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F 4 0 OF 1 0 1

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

IN PROCEEDINGS NO. C.A. 25 OF 1981

BETWEEN: A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

Appellant and Cross-Respondent
(Defendant)

AND: MARINUS MILTENBURG

Respondent and Cross-Appellant
(Plaintiff)

RECORD OF PROCEEDINGS

SOLICITORS FOR THE APPELLANT
CROSS-RESPONDENT

Leigh M. Virtue,
291 George Street,
SYDNEY.

By their Agents:

Sharpe Pritchard & Co.,
109 Kingsway,
LONDON. W.C.2B 6PZ

SOLICITORS FOR THE RESPONDENT
CROSS-APPELLANT

H.N. Chippindall & Co.,
64 Castlereagh Street,
SYDNEY.

By their Agents:

Ingledeu, Brown Bennison & Garrett,
51 Minories,
LONDON. EC3N 1JQ

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AND: MARINUS MILTENBURG

Respondent and Cross-Appellant

RECORD OF PROCEEDINGS

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3.	Affidavit of Sharon Mack of Service of Summons, and Affidavit in Support	27 October, 1980	
4.	Subpoena for Production to A.M.P. Fire & General Insurance Co. issued at the request of H.N. Chippindall & Co.	30 October, 1980	
5.	Plaintiff's written submissions on the question of the jurisdiction of the Supreme Court	21 November, 1980	
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9.	Statement of Claim in Common Law Division of the Supreme Court C.L. 9336/78	19 January, 1978
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16.	Notice of Motion for expedition filed on behalf of the Plaintiff	6 February, 1981
17.	Affidavit of J.K. Chippindall in Support of Notice of Motion for expedition	6 February, 1981
18.	Transcript of Evidence taken before The President, his Honour, Mr. Justice Moffitt, his Honour, Mr. Justice Reynolds and his Honour, Mr. Justice Samuels	9 February, 1981
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21.	Case Stated from Workers' Compensation Commission of New South Wales pursuant to Section 37(4)(b) of the Workers' Compensation Act, 1926, referring to the decision of the Court of Appeal certain questions of law which arose in proceedings before the said Commission	18 February, 1981

No.	Description of Document	Date
	Annexure "A" to Case Stated being an Application for Determination filed by Marinus Miltenburg on the 18 February, 1981	
	Annexure "B" to Case Stated being an Answer filed by A.M.P. Fire & General Insurance Co. Limited on the 18 February, 1981	
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22.	Transcript of Evidence taken before The President, his Honour, Mr. Justice Moffitt, his Honour, Mr. Justice Glass and his Honour, Mr. Justice Samuels	19 February, 1981
23.	Transcript of Evidence taken before The President, his Honour, Mr. Justice Moffitt, his Honour, Mr. Justice Glass, and his Honour, Mr. Justice Samuels	20 February, 1981
24.	Transcript of Evidence taken before The President, his Honour, Mr. Justice Moffitt, his Honour, Mr. Justice Hutley, and his Honour, Mr. Justice Samuels	29 June, 1981
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26.	Short Minutes of Order	29 June, 1981
27.	Notice of Motion for Conditional Leave to Her Majesty in Council by A.M.P. Fire & General Insurance Co. Ltd.	30 June, 1981
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29.	Notice of Motion for Conditional Leave to Cross Appeal to Her Majesty in Council by Marinus Miltenburg	3 July, 1981
30.	Affidavit of J.K. Chippindall	6 July, 1981
31.	Short Minutes of Order for Conditional Leave to Appeal to Her Majesty in Council by A.M.P. Fire & General Insurance Co. Ltd.	6 July, 1981

No.	Description of Document	Date	
32.	Minute of Order of the Court of Appeal and the Supreme Court of New South Wales granting Conditional Leave to Appeal and to Cross Appeal to Her Majesty in Council	6 July,	1981
33.	Notice of Motion for final leave by the Appellant	24 September,	1981
34.	Affidavit of Leigh M. Virtue in Support of Notice of Motion for final leave	24 September,	1981
35.	Notice of Motion for final leave by the Cross Appellant	28 September,	1981
36.	Registrar's Certificate of compliance for final leave	25 September,	1981
37.	Short Minutes of Order	28 September,	1981
38.	Transcript of Proceedings granting final leave to appeal to Her Majesty in Council	28 September,	1981

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
) No. S16184 of 1980
SYDNEY REGISTRY)
)
COMMON LAW DIVISION)

MARINUS MILTENBURG

Plaintiff

A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

Defendant

SUMMONS

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Amended pursuant to leave granted by His Honour Mr. Justice Toose on 24th November, 1980 and further amended pursuant to leave granted by the Court of Appeal on the 20th February, 1981.

The Plaintiff claims:

1. An Order that the Plaintiff have leave to commence an action in this Court against the Defendant to enforce a charge upon insurance moneys payable by the Defendant as insurer of Henry Willem Louwen trading as Any (Roof) Conversion pursuant to the provisions of Part IV of the Law Reform (Miscellaneous Provisions) Act, 1946 for the amount of \$150,000.00 and costs in Action No. 9336 of 1978 brought in the Common Law Division amounting to \$18,556.58 in which said action the Plaintiff herein was the Plaintiff and Henry Willem Louwen trading as Any (Roof) Conversion was the Defendant.

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1A. In the alternative a declaration that in the event of leave being granted pursuant to this summons, the Plaintiff is entitled to Judgment against the Defendant in the sum of \$63,709.10 and its costs of \$18,556.58.

1B. That the Defendant pay interest on the amount of the

Amended Summons

Judgment at the rate of ten percentum (10%) per annum from the 9th November, 1979.

