The Year In Review – Sections 54 and the Utmost Good Faith[1]

I. Abstract

1 This paper follows a presentation given at the Claims Discussion Group on 13 February 2018.

2 That presentation considered noteworthy judgments from 2017 (and late 2016) dealing with the perpetually thought-provoking section 54 of the *Insurance Contracts Act 1984* (Cth) and the immutable duty of utmost good faith.

3 This note does not touch on other aspects of the cases considered, which in some instances involved many issues.

II. Sections 54 and 13 of the Insurance Contracts Act

4 In broad terms section 54 of the Insurance Contracts Act (which I refer to simply as section 54 from here on in) is a consumer protection provision which prevents an insurer denying liability for acts or omissions unconnected with the loss insured or which do not aggravate the loss insured. It also prevents an insurer from denying indemnity when an act or omission only partly contributes to the amount of loss (section 54(4) of the Insurance Contracts Act).

5 I refer readers to what has been written on their operation in leading texts.[2]

6 For convenience, I set out the aspects of section 54 relevant to the cases reviewed in this paper:

> Section 54: Insurer may not refuse to pay claims in certain circumstances
>
> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred [or omission s54(6)] after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

---

[1] Nicholas Olson, Barrister, Ground Floor Wentworth Chambers

[2] See for example Mann's Annotated Insurance Contracts Act; Suttons on Insurance Law.

(2) Subject to the succeeding provisions of this section, where the act [or omission] could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act [or omission], the insurer may not refuse to pay the claim by reason only of the act.

7 The duty of utmost good faith is an all-party duty owed by all parties to an insurance contract to one another. The duty of utmost good faith appears to have its origins in Lord Mansfield's decision in *Carter v Boehm* (1766) 3 Burr. 1905. It is a duty higher than the obligation owed in contract law but of a different character to a fiduciary relationship. It is far closer to the contractual obligation of good faith and, arguably, at common law, simply a more onerous expression of that same duty of good faith. It has in Australian law been largely captured in recent history by statute. Much has been written on the history, development and scope of the duty of utmost good faith, but for present purposes it is sufficing to note the core statutory obligation imposed by section 13 of the duty of utmost good faith:

Section 13: The duty of the utmost good faith

(1) A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

(2) A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements o``f this Act.

III. Ebraham v AAI Limited [2018] VCC 18

8 At the time of publication, the most recent judgment on both the duty of utmost good faith and section 54 was in *Ebraham v AAI Limited (trading as GIO)* [2018] VCC 18.

A. The Facts

9 Mr Ebraham entered into a Classic Extras Home and Contents Insurance Policy with GIO in August 2014.[3] The period of insurance was from August 2014 to September 2014 [4.] Prior to this, Mr Ebrraham had insured his home with AAMI.[5]

[3] *Ebraham v AAI Limited* [2018] VCC 18 at [17].

[4] *Ebraham v AAI Limited* [2018] VCC 18 at [18].

[5] *Ebraham v AAI Limited* [2018] VCC 18 at [16].

10 On New Year's Eve in 2014, Mr Ebraham was holidaying in Ballarat at a caravan site with his family. [6] Upon returning home, he discovered his home had been burgled.[7]

11 Mr Ebraham's wife submitted a claim.[8] He claimed $186,629 of gold jewellery was stolen.[9]

12 The circumstances in which Mr Ebraham alleged he obtained this jewellery were odd.

13 Mr Ebraham met with his father in November 2013 in Lebanon. He claimed his father gave him this jewellery.[10] He said the jewellery was repayment of money he had previously invested in his father's business. Mr Ebraham said he was given gold because of the difficulties in transferring and smuggling money to another country.[11]

14 Mr Ebraham claimed his father gave him a receipt for the jewellery from Samir Jewellery Products, a store he alleged in Damascus, which was issued in the name of Mr Ebraham rather than his father[12]. Judge Ryan described this as the "Samir receipt".

15 Mr Ebraham submitted the Samir receipt and a valuation in support his claim. The valuation was obtained from Baghdad Jewellery in Brunswick NSW. The valuation was performed by Mr Abbas Al Saffar. Mr Ebraham said he paid about $200 or $250 in cash for the valuation but was unable to adduce a receipt[13].

16 The items in the Samir receipt and the Baghdad valuation were listed in the same order and were littered with identical spelling mistakes[14].

