its behalf and having lost the case, the Appellant cannot be heard to say that it is not liable to indemnify its insured for the costs which the Cross-Appellant has incurred but which the insured is liable to pay.

8.11 A party embarking upon any piece of litigation "incurs" a liability for his own costs although of course he is hopeful that he will succeed and that his opponent will be ordered to pay those costs and a liability for his opponent's costs in the event of his case not succeeding. Both sets of costs are contingent upon the result but both are "incurred" by embarking upon a defence of the matter.

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8.12 The word "incur" is defined in the Shorter Oxford English Dictionary in the following terms :-

> "2. to run into (danger etc.); to render oneself liable to (damage)"

It is not therefore necessary for the liability to have in fact accrued. The action of defending the case causes the defendant to render itself liable to both sets of costs.

9.00 APPELLANT'S DIRECT LIABILITY

9.01 The learned trial judge made a separate order as part of his judgment that the Defendant/Employer pay the plaintiff's costs of the proceedings now taxed in the sum of $18,556.58. That order is "an order . . . made against the Employer . . . in respect of his liability independently of the Act and in respect of which the Employer is indemnified under this Policy" within the terms of the Proviso to the Policy and s.18(3) of the Act.

5(10)

9.02 The Appellant is therefore "bound by and subject to" the order which may be enforced directly against it, rendering the Appellant directly liable to the Plaintiff for the amount of the costs.

10.00 FURTHER GENERAL SUBMISSIONS ON COSTS

10.01 As a general principle a provision for costs in such a policy of insurance is intended to include both costs incurred by the insured in defence of the proceedings and costs which he may be ordered to pay to a successful plaintiff. British General Insurance Company Ltd. v. Mountain (1919) 36 TLR 171.

10.02 If the Appellant had intended to limit its total liability for compensation, damages and costs to the sum of $150,000 the policy should have been expressed in such a way as to make that intention clear.

10.03 The limitation on the costs for which the employer and the Appellant may be liable, requiring the Insurer's written consent is intended to protect the insurer from a

liability for costs in proceedings which are defended by the employer without its consent. It is not intended to provide an indemnity for only such costs and expenses as it expressly agrees to pay.

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10.04 The meaning which the Appellant seeks to attribute to the provision would mean that even as between the Appellant and its own solicitors, it would only be liable for costs and expenses which it has expressly agreed to pay. If any costs and expenses were incurred without its prior written approval it could deny any liability for such costs.

10.05 The judgment of the New South Wales Court of Appeal is therefore to this extent wrongly decided where His Honour Mr. Justice Samuels says that the costs are limited to the costs of the employer as opposed to costs which the employer may be ordered to pay. 28(13)

10.06 The Court of Appeal further fell into error in concluding that the employer's and thus the Appellant's liability to pay an amount independently of the Act includes his liability to pay costs because such a conclusion overlooks the words appearing in the Policy "the insurer will also pay all costs and expenses . . ." 28(21-5)

11.00 FINAL SUBMISSION

11.01 The Respondent accordingly submits that the Appeal should be dismissed and that the Cross-Appeal be allowed for the reasons appearing in the judgment of the New South Wales Court of Appeal and the reasons appearing in the printed case.

DATED at Sydney 23rd November, 1981

PETER DEAKIN

Counsel for Respondent/Cross-Appellant

IN THE PRIVY COUNCIL No.40 of 1981

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

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Appellants & Cross Respondent (Defendant)

- and -

MARINUS MILTENBURG

Respondent & Cross Appellant (Plaintiff)

CASE FOR RESPONDENT AND CROSS-APPELLANT MARINUS MILTENBURG

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