2. An Order that the costs of this summons be paid by the Defendant.

3. Directions as to the conduct of the said action in the event that this Honourable Court shall grant leave.

4. Such further or other relief as the nature of the case may require.

TO THE DEFENDANT: A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED, 10
1st Floor, A.M.P. Building, Sydney Cove.

If there is no attendance before the Court by you or by your counsel or solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer Judgment or an order against you in your absence. Before any attendance at that time, you must enter an Appearance in the Registry.

TIME: 1980 at 10:00 a.m.

PLACE: Court Law Courts Building, 20
Queens Square, Sydney.

PLAINTIFF: MARINUS MILTENBURG of C/o Messrs. T.D. Kelly
& Co. 70 Castlereagh Street, Sydney
Pensioner.

PLAINTIFF'S
ADDRESS FOR
SERVICE: C/o H.N. Chippindall & Co., Solicitors,
64 Castlereagh Street, Sydney DX 495 Sydney.

Amended Summons

ADDRESS OF
REGISTRY:

Supreme Court of New South Wales, Common Law
Division, Law Courts Building, Queens Square,
Sydney.

DATED this 2nd day of December, 1980.

J.K. Chippindall

Solicitor for the Plaintiff.

CLERK OF THE COURT

IN THE SUPREME COURT)
) C.A. 25 of 1981
OF NEW SOUTH WALES)
) C.L. 16184 of 1980
COURT OF APPEAL DIVISION)

MARINUS MILTENBURG

Plaintiff

A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

Defendant

STATEMENT OF AGREED FACTS AND QUESTIONS
ARISING FOR THE DECISION OF THE COURT

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1. On the 12th October, 1977 the plaintiff, Marinus Miltenburg, sustained severe injuries in the course of his employment with Henry William Louwin trading as "Any (Roof) Conversion" (hereinafter referred to as "the employer").

2. Pursuant to a proposal form dated 26th June, 1972 and signed by the employer (a copy of which is annexed hereto and marked "A") the defendant issued a Policy of indemnity to the employer in the form appearing in Appendix 1 of Division 1 of the Workers' Compensation Regulations under the Workers' Compensation Act 1926 (as amended).

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3. The said Policy was thereafter validly renewed from time to time and was in full force and effect on the 12th October, 1977 in the form appearing in the said regulations save only that the sum specified therein was \$150,000 in lieu of \$100,000.

4. Proceedings were commenced in the Common Law Division of the Supreme Court of New South Wales by the plaintiff against his employer which came on for hearing before His Honour Mr. Justice Toose who delivered a judgment in the proceedings (No. 9336 of 1978) on the 9th November, 1979.

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Statement of Agreed Facts

5. His Honour held that the plaintiff's injuries were caused by the negligence of the employer and assessed damages in the sum of \$521,030. From this figure His Honour deducted the sum of \$63,709.10 being the amount paid by way of compensation in respect of the said injuries pursuant to the provisions of the Workers' Compensation Act 1926 as amended and directed the entry of judgment for the plaintiff in the sum of \$457,320.90.

6. The plaintiff's costs in the proceedings against the employer have been taxed in the sum of \$18,556.58.

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7. In addition to the sum of \$63,709.10 referred to in paragraph 4 the defendant has since judgment also paid to the plaintiff the sum of \$86,290.90 in part satisfaction of the judgment, being \$150,000 less \$63,709.10. No other monies have been paid in satisfaction of the judgment.

8. On the 17th October, 1980 the plaintiff commenced proceedings against the defendant by way of Summons bearing Plaint No. 16184 of 1980 seeking leave to commence an action against the defendant to enforce the statutory charge (if any) created by Section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 for the full amount of \$150,000 together with costs as taxed in the sum of \$18,556.58.

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9. Pursuant to leave granted by His Honour Mr. Justice Toose on the 24th November, 1980 an Amended Summons was filed by the plaintiff on the 2nd December, 1980 seeking in the alternative a declaration that the plaintiff is entitled to judgment in the sum of \$63,709.10 together with his costs as taxed in the sum of \$18,556.58.

Statement of Agreed Facts

10. By order of Mr. Justice Toose on the 6th February, 1981 the proceedings were removed to the Court of Appeal and are now fixed for hearing before the Court of Appeal on the 19th February 1981.

11. The questions arising for the decision of the Court are:-

- (1) Whether the Court has jurisdiction to hear and determine the plaintiff's claim;
- (2) Whether the limit of the defendant's liability under the policy in respect of the plaintiff's injuries, for compensation, damages and the plaintiff's costs of the proceedings No. 9336 of 1978, is \$150,000 in all; 10
- (3) If not,
 - (a) Whether the defendant having paid \$86,290.90 in part satisfaction of the judgment is liable under the policy for the further sum of \$63,709.10 to be paid in further part satisfaction of the judgment;
 - (b) Whether the defendant is liable under the policy for the plaintiff's costs of the proceedings No. 9336 of 1978, in addition to such further sum of \$63,709.10 or at all. 20

12. Without prejudice to its rights of appeal and the question of jurisdiction the defendant will submit to judgment in favour of the plaintiff for any amount for which it is held liable under the policy pursuant to the determination of the foregoing questions.

Statement of Agreed Facts

NOTE:-

At the time of filing this Statement, the plaintiff sought a further admission from the defendant in the following terms:-
"Written instructions were given by the defendant to Messrs. Leigh M. Virtue, Solicitors, to take all necessary steps in proceedings No. 9336 of 1978 on its behalf." The defendant was not able to provide such an admission.

DATED this 16th day of February, 1981.