17 This was not the first time Mr Ebraham had been burgled whilst holidaying. In February 2009, he had been burgled and made a claim for $33,000 which AAMI paid[15]. The items stolen included $15,000 of wife's gold jewellery. In March 2013, Mr Ebraham was again burgled. He

---

[6] *Ebraham v AAI Limited* [2018] VCC 18 at [25].

[7] *Ebraham v AAI Limited* [2018] VCC 18 at [28].

[8] *Ebraham v AAI Limited* [2018] VCC 18 at [32].

[9] *Ebraham v AAI Limited* [2018] VCC 18 at [34].

[10] *Ebraham v AAI Limited* [2018] VCC 18 at [8].

[11] *Ebraham v AAI Limited* [2018] VCC 18 at [10].

[12] *Ebraham v AAI Limited* [2018] VCC 18 at [10].

[13] *Ebraham v AAI Limited* [2018] VCC 18 at [14].

[14] *Ebraham v AAI Limited* [2018] VCC 18 at [15].

[15] *Ebraham v AAI Limited* [2018] VCC 18 at [46].

claimed $333,100 of property was stolen, including about $190,000 of Syrian gold and ladies necklaces[16].

18 It is notable that Mr Ebraham's brother, Mr Abraham, had been burgled in similar circumstances on three occasions. He had been paid twice by GIO for the first two burglaries. The brother's claim in respect of the third had been refused and at the time of this judgment the Financial Ombudsman were considering a complaint by the brother[17].

B. The issues

19 GIO alleged the claim was fraudulent and GIO's decision to deny indemnity was justified on this basis[18].

20 GIO further and alternatively claimed that it was entitled to refuse indemnity because Mr Ebraham had failed to prove the existence of the jewellery, failed to provide proof of ownership and meet its minimum proof requirements[19].

21 In this regard, GIO relied on a proof of loss clause[20], which was in the following terms:

> (i) You must validate your claim by giving us details of when and where items were purchased and reasonable proof of ownership and value.
>
> (ii) We have minimum proof requirements for some items set out below.
>
> (iii) The minimum proof for assessment where the amount claimed for each item or set is over $3,000 - proof of purchase that identifies the item plus a valuation by a qualified jeweller or professional valuer. A close-up photograph might also help us.[21]

22 Finally, GIO raised the duty of utmost good faith as a positive defence. GIO claimed that Mr Ebraham had breached his duty of utmost good faith by making a fraudulent claim. Mr Ebraham denied such a breach of duty[22].

---

[16] *Ebraham v AAI Limited* [2018] VCC 18 at [47].

[17] *Ebraham v AAI Limited* [2018] VCC 18 at [50]-[53]

[18] *Ebraham v AAI Limited* [2018] VCC 18 at [44].

[19] *Ebraham v AAI Limited* [2018] VCC 18 at [44].

[20] *Ebraham v AAI Limited* [2018] VCC 18 at [43]-[44].

[21] *Ebraham v AAI Limited* [2018] VCC 18 at [22].

[22] *Ebraham v AAI Limited* [2018] VCC 18 at [36].

23 In summary, the issues in the case were whether Mr Ebraham breached duty of utmost good faith by providing the clearly inadequate claim proof; and, whether GIO was prevented by section 54 from relying on the provision requiring proof of purchase and valuations

C. The decision

24 Judge Ryan found that Mr Ebraham's evidence in the proceedings was incredulous[23]. Despite this, her Honour did not find the claim was fraudulent as alleged by GIO.

25 Her Honour found the insured had however failed to prove his ownership and the value of the jewellery. The Samir receipt and a valuation obtained in suspicious circumstances[24] by a valuer with no formal qualifications did not meet the proof requirements[25].

26 The issues in the case then became whether Mr Ebraham breached the duty of utmost good faith by providing the inadequate documents in support of the claim and, whether GIO was prevented by section 54 from relying on the above provision requiring proof of purchase and valuations.

27 Judge Ryan found that the Samir receipt was unsatisfactory for the purpose of the policy and the Baghdad valuation obtained in suspicious circumstances.[26] Her honour noted that there was a paucity of evidence to show that Samir Jewellery ever existed (noting that GIO's investigators could not find any trace of the store). [27]

28 Despite the inadequate evidence, her Honour found that Mr Ebraham had not breached his duty of utmost good faith. Her honour found that Mr Ebraham's submission of the claim did not show "dishonesty on his part" or amount to "conduct which was capricious, unreasonable or involved unfair dealing." [28]

29 Turning to section 54, her honour found that Mr Ebraham's inability to prove the claim was of a different quality to GIO declining the claim on the basis of the proof provisions.[29] Mr Ebraham

---

[23] *Ebraham v AAI Limited* [2018] VCC 18 at [162]

[24] *Ebraham v AAI Limited* [2018] VCC 18 at [132]

[25] *Ebraham v AAI Limited* [2018] VCC 18 at [120].

