

Insurance and Professional Negligence Law

Case & Journal Notes by Stephen Warne



Victoria

***McConnell Dowell Middle East LLC v Royal & Sun Alliance Insurance Plc (No 3)* [2009] VSC 94**

Section 101 of the *Supreme Court Act, 1986* says 'Every judgment debt carries [penalty] interest ... from the time the judgment was given or ... such other date as the Court orders.' Where s. 57 of the *Insurance Contracts Act, 1984* applies, however, s. 101 is excluded. Section 57 requires payment of interest calculated by a complicated formula to be paid by an insurer to a claimant for the period in which it was unreasonable to withhold payment, ending on the day the insured's claim on the policy was paid.

Justice Hansen ordered the insurer to pay US\$3.3 million on 28 November ([2008] VSC 501; see below). The insurer paid on 19 December. On 20 February, his Honour ordered the payment of *Insurance Contracts Act* interest on that sum for the period after 2001 ([2009] VSC 49), and distributed a draft written order. There was an error, and subsequently a proposal by his Honour to amend the order under the slip rule. That was quickly agreed to, but authentication was held over as a result of one final issue which then arose, and authentication occurred on 25 March.

His Honour held that judgment was 'given' for the purposes of *Supreme Court Act* interest on 20 February, notwithstanding the revisions and the delay in authentication of almost 5 weeks. That was true in this case, but his Honour emphasised that what actually happened at each stage on the path to authenticate judgment must be scrutinised to get to the substance of when judgment was 'given'. Then his Honour held that *Supreme Court Act* interest accrued on the judgment for *Insurance Contracts Act* interest during the period between the giving of judgment and payment of it, since the *Insurance Contracts Act's* exclusion of the *Supreme Court Act's* judgment interest provision ceased to have effect once s. 57's operation came to an end when the insurer paid the amounts it had unreasonably withheld.

Unless the Court otherwise ordered, his Honour said, the first day's *Supreme Court Act* interest accrued on 21 February. His Honour did decide to order otherwise, however, and ordered the insurer to pay *Supreme Court Act* interest on the judgment for *Insurance Contracts Act* interest not from the date of the second judgment for *Insurance Contracts Act* interest on 20 February, but from the date of the original judgment on 20 November. But for the fact that the s. 57 interest was not readily calculable on that first date, and that counsel requested time to consider the *Insurance Contracts Act* interest issues, that interest would have been an incident of

the main judgment. The insured having not had the use of the *Insurance Contracts Act* interest during the period between the main, first, judgment and the judgment for interest, it should compensate the claimant accordingly.

McConnell Dowell Middle East LLC v Royal & Sun Alliance Insurance Plc (No 2) [2009] VSC 49.

Justice Hansen's decision in relation to the date from which *Insurance Contracts Act* interest was payable is not easy to summarise, and some detailed notes are linked to below. It was a messy claim, however, arising out of the disappearance of equipment from a diamond mine in the Central African Republic. Even after the trial, exactly what happened remained unclear. The insured did not respond promptly to some requests by the insurer for documentation which turned out not to be determinative of the claim. Nevertheless, his Honour held that 4 months was a reasonable period for the insurer to have investigated sufficiently to decide whether to admit or deny indemnity, consistently with the few other areas in this area which suggest that even in complex claims, the interest-free period in which an insurer has to investigate and come to a correct position in relation to indemnity is at most a few months. The judgment reiterates that an insurer which takes a reasonable decision to deny indemnity on a bona fide basis will nevertheless often have to pay interest under s. 57 of the Act if its decision is ultimately found to be wrong. The provision is not there to punish unreasonable behaviour by insurers, but to compensate insureds whose payment is deferred without good cause, objectively speaking. Any other result would reward the insurer recipients of poor advice. Clayton Utz's note is [here](#). Middleton's is [here](#). Lander & Rogers's is [here](#).