14001069M

Class of Employees

Class of Employees	Approx. No.	1. Estimated Amount of Wages, Salaries, and other Cash Earnings for Period	2. Estimated Value of Board and Lodging and other Substitutes for Cash	Total of Columns 1 & 2	Tariff Class. Number	Rate of Prem. per cent	Premium
SECTION 1.							
Managerial and Clerical Staffs (i.e. persons engaged solely in office work)							
Commercial Travellers							
General Employees					568	4.15	40.15
					586		26.09
					+657		66.24
							14.89
					+2227		81.13
SECTION 2 - MEMBERS OF FAMILY OR HOUSEHOLD							
Should there be no members employed please mark this as "NIL"							
Columns to be completed also							
Name	Relationship to Employer	Age					
SECTION 3 - CONTRACTORS AND SUBCONTRACTORS							
CLASS OF WORK PERFORMED	Full Contract Price Labour only Supplied	Full Contract Price Labour and Materials Supplied					

TOTALS \$

Additional Common Law plus

PREMIUM % 37
 \$ 81.13
 \$ 2.43
 \$ 83.56
 \$ 10
 \$ 15

FOR OFFICE USE ONLY

ENDTS &/OR WARRANTIES

Silicosis Levy

BOARD AND LODGING - Where employees are provided with board and lodging the value shall be assessed at its actual no case less than

\$5.00 per week For each

**WORKERS' COMPENSATION
 INSURANCE
 PROPOSAL
 GENERAL**

(other than for Private Household Employees)

A.M.P. RATE
 - 30.10.1972
 AND GENERAL

ISSUED BY



A.M.P. FIRE & GENERAL INSURANCE CO. LTD.

8. Annexure "A" to Statement of Agreed Facts

610294473 Policy No. W001069

A.M.P. FIRE AND GENERAL INSURANCE CO. LTD.

PERIOD: FROM 26.6.72 TO 26.6.73 at 4 p.m.
(COMMENCEMENT DATE) (RENEWAL DATE)

Full Name of Employer: HENRY WILLEM LOUWEN

Postal Address: 132 PERTAMA PLACE
 PROMER NSW 2079

Situation of Business: ANYWHERE IN N.S.W.

Nature of Business: SUB CONTRACTOR - BUILDING

Limit of Indemnity at Common Law \$ 100,000

ESTIMATED EARNINGS \$ 1,000	PREMIUM \$:
(Details to be shown in Schedule overleaf)	(Subject to Adjustment)
	Silicosis Levy \$:
	Stamp Duty \$:
	Amount Payable \$:

Agency Name: E.W. LEUENBERGER
 Not 11977

FOR OFFICE USE ONLY

Spec. Des.				
Spec. Act.				
Stats	Locality			
COVER NOTE				
No.	Date of Issue / /			
PROVISIONAL PAYMENT				
Rept. No.	Amount	Date Recd.	Initials	D.D.B.
Policy Dated 21.7.72	IN LIEU OF Policy No.	App. Adv. A/C No.		
DATE	ACCEPTANCE TO MEMORANDA			
26.6.72	Policy to amt to client			
R.O./D.O. Date Stamp		Branch Office Date Stamp		
FG NB 20-1(5)				

PARTICULARS OF INSURANCE

I hereby request A.M.P. FIRE AND GENERAL INSURANCE COMPANY LIMITED to issue to me/us in respect of my/our business, trade, work, or occupation described in this form, a Policy indemnifying me/us against my/our legal liability in respect of any worker within the meaning of the Workers' Compensation Act of N.S.W. :- (a) Compensation under the Workers' Compensation Act of N.S.W. for personal injury within the meaning of such Act and/or (b) Damages independently of the said Act for any injury (as defined in the said Act) to any such worker engaged in the business or occupation to which this Policy is issued. PROVIDED ALWAYS that the liability of the Company arising out of all claims made independently of the said Act by respect of any such worker for any such injury shall be limited to an amount not exceeding \$40,000 in the terms of the Pol.

1. What machinery and motive power are used?	1. Electric (110V) Saw (Circular)
2. Are your machinery, plant, works, and ways properly fenced and guarded and otherwise in good order and condition?	2. YES
3. Are any explosives, chemicals, gases, or dangerous substances used? If so, please give details.	3. NO
4. In respect of your liability as an Employer, has any Company:- (a) Permitted withdrawal of or declined any Proposal? (b) Cancelled or refused to renew a Policy? (c) Demanded an increased rate?	4. (a) NO (b) NO (c) NO
5. (a) Have you any employees engaged otherwise than in connection with the business described in this form? (b) If so, in what trade or business are they engaged? (c) Where are they employed? (d) With which Company are they insured?	5. (a) NO (b) (c) (d)
6. Are any of your relatives or members of your family or household employed in connection with your business? (If so, details must be completed in Section 2 of the Schedule overleaf.)	6. NO
7. (a) Do you expect to let any contract for supplying timber, tree-felling, firewood cutting, scrub-cutting or clearing land of stumps or logs, the whole or part of which work will be done by the Contractor personally? (If so, Section 3 of the Schedule overleaf must be completed) (b) Do you, in respect of your business expect to let to working Contractors any contracts for work (not being work incidental to a trade or business regularly carried on by the Contractor in his own name or under a business or firm name)? (If so, Section 3 of the Schedule overleaf must be completed)	7. (a) NO (b) NO
8. (a) Do you expect to let contracts for any part of your business, other than those specified in Question 7? If so, (b) Will you satisfy yourself on every occasion that the Contractor is insured against his full liability under the Workers' Compensation Act? (If so, to ensure protection you must obtain a certificate of indemnity from the Contractor's insurers.) OR (c) Do you desire indemnity against your liability to employees of Contractors? (If so, Section 3 of the Schedule overleaf must be completed)	8. (a) YES (b) YES (c) NO
9. (a) Do you require any extension of the \$40,000 limit of indemnity at Common Law? (b) If so, please state the total amount of indemnity required.	9. (a) YES (\$100,000) (b) \$9,000.00