[26] *Ebraham v AAI Limited* [2018] VCC 18 at [117].

[27] *Ebraham v AAI Limited* [2018] VCC 18 at [117].

[28] *Ebraham v AAI Limited* [2018] VCC 18 at [145].

[29]

could not prove that he owned the property claimed nor its value, regardless of the exclusion in the Policy. Therefore, section 54 was not engaged.

30 In this regard, her Honour relied on the line of authority represented by *Maxwell v Highway Hauliers*[30]. Her honour's findings were, in effect, that proof of ownership of the property was a matter inherent in the claim.

IV. Mobis Parts Australia Pty Ltd v XL Insurance Company SE [2017] NSWSC 1321

31 The decision of Stevenson J in *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 touched on both section 54 and the duty of utmost good faith.

A. The facts

32 Mobis was a wholly owned Australian subsidiary of Hyundai Mobis. It stored and distributed spare parts for Hyundai and Kia cars.[31] Mobis' warehouse collapsed in severe storm in Sydney on 25 April 2015.[32]

33 During the demolition and recovery process, three months after the storm, a fire broke out at the warehouse, virtually destroying the warehouse, all of its contents and stock.[33]

34 Mobis sought indemnity for the loss by reason of the collapse under a Property Damage and Business Interruption Policy issued by XL, which was referred to in the judgment as the "Local Policy".[34]

35 XL had also issued a Master Policy in to a related entity, but Mobis' primary argument was that the Local Policy covered the storm loss[35].

36 On 5 June 2015, XL sent Mobis a letter provisionally accepting liability, which was in the following terms:

---

[30] *Ebraham v AAI Limited* [2018] VCC 18 at [151]

[31] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [2].

[32] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [1]

[33] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [4].

[34] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [5].

[35] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [9].

> Investigations into and the adjustment of the loss by XL has [sic] been ongoing since the date of the loss.
>
> …
>
> XL accepts liability under the policy in respect of the loss on the basis of known facts and circumstances, and subject to the applicable terms and conditions.
>
> The maximum limit of liability applicable to the loss is EUR 10 million (the limit). XL is satisfied that the loss will exceed the limit and XL is therefore prepared to pay Mobis the amount of the limit forthwith.
>
> Please submit your bank details for electronic funds transfer.
>
> XL understands that Mobis does not agree that the limit applies to the loss. Accordingly, XL accepts that if Mobis takes payment of [EUR 10 million] at this time Mobis's rights remain reserved.
>
> XL otherwise reserves its position.[36]

37 At the time of the letter, XL had a preliminary engineering report for Costin Roe suggesting that the warehouse was compliant with the relevant Australian building standards.[37]

38 Mobis requested payment of the $10 million.[38] On 23 June 2015, XL paid Mobis $14.4 million.[39]

39 XL later obtained a report from an engineer, Mr Paul Summers, which suggested the warehouse did not comply with the relevant Australian building standards.[40]

40 XL ultimately relied on a Faulty Design Exclusion to deny liability. That exclusion was in the following terms:

> "Damage or Business Interruption caused by or consisting of:
> i. inherent vice, latent defect, gradual deterioration, wear and tear, frost, change in water table level, its own faulty or defective design or materials, or any gradually occurring loss or any loss which commenced prior to the inception of the Policy
> …
> but this shall not exclude subsequent Damage or Business Interruption which
> results from a cause not otherwise excluded".[41]

---

[36] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [53].

[37] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [81]

[38] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [55]

[39] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7*) [2017] NSWSC 1321 at [56]

[40] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [84]

[41] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [404] to [406]

41 Mobis argued that the letter from XL and payment of approximately $14 million was a settlement of the claim.[42] Mobis also argued that XL's conduct was an unequivocal election to waive its right to rely on a Faulty Design Exclusion in the Policy.[43] Justice Stevenson rejected those arguments on the basis that the letter did not form a contract of settlement between the parties[44] and that Mobis did not make an unequivocal election not to rely on the Faulty Design Exclusion[45], which are matters beyond the scope of this article.

B. Duty of Utmost Good Faith Issue

42 Mobis alleged that in the circumstances outlined above, the reliance by XL on a Faulty Design Exclusion amounted to a breach of s 14 of the *Insurance Contracts Act* (which provides that a party can't rely on a provision other than in the utmost good faith)[46].

