

¶[61-353] SUN ALLIANCE AND ROYAL INSURANCE AUSTRALIA LIMITED v  
SWITZERLAND INSURANCE AUSTRALIA LIMITED

Supreme Court of New South Wales

Judgment delivered 20 November 1996

Judgment below

*Insurance — Policy — Construction — Exclusion clause — Contribution — Interest — Whether contribution between insurers was a payment to which sec 57, Insurance Contracts Act applied — Whether interest on amount of contribution calculated pursuant to sec 94, Supreme Court Act — Insurance Contracts Act 1984 (Cth), sec 57 — Supreme Court Act 1970 (NSW), sec 94.*

A fire broke out in the premises of the insured, Commonwealth Industrial Gases Ltd (“CIG”), and hundreds of acetylene cylinders exploded, scattering debris over about eight square kilometres. CIG was required by the relevant government departments to perform a clean-up and arrange for decontamination.

CIG held two policies at this time, one issued by Sun Alliance (“the Sun policy”), and the other by Switzerland General Insurance Ltd (“the Switzerland policy”).

CIG informed Switzerland of the explosion shortly after it occurred. The cost of the clean-up was paid by Sun Alliance. Sun Alliance commenced proceedings seeking contribution from Switzerland.

Switzerland resisted the application, relying on General Exclusion (1) of the Switzerland policy. The first sentence of the exclusion provided, relevantly, that personal injury or property damage arising out of the release of contaminants or pollutants was not covered except where the discharge was caused by a sudden, unexpected, unintended and accidental happening. The second sentence provided that the expenses for the prevention, removal, nullifying or cleaning up of such contamination or pollution would also form part of this exclusion and would not be recoverable under the policy.

The parties submitted a stated case for determination by the Supreme Court of New South Wales on the following issues:

- The exclusion point: whether General Exclusion (I) relieved Switzerland from liability.
- The interest point: the time from which and the rate at which interest should run on any amount to which Sun Alliance was entitled.

### *Submissions*

Switzerland conceded that the exception applied to the first sentence of Exclusion (I) and accordingly if property damage had occurred giving rise to a claim for compensation, it would have been liable to indemnify CIG. However, the claim arose because of the need to "clean up" and the exclusion in the last sentence was not subject to or qualified by the exception, with the result that Switzerland could not have come under any liability to CIG. Therefore, Switzerland was not liable to make contribution.

The concluding sentence created an additional exclusion which was not subject to the exception. It was submitted that this was not only because of the placement of the exclusion in the final sentence (after the exception), but also because of the words of that sentence. It commenced by stating "it is further agreed", which, it was submitted, indicated an additional agreement to that contained in the preceding sentence.

Sun Alliance submitted that (i) each of the words "prevention", "removal", "nullifying" and "cleaning up" referred to an activity consequential upon a discharge, dispersal, release or escape and that each activity was causally related to such a happening; (ii) the words "it is further agreed" did not indicate a separate and distinct subject matter from that referred to in the first sentence; and (iii) the words "this exclusion" showed that the expenses were included within the exclusion by dint of the terms of the first sentence, but that that exclusion was not absolute but subject to the exception.

*Held:* for the plaintiff.

(1) Each sentence of the exclusion dealt with a consequence of the discharge of pollutants or contaminants. The first directed itself to personal injury or property damage and the second to the expenses of remedial activities. The second sentence dealt with expenses rather than property damage. However, once it was conceded that the expenses were consequential upon and causally related to the event which caused the property damage there was no real difference. The same basis for liability was under consideration in the context of the amount payable by way of loss.

(2) Clause (I) should be construed in the way in which Sun Alliance contended essentially for the reasons which it advanced. Firstly, the clause was concerned with the financial consequences arising from the specified events. The financial consequences might be compensation for personal injury or property damage or expenses of the type referred to in the second sentence. It would be strange to exclude certain of those financial consequences save if the exception was met, but exclude others to which the clause directed attention irrespective of whether the exception applied. Obviously the parties could have agreed to do so, but on the proper consideration of the words the Court did not consider that that occurred in this instance.

(3) The words in the second sentence were subject to the exclusion in the first sentence, and that exclusion incorporated the exception. There was no justification, having regard to the words used in the context in which they appeared, to read "this exclusion" in the second sentence as having an operation freed from the exception to which it was clearly subject.

(4) The word "further" in the second sentence indicated an additional promise but did not suggest a discrete and separate promise, and the second sentence was tied back to the first.

(5) The concluding words of the second sentence only reinforced that if the exclusion applied there should not be any recovery under the policy. They did not, as a matter of construction, write out the exception to the exclusion.

(6) Accordingly, the exclusion with its exception applied in respect of the second sentence, so that recovery under both sentences was governed by the same considerations. Therefore, on the issue propounded, the agreements reached as to the facts and the concessions made, the defendant was liable to CIG and it was liable to contribute to the payment made by the plaintiff.

### *Interest*

(1) Section 76(3) acknowledged the right of an insurer to seek contribution from another or other insurers, but it did not create or purport to create that right. Accordingly, it did not impose a liability to pay. The right to contribution did not arise under any section of the Insurance Contracts Act and was not enforceable by virtue of sec 57. The obligation to make contribution flowed from the fact that the insurer found to be liable to pay it had issued a policy of insurance to the insured for a certain loss and that another insurer, liable for the same loss, had indemnified the insured. The recovery of contribution was not pursuant to a liability under a contract of insurance, because when contribution was sought there was no liability as between the insurer and the insured. Nor was there any provision of the Insurance Contracts Act which made the contribution payable. Rather the contribution was payable to bring about equality between the parties who would, but for the payment by one, have been liable. Accordingly, interest was payable pursuant to sec 94, Supreme Court Act 1970 (NSW).

(2) There was no practice that the date of making the claim was the date from which interest under sec 94 should run. Rather, the general or prima facie approach was that interest ran from the accrual of the cause of action. There were exceptions to that rule brought about by delay or misconduct on the part of the successful party, but there was no evidence that such exceptions did exist in this case nor that any delay had prejudiced the defendant. The proper exercise of discretion, having regard to the facts of the case, was that interest should run from the date of the accrual of the cause of action.

*[Headnote by the CCH INSURANCE LAW EDITORS]*

PE Blacket and RC Titterton (instructed by Peter A Collins & Associates) for the plaintiff. JJ Graves (instructed by Dunhill Madden Butler) for the defendant.

Before: Rolfe J.