I/we hereby declare and warrant that all the above statements, together with particulars supplied in the Schedule on back hereof, which I/we have read and checked, are true; that I/we have not suppressed, misrepresented, or misstated any material fact; that I/we have fairly estimated my/our total expenditure for wages, salaries, and all other forms of remuneration during the period of indemnity proposed, and I/we shall keep a proper Wages Book in which the name and earnings of every employee shall be entered regularly. And I/we shall supply the Company on request with a correct amount of all wages, salaries, and other forms of remuneration paid or accrued during any period of indemnity, and if the total amount so paid shall differ from the amount on which premium has been paid, the difference in premium shall be met by a further proportionate payment to the Company or by a refund by the Company, as the case may be, but subject always to the minimum premium payable. This Proposal and Declaration shall, subject to the terms and conditions of the Policy, be the basis of the Contract, and be incorporated therein.

If this Proposal in any particular is filled in by any person other than the Employer, such person shall be deemed the Agent of the Employer and not of the Company.

Date 26.6.72 19..... Signature of Employer *[Signature]* (SEE OVER)

IN THE SUPREME COURT)
) C.A. 25 of 1981
OF NEW SOUTH WALES)
) C.L. 16184 of 1980
COURT OF APPEAL DIVISION)

MARINUS MILTENBURG

Plaintiff

A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

Defendant

AMENDED ADDENDUM TO STATEMENT OF AGREED FACTS

10

For the purposes only of the plaintiff's argument that the employer's liability for the worker's costs is covered by the policy as having been "incurred with the written consent of the insurer", the defendant admits that on 20th February, 1978 the defendant addressed a letter to L.M. Virtue, solicitor, a copy whereof is annexed hereto and thereafter L.M. Virtue filed an appearance and acted on behalf of the employer in the proceedings referred to in paragraph 4 of the Statement of Agreed Facts.

DATED: This 18th day of February, 1981.

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FIRE & GENERAL INSURANCE CO. LTD.

(INCORPORATED IN CANBERRA, A.C.T.)

A WHOLLY OWNED SUBSIDIARY OF THE AUSTRALIAN MUTUAL PROVIDENT SOCIETY

Box 4268 G.P.O. Sydney 2001
Tel. 20530 Ext. 3431
Please Quote Claims:RP:M:788128

Metropolitan Region
Sydney Cove.

20 February 1978

LEIGH M VIRTUE

D.X. 928

10

Dear Sir

RE: WORKERS COMPENSATION CLAIM M788128
R MILTENBURG E/B H.W. LOUWEN

Attached please find relevant copies of our file together with Statement of Claim No 9336 which we request that you defend on our behalf.

We have afforded the worker payment of Workers Compensation benefits however we do not agree with the weekly rate suggested by Tim Kelly as Miltenburg was a casual employee and paid an average of \$99.00 per week as indicated on the attached copies of the wage book.

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As agreed verbally we have not accepted the proposed Section 16 entitlement pending further medical advice that you will arrange to be forwarded.

Yours faithfully

per R. Parsons

R. Parsons
for the Manager.

Encl.

CONSULT YOUR A.M.P. AGENT OR PHONE OUR NEAREST BRANCH OFFICE ON ALL YOUR INSURANCE PROBLEMS.

Amended Addendum to
12. Statement of Agreed Facts

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

)
) C.A. 25 of 1981
) C.L. 16184 of 1980
)
)

CORAM: MOFFITT, P.
GLASS, J.A.
SAMUELS, J.A.

Monday, 22nd June, 1981

MILTENBURG v. A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

Insurance - reference from Common Law Division - summons for
leave to commence action against insurer under s. 6 of the Law
Reform (Miscellaneous Provisions) Act, 1946 - statutory policy
under Workers' Compensation Act - indemnity against liability
independently of the Act limited to \$150,000 - worker recovers
judgment for damages at common law which after deduction of
workers compensation paid far exceeds limit of indemnity -
insurer bound to apply the whole of the indemnity in part
satisfaction of the judgment.

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ORDERS

Leave sought in paragraph 1 of the summons granted -
declaration refused - defendant to pay 7/10ths of the
plaintiff's costs of the summons. Questions asked in
the case stated by the Workers' Compensation Commission
not answered. No order for the costs of the case stated.

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

)
) C.A. 25 of 1981
)
) C.L. 16184 of 1980
)

CORAM: MOFFITT, P.
GLASS, J.A.
SAMUELS, J.A.

MONDAY, 22ND JUNE, 1981

MILTENBURG v. A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

10

JUDGMENT

MOFFITT, P. I agree with the judgment of Samuels, J.A.

I certify that this is a true copy of the reasons
for judgment herein of The Honourable Mr. Justice Moffitt.

A. Lindsay
Associate

Date 22.6.81

14. Reasons for Judgment of his
Honour, Mr. Justice Moffitt

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

)
) C.A. 25 of 1981
)
) C.L. 16184 of 1980
)

CORAM: MOFFITT, P.
GLASS, J.A.
SAMUELS, J.A.

MONDAY, 22ND JUNE, 1981.

MILTENBURG v. A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

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JUDGMENT

GLASS, J.A.: I agree with the judgment of Samuels J.A. and with the orders he proposes.

I certify that this is a true copy of the reasons for Judgment herein of The Honourable Mr. Justice Glass.