43 Justice Stevenson held there was "no basis" on which XL's reliance on the exclusion could amount to a breach of s 14[47]. XL had reserved its rights under the Local Policy, Mobis' rights were reserved and the payment was made on the basis of the facts and circumstances which Mobis knew at the time of the letter, which his Honour found was limited at that time to Costin Roe's report[48].

44 It is respectfully suggested that Stevenson's J's are sound in principle. An insurer ought not be in breach of its duty of utmost good faith simply by conditionally indemnifying (as his Honour found had occurred here) whilst reserving its rights during further investigation into a claim.

C. The Section 54 Issue

45 Under the Local Policy, XL had an option to indemnify by reinstatement by replacement or repair.[49]

46 The Local Policy contained a condition precent to liability, clause 4.2.1(d):

---

[42] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [57]

[43] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [57]

[44] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [73]

[45] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [91]

[46] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [57]

[47] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [99]

[48] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [66]

[49] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [39]

> No costs of reinstatement shall be payable under this Policy until such costs have been incurred by the Insured.

47 Mobis had not replaced its stock and XL refused to indemnify for reinstatement until Mobis did so. [50]

48 Justice Stevenson found that the clause was engaged notwithstanding XL having made no decision about whether to repair or replace.[51]

49 The issue then became: did section 54 prevent XL from relying on clause 4.2.1(d)?

50 XL ultimately conceded in submissions that "it was not entitled to refuse to pay Mobis's claim by reason only of the fact that Mobis had not complied with cl 4.2.1(d)".[52] Therefore, Stevenson J was not called on to decide the issue.

51 Had the issue been pressed by XL, it is suggested that section 54 would have prevented Mobis' reliance on clause 4.2.1(d) because there was no causal connection between Mobis having not purchased stock and the loss occasioned by the storm: see s 54(2) of the *Insurance Contracts Act 1984*.

V. Herbert v American Express Australia Limited [2017] NSWSC 367

52 A curious argument on s 54 of the *Insurance Contracts Act* was dealt with by Adamson J in *Herbert v American Express Australia Limited* [2017] NSWSC 367.

53 Ms Herbert made a claim for a TPD benefit which required the insurer, AMP, to form the an opinion about her incapacity.[53]

54 AMP declined to pay a benefit because Ms Herbert had refused to provide information and attend examinations as requested by AMP.[54]

55 Ms Herbert, who was represented by a Mr Herbert, argued that section 54 relieved her of any obligation to provide information or attend medical assessment. Her submission in this regard was recorded in the judgment as follows:

---

[50] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [964]

[51] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [972]

[52] *Mobis Parts Australia Pty Ltd v XL Insurance Company SE (No 7)* [2017] NSWSC 1321 at [990]

[53] *Herbert v American Express Australia Limited* [2017] NSWSC 367 at [16], [93],

[54] *Herbert v American Express Australia Limited* [2017] NSWSC 367 at [107]

> The High Court in *Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590; [2014] HCA 33 decided that s 54 of the *Insurance Contracts Act* meant that an insurer was not entitled to refuse to pay a claim, and accordingly, the plaintiff having made claim, was entitled to payment[55].

56 The is syllogism can perhaps be explained by Ms Herbert being represented by Mr Herbert. Such Aristotelian reasoning did not persuade Adamson J.

57 Justice Adamson found this was at odds with the contract "which expressly provides that the entitlement to the monies is limited to instances where an insured is, in the opinion of AMP, totally and permanently incapacitated."[56]

58 Her Honour found that s 54 did not have the effect of relieving Ms Herbert of the obligation to provide information and attend examination.[57]

59 That is not to say that section 54 can never operate where the insurer on a similar policy failed to form an opinion. In the appropriate case, section 54 could of course operate on such a TPD clause or other insuring clause requiring an insurer to form an opinion.

VI. Sharma v Insurance Australia Limited [2017] NSWCA 55

60 I now turn to *Sharma v Insurance Australia Limited* [2017] NSWCA 55 the most recent judgment at the time of writing of the NSW Court of Appeal on the duty of utmost good.

61 Mr Sharma's carport in Lurnea was damaged in a storm on 28 December 2009.

62 On 14 January 2010, Mr Sharma fell from a ladder while attempting to repair damage and significantly injured his hands and wrists in the fall.