***Spiteri v Roccisano* [2009] VSC 132 –**

is a decision of 9 April 2009 in which the plaintiff invested hundreds of thousands of dollars in a property development venture of an old school mate, and lost it all. He sued his solicitor of 20 years for negligently failing to advise on the adequacy of the security he got for his investment. The breach was made out. The solicitor joined as third parties two proponents of the investment and the company which received the investment. Justice Kaye found that they were concurrent wrongdoers, and apportioned 40% of the responsibility for the plaintiff's losses to them. They were insolvent, and the plaintiff already had a useless judgment against them from earlier proceedings, which no doubt explains why he did not add them as defendants. His Honour found that a critical representation that a company, shares in which were offered as security, had \$4 million in equity was fundamentally incorrect and made without any reasonable basis. It was negligent and a breach of the *Fair Trading Act, 1991*'s prohibition on misleading and deceptive conduct. Whereas one might expect the parties who had actually engaged in the misleading conduct to bear the brunt of the responsibility for the plaintiff's loss, Justice Kaye said the solicitor who failed to detect the deception should do so for the following reasons:

'109 ... the plaintiff engaged the defendant as his solicitor to ensure that he had adequate protection for his investment The defendant, certainly, could not play any role in ensuring the financial viability of the ... project. However, given the inherent risks in such a venture, the role undertaken by the defendant was an important and significant role on behalf of the plaintiff. The plaintiff looked to him to exercise reasonable care and skill to ensure that there was adequate security for his investment. It is clear that the plaintiff was significantly reliant on the defendant for that purpose. A substantial part of the negotiations ... were

conducted between [one of the proponents] and the defendant. Indeed, ... the defendant ... did not see the plaintiff, face to face, about the transaction, until [late in the piece]. As I have found, the defendant breached his duty of care to the plaintiff, in two fundamental respects. First, he failed to give proper advice to the plaintiff about the legal deficiencies in the security, consisting of the transfer of shares ..., proposed by [the two proponents]. Further, the defendant breached his duty of care to the plaintiff, both by adding his imprimatur to the representation given by [them] concerning the equity position of [the company whose shares were to be transferred by way of security], and also by failing to caution the plaintiff properly against accepting that representation at face value.'

New South Wales

David v David [2009] NSWCA 8 ([2007] NSWSC 855) –

is a case brought by a plumber, Mr David, and his wife, against a firm of solicitors.

In March 2001, the plumber invested money borrowed against his matrimonial home in a scheme promoted by a con man. By August, he had invested almost \$200,000. By December, he had lost almost all of it; ASIC had wound up the con man's unregistered managed investment scheme, and the con man later went to jail.

When the plumber contacted the solicitors in February 2001, he had all the relevant borrowing documentation completed, and had already decided to invest with the con man. The file handler's job involved arranging a discharge of the plumber's existing mortgage loan and advising the plumber about the new loan and mortgage documents. This she did competently, successfully orally limiting her retainer by telling the plumber she was not giving advice on the financial advisability of the transaction, and suggesting getting advice from a financial adviser or accountant.

On the eve of the settlement of the refinancing, the file handler learnt that the funds were to be paid to a company associated with the con man, for whom her firm had acted. To that point, she had had no idea what the plumber proposed to do with the money if the refinancing succeeded. She told the plumber her firm acted for the con man and had referred to specialist lawyers the question of whether the way his business was structured was legal. She said it would be best to wait and see what happened. (Criticised by the plumber for not going far enough in making this disclosure, the Court of Appeal suggested she had in fact gone too far in disclosing the con man's confidences.) The plumber told her he was continuing and that his cousin was one of the best financial advisers in Australia.

On the eve of the settlement, the file handler knew that:

- Her husband and his sister (her employers, and partners in the firm of which she was an employee) had themselves invested in schemes propounded by the con man, apparently successfully;
- Other members of the Assyrian community of which the plumber, the lawyers, and the con man were a part seemed to be making a lot of money by investing in schemes propounded by the con man;

- Her husband and his sister were to take financial interests in a new business associated with the con man the registered office of which was the firm;
- The con man was an important client of the firm;
- There were grave concerns that the con man's company to which the plumber's refinanced funds were to be directed was accepting investments for the purposes of its trolley collection business in contravention of the *Corporations Law*.

The plumber sought compensation for negligence and breach of fiduciary duties in acting in the face of a conflict of duties and a conflict between self-interest and duty.