Margaret G. Newby
Associate

Date 22/6/1981

IN THE SUPREME COURT)
) C.A. 25 of 1981
OF NEW SOUTH WALES)
) C.L. 16184 of 1980
COURT OF APPEAL)

CORAM: MOFFITT, P.
GLASS, J.A.
SAMUELS, J.A.

Monday 22nd June 1981

MILTENBURG v. A.M.P. FIRE & GENERAL INSURANCE CO. LIMITED

10

JUDGMENT

SAMUELS, J.A.: On the 12th October 1977 Marinus Miltenburg (whom I will call "the plaintiff") sustained severe injuries in the course of his employment with one Louwen (whom I will call "the employer"). At that time the employer was indemnified against his liability under the Workers' Compensation Act 1926 ("the Act") and at common law by A.M.P. Fire & General Insurance Company Limited (which I will call "the defendant") pursuant to an employer's indemnity policy in the statutory form in which indemnity in respect of liability independently of the Act was limited to the sum of \$150,000. That policy was in full force and of effect on the 12th October 1977.

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The plaintiff commenced proceedings in the common law division of the Supreme Court against his employer; and on the 9th November 1979 Toose J. held that the plaintiff's injuries had been caused by the employer's negligence and assessed damages in the sum of \$521,030. In those proceedings, which the defendant did not conduct, the employer pleaded as a defence provided by s.63(5) of the Act that he had paid to the plaintiff by way of compensation the sum of \$63,709.10.

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Reasons for Judgment of his
16. Honour, Mr. Justice Samuels

Accordingly, his Honour deducted that figure from the total amount of damages and directed the entry of judgment for the plaintiff in the sum of \$457,320.90, together with the plaintiff's costs which were taxed in the sum of \$18,556.58.

Subsequently, the defendant (which had of course already paid to or on behalf of the plaintiff the sum of \$63,709.10) paid to the plaintiff the sum of \$86,290.90 in part satisfaction of the judgment, that figure being calculated by deducting 10 \$63,709.10 from the total of the common law cover under the policy, namely, \$150,000.

On the 17th October 1980 the plaintiff initiated proceedings against the defendant by a summons seeking leave to commence an action against the defendant to enforce a statutory charge pursuant to the provisions of s.6 of the Law Reform (Miscellaneous Provisions) Act, 1946 for the full amount of \$150,000 together with the taxed costs of \$18,556.58. Pursuant to leave granted by Toose J. on the 24th November 1980 the plaintiff, on the 2nd December 1980, filed an amended summons 20 seeking in the alternative a declaration that in the event of leave being granted to commence an action under s.6, the plaintiff was entitled to judgment in the sum of \$63,709.10 together with the taxed costs.

On the 6th February Toose J. ordered that the proceedings be removed into the Court of Appeal.

The defendant's solicitors, having intimated to the plaintiff's solicitors that in reliance upon s.36(1) of the Act

the defendant would contend that the Supreme Court had no jurisdiction to entertain the summons, the parties sensibly conferred in order to select some procedural means by which the matters which they wished to have determined could be properly brought before this Court. To that end, on the 18th February 1981, the defendant as applicant filed an application for determination in the Workers' Compensation Commission seeking a declaration that the limit of the defendant's liability under the policy, in respect of the plaintiff's injuries, for compensation, damages and the Plaintiff's costs of the proceedings in the Supreme Court, was \$150,000 and no more. To this application the plaintiff filed a disputing answer. Thereupon, at the defendant's request, and with the concurrence of the plaintiff, his Honour Judge Langsworth stated a case under s.37(4) (b) of the Act, referring to the Court of Appeal the following questions of law:-

- "(1) Whether the Workers' Compensation Commission of New South Wales has jurisdiction to hear and determine the questions hereinafter appearing. 20
- (2) Whether the limit of the applicant's liability under the policy in respect of the respondent's injuries, for compensation, damages and the respondent's costs of the proceedings No. 9336 of 1978 in the Supreme Court of New South Wales is \$150,000 in all.
- (3) If the answer to the previous question is 'No',
 - (a) Whether the applicant having paid \$86,290.90 in part satisfaction of the judgment is liable under the policy for the further sum of \$63,709.10 to be paid in further part satisfaction of the judgment. 30
 - (b) Whether the applicant is liable under the policy for the respondent's costs of the proceedings

No. 9336 of 1978, in addition to such further sum
of \$63,709.10 or at all".

On the following day, that is, the 19th February 1981,
both sets of proceedings came on for hearing in this Court.

The stated case sufficiently indicates the questions for
determination. So far as the summons referred by Toose J. is
concerned, the defendant, in a statement provided by the parties
and headed "Statement of Agreed Facts and Questions Arising for 10
the Decision of the Court" (that is, the Court of Appeal), had
made a concession in the following terms:-

"Without prejudice to its rights of appeal and the ques-
tion of jurisdiction the defendant will submit to judgment
in favour of the plaintiff for any amount for which it is
held liable under the policy pursuant to the determina-
tion of the foregoing questions".

Those questions, which are set out in the statement, are, in
substance, identical with the questions referred by the Workers'
Compensation Commission. In the light of this concession, Mr. 20
P. Deakin for the plaintiff, informed us that he considered it
no longer necessary to press the relief he sought under his
summons; on the footing that if the questions raised in the
stated case were answered in his favour the defendant's conces-
sion, when carried into effect, would dispose of the matters
outstanding between the parties and provide the relief which
the plaintiff sought. Nonetheless, I think that the issues
raised in the summons must be determined for reasons which will
later appear. I therefore turn first to consider the submis-
sion that the Supreme Court has no jurisdiction to entertain or 30
grant that application.

The argument is founded upon the provisions of s.36(1) of the Act which is in the following terms:-

"Subject to section 37, the Commission shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Act, and the action or decision of the Commission shall be final".