63 Mr Sharma instituted proceedings seek damages against Insurance Australia Limited (**NRMA**) for breach of contract and the duty of utmost good faith.[58] He brought appeal against that decision in the NSW Court of Appeal.[59] He was self-represented in the first instance and on appeal.

---

[55] *Herbert v American Express Australia Limited* [2017] NSWSC 367 at [53].

[56] *Herbert v American Express Australia Limited* [2017] NSWSC 367 at [94].

[57] *Herbert v American Express Australia Limited* [2017] NSWSC 367.at [94].

[58] *Sharma v Insurance Australia Limited* (District Court of New South Wales, 17 April 2015, Bozic DCJ)

[59] *Sharma v Insurance Australia Limited* [2017] NSWCA 55 at [110] to [111]

64 In a joint judgment, McColl, Meagher and Payne JJA held that the trial judge had not erred in a finding that the insurer was not in breach of its duty of utmost food faith.

65 The Court referred to descriptions given by the seminal statements on the utmost good faith of the split majority in *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1[60]. The Court of Appeal noted the following the extract from the reasons of Gleeson CJ and Crennan J:

> We accept the wider view of the requirement of utmost good faith … in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.[61]

66 The Court then extracted the following passage from the reasons of Callinan and Heydon JJ:

> At the outset we should say that we agree with the Chief Justice and Crennan J that a lack of utmost good faith is not to be equated with dishonesty only. The analogy may not be taken too far, but the sort of conduct that might constitute an absence of utmost good faith may have elements in common with an absence of clean hands according to equitable doctrine which requires that a plaintiff seeking relief not himself be guilty of tainted relevant conduct. We have referred to the doctrine of clean hands because, as with another equitable doctrine, that he who seeks equity must do equity, it invokes notions of reciprocity which are of relevance here. That is not to say that conduct falling short of actual impropriety might not constitute an absence of utmost good faith of the kind which the Insurance [Contracts] Act demands. Something less than that might well do so. Utmost good faith will usually require something more than passivity: it will usually require affirmative or positive action on the part of a person owing a duty of it. It is not necessary, however for the purposes of this case, to attempt any comprehensive definition of the duty, or to canvass the ranges of conduct which might fall within, or outside s 13 of the Insurance [Contracts] Act.[62]

67 The Court found that the primary judge had not erred in finding the insurer acted consistently with its obligation of good faith. The Court held that it was not unreasonable for the insurer to

---

[60] *Sharma v Insurance Australia Limited* [2017] NSWCA 55 at [110] to [111]

[61] *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at [15]

[62] *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at [257]

have taken two weeks during the annual holiday period between 29 December 2009 (the date Mr Sharma made the claim) and 14 January 2010 (the date Mr Sharma alleged consequential loss occurred due to the insurer's dilatory assessment).[63]

68 The Court found in the respondent insurer's favour after dealing with several other grounds of appeal formulated by Mr Sharma, who was self-represented, which are beyond the scope of this article.

69 Mr Sharma sought special leave to appeal from the decision to the High Court which was refused in August 2017.[64]

VII. Lawcover Insurance Pty Ltd v Muriniti [2017] NSWSC 1557

70 Justice Sackar considered in *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 whether an insurer's decision not to pursue an appeal of a judgment triggering indemnity under a professional indemnity policy amounted to a breach of the duty of utmost good faith.

71 Lawcover insured two lawyers, Mr Murtini and Mr Newell. The policy provided insurance in relation to applications for professional costs orders that might be made against them in respect of proceedings which they acted.

72 In proceedings in which Mr Murtini and Mr Newell had acted Sheahan J of the Land and Environment Court made orders for personal costs against them in *Young v King (No 11)* [2017] NSWLEC 34.

A. History of the Personal Costs Order Litigation

73 It is necessary to set out the history of the litigation which resulted in the personal costs orders to understand the utmost good faith issues in the case.

74 The personal costs orders arose from litigation in the Land and Environment Court spanning 9 years which is detailed in full by Sackar J.[65]

75 The thrust of the underlying Land and Environment Court litigation was to set aside a consent order Ms Young, through her former legal advisers, had agreed to in respect of drainage on and

---

[63] *Sharma v Insurance Australia Limited* [2017] NSWCA 55 at [113]

[64] *Sharma v Insurance Australia Limited* [2017] HCASL 182 at [1]

[65] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [5] to [102].

around her and the Kings' property.[66] The argument run was that Ms Young's former legal advisers, Mr and Mrs Kings advisers and the Council had engaged in a conspiracy which resulted in Ms Young consenting to orders with respect to drainage at her property.