The Court of Appeal found against the plumber:

'Here the retainer undertaken by Ms Jajoo and [her firm], which was almost complete in its execution, was not apparently contradictory to any personal interest held by members of the firm or employees in relation to [the con man's] business, nor was it contradictory to any duty to [him]. The advice and actions required of the firm were in relation to a financing transaction. When the retainer was undertaken and through the majority of the time of its execution, there was no knowledge whatsoever of any relationship of the proposed use of the funds in connection with [the con man]. When this matter was adverted to by [the plumber], it did not create any inability to continue the retainer. There was no possible conflict between the duty to the [plumber] and any interests of [the firm]. There was no conflict with any duty owed to [the con man] in completing the retainer. The funds were being made available by the refinancing. However, the completion of the retainer did not mean that the investment with [the con man] must necessarily take place. The cheques were to be made available to be picked up after the refinancing. There was an opportunity for the advice that Ms Jajoo urged in clear terms upon the [plumber] (on [two occasions]) ... to be taken. Ms Jajoo made it clear that she could not advise the [plumber] about [the con man's] business, in respect of which a conflict of duties would arise and perhaps also a conflict between the duty to the [plumber] and the interests of [the firm] with such an important client. The plumber was, however, content with the retainer being completed on that basis: cf *Clark Boyce v Mouat* [1994] 1 AC 428 at 435.

79 Therefore, I agree with the learned primary judge that there was no obligation to cease to act.'

England

***Haithwaite v Thomson, Snell & Passmore* [2009] EWHC 647 -**

is a case about solicitors who negligently allowed a medical negligence claimant's statute of limitation to expire. It goes through the law about the extent to which the plaintiff must conduct a 'trial within a trial' to establish what the outcome would have been had it been allowed to go ahead. The Court reiterated that any difficulties occasioned by the passage of time in ascertaining what would have happened ought to be resolved against the solicitor. The English High Court held in this case that there was a 40% chance of establishing negligence and a 75% chance of establishing

causation, so that the plaintiff was entitled to 30% of what he would have got had he succeeded at trial. In other words, even though he probably would have lost his case had the chance to prosecute it not been negligently allowed by his solicitors to slip by, he recovered substantial compensation on the 'loss of a chance' principles.

Global Process Systems Inc and another v Syarikat Takaful Malaysia Berhad [2009] EWHC 637 is an interesting decision in which only one issue fell to be determined. An oil rig was transported by sea, covered by a policy of cargo insurance. Conditions of the voyage were unremarkable. The rig's legs fell off. It was an all risks policy. The insurer justified its denial of indemnity by saying that when that rig was sent on that barge around the Cape of Good Hope, the legs were certain to fall off, and so was not an accident (or to use insurance speak, a 'casualty'). Justice Blair said that it was very likely indeed that the legs would fall off, but it was not certain. The insurer failed on that ground. Then the insurer said, alternatively, that the 'inherent vice' exclusion applied. His Honour decided that the exception required an analysis of what the proximate cause was. Was it some peril of the sea, or was it the decision to send this rig across that sea in the first place? It was the latter, his Honour found, so the exclusion applied, and the insurers' denial of indemnity was vindicated.

***Axa Insurance Limited v Akther & Darby Solicitors* [2009] EWHC 63 -**

is a case where £20 million turned on a limitation point. The plaintiff's predecessor had a financially disastrous spell as a litigation funder. The plaintiff brought a big professional negligence case against 89 firms, in respect of 26,000 different cases. It claimed £65 million. This decision of Justice Flaux came about when limitations issues were ordered to be determined on agreed facts as a preliminary issue. I have [written elsewhere](#) about the trend towards surprising harshness towards claimants of limitations law in respect of economic loss claims against negligent solicitors. Previous decisions have side-stepped the issue of whether the limitation period commenced at the point at which it may be said that the client has suffered any demonstrable diminution in the prospects of success of his claim, as opposed to when, much later, the full catastrophe occurs. Previously, time has been found to have commenced not when the client's case was dismissed for want of prosecution but when it could be said to have been amenable to being struck out: *Khan v Falvey* [2002] EWCA Civ 400; *Hatton v Chafes* [2003] EWCACiv 341. This time round, Justice Flaux actually said:

[98] The second category of conduct breach is where the panel solicitors allegedly failed to pursue the particular claim with due care and attention, so that [AXA's predecessor] lost the opportunity to secure a successful outcome at trial or a favourable settlement.

...