Section 37 deals with appeals to the Supreme Court by way of stated case or notice of motion and does not affect the point now in issue. The defendant submits that the questions raised by the summons constitute "matters and questions arising under" the Act which the Commission has exclusive jurisdiction to determine. 10

I have already referred to the statement of agreed facts; and in paragraph 11 of this document there are stated the issues and questions which are said by the parties to arise for decision. Leaving aside the issue of jurisdiction, the questions are substantially identical with those presented by the stated case which I have set out above. Accordingly, the questions concern the extent of the defendant's liability under the contract of insurance between it and the employer but to which the plaintiff also may have recourse pursuant to the provisions of s.18(3)(a) of the Act, a right which the policy itself also stipulates: see Miller v. Law Union & Rock Insurance Company Limited [1969] 71 S.R. 201. But the plaintiff here is not endeavouring to enforce his rights under s.18(3)(a). Accordingly, no question arises of the kind discussed in Devine v. Devine & Queensland Insurance Co. Limited [1928] 28 S.R. 503 or 20

McNellee v. Co-Operative Insurance Co. of Australia Limited

[1964] 64 S.R. 295. Nor can it be said - and, indeed, it was not argued - that the provisions of s.6(8) of the Law Reform (Miscellaneous Provisions) Act are attracted for want of some preliminary determination between the plaintiff and the employer: see Spain v. Metropolitan Meat Industry Board [1971] 1 N.S.W.L.R. 91 which, as to its first holding, cannot any longer be regarded as of authority since the recent decision in National Mutual Fire Insurance Company Limited v. The Commonwealth of Australia (Court of Appeal, 15th April 1981), but whose second holding was not there discussed. In the present case, the plaintiff relies upon the Law Reform (Miscellaneous Provisions) Act to obtain access to the insurance fund consequent upon his having recovered judgment against the employer. 10

It follows, to my mind, that the defendant must depend solely upon the privative provisions of s.36(1). For this purpose reliance was placed upon the decision of the High Court in The King v. Commonwealth Court of Conciliation & Arbitration & ors. [1945] 70 C.L.R. 141. There, considering s.76(ii) of the Commonwealth Constitution, which provides that the High Court may have conferred upon it jurisdiction "in any matter arising under any laws made by the Parliament", Latham C.J. at 154 said:- 20

"The relevant enquiry is whether the matter arises under the law. Thus one is compelled to the conclusion that a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for 30

its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law. In either of these cases, the matter arises under the Federal law. If a right claimed is conferred by or under a Federal statute the claim arises under the statute".

More recently, in Moorgate Tobacco Company Limited v. Phillip Morris Limited [1980] 54 A.L.J.R. 479, Stephen, Mason, Aickin and Wilson JJ. at 484 said:-

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"Moreover, the parties were in agreement that a matter is a section 76(ii) matter if, being a right, title, duty, privilege, protection or immunity, it 'owes its existence to Federal law or depends upon Federal law for its enforcement'".

But to my mind these cases, and Felton v. Mulligan & anor. [1971] 124 C.L.R. 367, can be distinguished upon their material, that is to say, upon consideration of the issues which they presented for determination. Furthermore, I am by no means persuaded that reasoning which applies to identify a matter arising under federal law under the Commonwealth Constitution is of appropriate application to the very different provisions of s.36(1). In respect of a provision of that kind, the High Court in Brakespeare v. The Northern Assurance Company Limited 101 C.L.R. 661 at 668 said this:-

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"Provisions (of this kind) ... derogate from the jurisdiction of the ordinary courts of justice. They are therefore not construed as going beyond the fair intentment of the language in which they are expressed".

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What is in contention here is the construction of the policy and, although it is a statutory policy which the employer was required to have and the defendant compelled to issue in the terms laid down by the Act, it is to be construed according to

its terms; although it is legitimate to take into account the provisions of the Act and its legislative intention: State Mines Control Authority v. Government Insurance Office of New South Wales & anor. [1964] 65 S.R. 258 at 261 and Dillingham Engineering Pty. Limited v. National Employers Mutual General Insurance Association Limited [1971] 1 N.S.W.L.R. 578 at 585.

Accordingly the summons (apart from an issue of jurisdiction) presents questions of construction which cannot be said to arise under the Act, and the conditions of s.36(1) are therefore not satisfied. Hence the Supreme Court has jurisdiction. 10

I turn then to consider the substantial issues involved.

The policy, so far as relevant, provided as follows:-

"... IF ... the employer shall be liable to pay compensation under the Act to or in respect of any person who is or is deemed by the Act to be a worker of such employer or to pay any other amount not exceeding One hundred and fifty thousand dollars in respect of his liability independently of the Act for any injury to any such person, THEN, and in every such case the insurer will indemnify the employer against all 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". 20

The policy also provided that "the insurer shall be (a) directly liable to any worker and in the event of his death, to his dependants, 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 30

his liability independently of the Act and in respect of which the employer is indemnified under this policy".

I leave out of account for the moment the question of any costs which an employer is liable to pay to a worker in proceedings brought independently of the Act. Upon a strict reading, the operative part of the policy might seem to be conditioned upon the employer's liability to pay in respect of liability independently of the Act, an amount not exceeding \$150,000. 10

But it would be absurd to conclude that where judgment passes against an employer for an amount greater than the limit of the indemnity provided in the policy, the employer's (or the worker's) right to indemnity is wholly defeated. Clearly enough, the policy means that the insurer will indemnify the employer in respect of liability independently of the Act up to the limit of the indemnity which the policy provides. That this was the legislative intention appears from s.18(3)(a) of the Act. Accordingly, the defendant in the present case was bound by the policy to pay to the employer or the plaintiff 20

without limit all compensation under the Act for which the employer might be liable, and to pay (again excluding costs) the amount of any damages not exceeding \$150,000 for which the employer might be liable independently of the Act.

The scheme of the Act has always been to prevent a worker from taking the benefit of both compensation and damages. Hence, s.63 does not permit a worker to obtain compensation after he has obtained judgment against his employer independently of the Act. He remains entitled to retain such

compensation as he has received before judgment but, prior to the amendments made in 1970, the amount of compensation paid before judgment was, pro tanto, satisfaction of the judgment. In 1970 s.63 was amended to provide that where any payment by way of compensation under the Act had been made, that payment should, to the extent of its amount, be a defence to proceedings against the employer independently of the Act in respect of the injury for which the compensation was paid. Prior to the amendment, judgment passed for what I might call the gross amount; but the employer was liable to pay to the plaintiff worker only the amount of that judgment less the sum paid for compensation. After the amendment, judgment passes only for the balance struck by deducting the amount of compensation paid from the damages assessed. In either case, it is correct to say that the employer's liability is to pay only the net amount.

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In the present case, judgment was directed to be entered for the amount of damages assessed less the compensation paid prior to judgment. The amount of the judgment far exceeded the limit of indemnity under the policy. The defendant's argument is that its total liability under the policy to indemnify the employer (and thus its liability to the plaintiff) for both compensation and damages does not exceed the sum of \$150,000. In my opinion, the argument is without substance. It is, I think, evident that the policy provides protection to an employer (and, I perhaps need not repeat, rights available to a worker) under two quite distinct heads. First of all, it

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provides indemnity against compensation paid under the Act; and, secondly, it provides indemnity against damages for which the employer is liable independently of the Act. The Act entitles the employer to deduct from the damages for which he is liable the amount of the compensation which he has paid under the Act. But it does not at all follow that the employer's liability, both for compensation and damages, is restricted to the amount of the indemnity (if limited in the policy) which is stipulated only in respect of liability independently of the Act, that is, for damages at common law. This seems to me to be the plain meaning of the policy, and is not displaced by reference to the Act as the legislative context in which the policy is set. 10

It was put on behalf of the defendant that, if this construction were adopted, an insurer's overall liability would be increased if the worker who recovered damages had been paid compensation. This is not so. The amount of an insurer's maximum liability under the policy where a worker who has been paid compensation obtains damages at common law will be equal to the amount of the damages recovered; and the same result follows where a worker who has never obtained compensation recovers judgment for damages at common law. Assume the case of a worker whose damages are assessed in the sum of \$100,000 and who has never received any payments of compensation under the Act. He will recover judgment for \$100,000 and that will represent the insurer's overall liability. Then assume the case of another worker whose damages are also assessed in the sum of \$100,000 20

but who has been paid \$50,000 in compensation under the Act. He will recover judgment for \$50,000; but the insurer has already paid out \$50,000, which the worker is entitled to retain, so that his overall liability is the same as before, that is, \$100,000. Now take a case where the indemnity against liability independently of the Act is limited by the policy to \$150,000, as it is here, and a worker's damages are assessed in the amount of \$200,000; he has, however, received and is entitled to re- 10
tain payments of compensation amounting to \$50,000. He will recover judgment for \$150,000. But the insurer's overall liability will exceed that figure, being made up of \$150,000, the amount of the judgment which he is bound to satisfy, together with the \$50,000 in compensation which he has already paid, and cannot get back, making a total of \$200,000, which exceeds by \$50,000 the limit of the indemnity under the policy. That result is entailed because the insurer must satisfy the whole of the judgment and cannot get back the compensation he has paid which has already been brought to account in calculating 20
the amount of the judgment. In other words, it cannot be said that an insurer's liability for damages and compensation must not exceed the limit of the indemnity against damages alone.

In my view, the error in the defendant's argument stems from the view that the limited indemnity against liability independently of the Act is intended to cover both that liability and liability under the Act. From the terms of the policy, supported by the structure of the Act, it is not. In

consequence, in any case where, after deducting the compensation paid from the total of the damages assessed, a figure for judgment is produced which exceeds the limit of the indemnity at common law, the whole of that indemnity must be applied in part satisfaction of the judgment.

The remaining question concerns the liability of the defendant to pay the amount of the plaintiff's taxed costs. In my view, looking again at the policy, the provision concerning the insurer's obligation to 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" must refer to costs incurred by the employer. I find it impossible to see how the insurer's consent, or its absence, can in any way affect the costs of the party on the opposite site of the record. The sums for which the indemnity provides are "all such sums for which the employer shall be so liable"; and this catches up the earlier words, namely, "any other amount ... in respect of his liability independently of the Act". The employer's liability to pay an amount in respect of his liability independently of the Act for any injury to the worker/plaintiff must include his liability to pay the worker/plaintiff's costs incurred in the proceedings in which the employer's liability is established. As Form 50 in the Fourth Schedule to the Supreme Court Act, 1970 indicates, judgment in an action for damages at common law is entered for both damages and costs. Hence, the common law indemnity in

the policy is designed to absorb both the amount of the damages and the amount of costs which the plaintiff, by his judgment, recovers.

In the present case, therefore, the defendant cannot be required to pay more than the sum of \$150,000, the limit of the indemnity, and this will go, so far as it can, to satisfy the plaintiff's damages and costs.