[105] ... [The solicitors submit] that the correct formulation as a matter of principle must be that the cause of action accrues when the conduct breach by the solicitor results in a material diminution in the prospects of success. She submits that the present examples of solicitor's negligence are analogous with 'loss of a chance' cases. If, as a consequence of the negligence of the panel solicitor, the prospects of the claim succeeding or of a successful settlement being reached have reduced to a material extent, by say 10% or at least by

more than a minimal amount below the 50% criterion, then actual damage has been suffered and the cause of action has accrued.

...

The panel solicitors' argument on this point was ... that, just as in [loss of a chance] cases, a more than minimal chance of success will found a claim, so a more than minimal reduction in the prospects of a claim succeeding can constitute actual damage for the purposes of the accrual of a cause of action in tort ... the panel solicitors' argument is right.'

Insurance Law Journal

Volume 20 no. 1 contains the following articles:

- Patrick Mead, 'Notifications under claims made and notified professional indemnity insurance policies and the effect of ss 54 and 40 of the *Insurance Contracts Act 1984* (Cth)' (2009) 20 ILJ 1.

'One of the most contentious applications of s 54 of the *Insurance Contracts Act 1984* (Cth) has arisen in relation to late notification under so called 'Claims Made and Notified' professional indemnity policies. A failure to notify facts or circumstances that might give rise to a claim, prior to the expiration of these policies, has been particularly problematic and has led to a consideration of the interface between ss 54 and 40 of that legislation. The following article traces the evolution of the court's interpretation of ss 54 and 40 in relation to these policies and the potential impact of the recent draft reform package.'

- Samantha Traves, 'The doctrine of attribution and its application in the context of insurance' (2009) 20 ILJ 20.

'The term "rules of attribution" was used by the *Privy Council in Meridian Global Funds Management Asia Ltd v Securities Commission*. The rules concern the issue of when the knowledge, intention act or omission of a person constitute that of another, usually a company, or be attributed to it. In the context of insurance, the issue of attribution is relevant to corporate insureds and to corporate insurers. This article examines the law of attribution, with particular emphasis upon its relevance in the context of insurance, including the issues of pre-contractual disclosure, policy coverage and fraudulent claims.'

- Neil Campbell, 'Don't be lost: Different conceptions of loss in insurance', (2009) 20 ILJ 40.

'Loss is a central concept in insurance. All indemnity insurance, and most contingency insurance, insures against the risk of certain types of loss befalling the insured. But the concept of loss can be elusive, especially with indemnity insurance. That's because, with indemnity insurance, there can be two quite different conceptions of loss. This article identifies those

conceptions, and illustrates how a failure to keep them distinct can be problematic.’

- Suzanne Webbey, ‘eHealth: the evolving electronic health record and its regulation’, (2009) 20 ILJ 52.

‘Ehealth is developing in Australia with reference to international initiatives. One component of the system, the electronic health record is evolving beyond a computerised version of the traditional paper record. It is a fundamental building block of an interoperable ehealth system traversing the public and private sectors both domestically and internationally. This article describes the concept of ehealth and the electronic health record and introduces a discussion regarding the value of the electronic health record outside the consumer-healthcare provider relationship. Theoretical frameworks for regulation of the use of the record are discussed in the context of the responsive regulation model and the government of risk model.’

- Tim Faulkner, case note, (2009) 20 ILJ 59:

‘In ***Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd***, [2008] NSWCA 243 the NSW Court of Appeal had to determine whether default leading to a claim on the insured was properly characterised as design fault or construction fault, whether there was a claim ‘arising out of’ an insured risk, and whether there was coverage for a claim which had two causes, one of which was expressly covered by the policy and one of which was expressly excluded. Consideration was also given to the meaning and effect of language customarily used by insurers, namely, ‘indemnity is granted for the claim.’

- Anthony Lo Surdo, case note, (2009) 20 ILJ 66:

‘The primary question in the appeal in ***Bofinger v Kingsway Group Pty Ltd*** [2008] NSWCA 332 was whether the appellants as guarantors were entitled upon the application of the principles of subrogation to the benefit of a first mortgage given by the principal debtor, to one creditor, Kingsway Group Ltd in priority to the rights as second and third mortgages of two other creditors. In addressing this issue, the court also had regard to whether the rule in *Otter v Vaux* (1856) 2 K & J 650 has any application.’