At the end of the argument, counsel for the plaintiff applied for, and was granted, leave to make a claim for interest at the rate of ten per centum per annum from the 12th October, 1977, which was the date of the plaintiff's injury, until judgment. I can see no justification, however, for awarding interest on this footing. I do not consider it to be fair to require the defendant to pay interest on a sum which, upon any practical view, it could scarcely have been expected to tender until at least the date of the plaintiff's judgment, which was the 9th November, 1979. I do not see why interest should not be ordered at the suggested rate from that date upon ordinary principles and, indeed, Mr. H.D. Sperling Q.C. for the defendant, did not argue to the contrary.

Although the summons is in form merely an application for leave to commence an action under s.6 of the Law Reform (Miscellaneous Provisions) Act, we have heard full argument upon the issues which the summons would raise if leave were granted. The actual grant of leave is a formality because of the concession made by the defendant to which I have earlier

referred. But in order to keep the record correct, it is necessary to make appropriate orders; and I would accordingly grant leave under the first prayer in the summons. The declaration sought in the alternative is not strictly necessary and, in any event, the declaration for which the plaintiff contended cannot be granted because the plaintiff is not entitled to recover from the defendant any more than the sum of \$63,709.10. The plaintiff has succeeded in part and failed in part, and since a good deal of time was taken up in the argument concerning costs, it seems to me that the plaintiff should recover seven/tenths of its costs of the summons. 10

It remains necessary to dispose of the stated case. I have some doubts as to the propriety of the procedure which the parties adopted in a very sensible endeavour to see that this Court had the opportunity of dealing with the real issues for decision. It is now unnecessary to make any orders in the case stated and hence the Court does not answer any of the questions asked in the case and makes no order for its costs. I must make it clear that I express no opinion (because it is not necessary to do so) upon the question whether the Commission had jurisdiction to determine the extent of the cover against liability at common law provided by the statutory policy. In my opinion, therefore, the leave sought in the first paragraph of the summons should be granted and the declaration sought in the alternative refused. The defendant should pay seven-tenths of the plaintiff's costs of the summons. 20

Reasons for Judgment of his
Honour, Mr. Justice Samuels

I certify that the 15 preceding pages are a true copy of
the reasons for judgment herein of The Honourable
Mr. Justice Samuels.

M. Anderson

Associate

Date 22 June, 1981.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) C.A. 25 of 1981
)
COURT OF APPEAL) C.L. Complaint No. 16184 of 1980
)
SYDNEY REGISTRY)

MARINUS MILTENBURG

Plaintiff

A.M.P. FIRE & GENERAL INSURANCE COMPANY LTD.

Defendant

ORDER

THE COURT ORDERS THAT -

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1. The Plaintiff have leave to enforce by way of action against the Defendant a charge on insurance monies payable in respect of the liability of Henry William Louwen under the judgment recovered by the Plaintiff against him in proceedings No. 9336 of 1978 in the Common Law Division of this Court.

2. There be Judgment for the Plaintiff in the sum of \$63,709.10.

3. The Defendant pay interest on the judgment at the rate of 10% per annum from 9 November, 1979 calculated in the sum of \$10,289.01.

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4. The Defendant pay seven-tenths of the Plaintiff's costs.

5. Entry of judgment be directed for the Plaintiff for \$73,998.11 and costs as abovementioned.

Ordered 29th June, 1981 and entered 4 August 1981.

By the Court

A.W. Ashe (S'gd)

REGISTRAR
COURT OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES)
)
COURT OF APPEAL) No. 25 of 1981
)
SYDNEY REGISTRY)

A.M.P. FIRE & GENERAL INSURANCE COMPANY LIMITED

Claimant

MARINUS MILTENBURG

Opponent.

O R D E R

UPON THE CROSS-APPELLANT BY HIS COUNSEL UNDERTAKING THAT A
NOTICE OF MOTION FOR FINAL LEAVE TO APPEAL TO HER MAJESTY IN
COUNCIL WILL BE FILED IN COURT -

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THE COURT ORDERS THAT -

1. The Claimant have leave to appeal to Her Majesty in Council from the Judgment of the Court of Appeal delivered on the 29th June, 1981.
2. The leave referred to in Paragraph 1 hereof is final.

ORDERED: - 28th September, 1981.

ENTERED: - 19 October, 1981.

By the Court,

A.W. Ashe (S'gd) (L.S.)
Registrar

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COURT OF APPEAL

CERTIFICATE OF THE REGISTRAR OF THE COURT OF APPEAL
OF THE SUPREME COURT OF NEW SOUTH WALES
VERIFYING THE RECORD OF PROCEEDINGS

I, ALYSON WENDY ASHE, Registrar of the Court of Appeal of the
Supreme Court of New South Wales

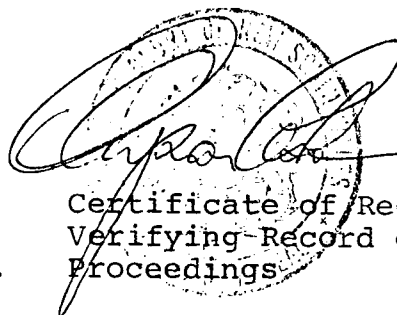
DO HEREBY CERTIFY as follows:-

That this record contains a true copy of all such Orders,
Judgments and documents as have relation to the matter of this
Appeal and a copy of the reasons for the respective Judgments
pronounced in the course of the proceedings out of which the 10
Appeal arose.

That the Respondent herein has received notice of the
Order of Her Majesty in Council giving the Appellant Special
Leave to appeal to Her Majesty in Council AND has also received
notice of the dispatch of this record to the Registrar of the
Privy Council.

DATED at Sydney in the State of New South Wales this twenty-third
day of October, One thousand nine hundred and eighty-one.

Registrar of the Court of Appeal
of the Supreme Court of New 20
South Wales


Certificate of Registrar
Verifying Record of
Proceedings