76 In *Young v King (No 6)* [2015] NSWLEC 111 (referred to as **Judgment No 6**), Sheahan J observed of that litigation that Ms Young, who Mr Murtini and Mr Newell represented, had been 'doomed from the start'[67] and had:

> [F]requently shifted ground, amended documents, ignored directions and correspondence, and caused delay, but she and her representatives have received many indulgences, because of a nagging concern in this Court — and I expect in other Courts — that she may have been the victim of at least an injustice, if not a fraud or a conspiracy of some sort… I blamed Young's legal team for many of the steps they took which led to some thirty listings before me prior to the September 2012 hearing.[68]

77 Ms Young appealed from Judgment No 6. The NSW Court of Appeal (Basten and Gleeson JJA and Emmett AJA) delivered judgment on the appeal in *Young v King* [2016] NSWCA 282 finding that the conspiracy allegations were unsustainable on the evidence.[69] The High Court refused special leave to appeal from the Court of Appeal's decision on 1 March 2017.[70]

78 Justice Sackar also noted that Bromwhich J had noted in *Young v Hughes Trueman Pty Ltd* [2016] FCA 1176 in an application by Ms Young with respect to bankruptcy proceedings had observed:

> The asserted conspiracy underlying this litany of litigation has never risen above a conspiracy theory, in the pejorative sense in which that term is used in common parlance. It is unfortunate, but perhaps understandable, that a lay person seeking to explain to themselves and those closest to them an undesirable outcome might assume the worst and, by a process of reverse engineering, conclude that this is the only explanation for what has happened. In the hands of a legal practitioner such fevered imaginings are unacceptable. Courts are entitled to expect that lawyers acting for litigants will remain dispassionate, and examine what is before them calmly and rationally and have proper regard to what can be proved and not merely asserted. Of equal importance, members of the public are also entitled to expect those qualities of their lawyers.

---

[66] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [5]

[67] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [55].

[68] *Young v King (No 6)* [2015] NSWLEC 111; *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [32].

[69] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [76]

[70] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [77]

> The conduct of the applicant's solicitors in this matter can only be described as reprehensible. The way in which the application has been brought in the Federal Circuit Court and in this Court is a matter that should be considered by the appropriate regulatory authority for the legal profession. Due regard may also need to be had to the conduct of the litigation in the L&E Court, the Supreme Court and the Court of Appeal that preceded the applications before the primary judge and before me. I will therefore direct the District Registrar of this Court to provide a copy of these reasons to the Office of the Legal Services Commissioner.[71]

79 Mr Murtini corresponded with Lawcover's solicitors about appealing the personal costs orders made by Sheahan J in *Young v King (No 11)* [2017] NSWLEC 34.[72]

80 Lawcover's solicitors filed a notice of intention to appeal from the personal costs order decision. Lawcover's solicitors advised Mr Murtini that it was filed to protect the position of Mr Murtini and Mr Newell.[73]

81 Lawcover representatives formed a preliminary view not to appeal and sought Mr Murtini and Mr Newell's consent not to appeal. The Lawcover representative informed Mr Murtini and Mr Newell that if they did not agree with the decision then an independent opinion would be obtained pursuant to a "QC clause" in the Policy[74].

B. Utmost Good Faith Issues in the Case

82 Lawcover sought declaratory relief on the terms of its professional indemnity policy held by the solicitor defendants.[75] Mr Murtini and Mr Newell claimed that Lawcover had acted in "bad faith" by failing to give reasons and not pursuing an appeal of the personal costs orders made against them.[76] Sackar J noted "*The allegations of bad faith raised by the Defendants are wide reaching and somewhat unstructured*".[77]

---

[71] *Young v Hughes Trueman Pty Ltd* [2016] FCA 1176 at [93] to [94]; *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [75]

[72] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [79] to [81].

[73] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [81] and [85].

[74] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [84].

[75] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [2].

[76] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [4].

[77] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [177]

83 In dealing with the allegations of bad faith, Sackar J cited the formative statement of Lord Mansfield on good faith in insurance contracts in *Carter v Boehm* (1766) 3 Burr. 1905:

> Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.[78]

84 His Honour noted the enactment since of s 13 of the *Insurance Contracts Act* since and extracted Leeming JA's restatement of the duty of utmost good faith in *TAL Life Ltd v Shuetrim* (2016) 91 NSWLR 439[79], which was in the following terms:

> The obligation to act in utmost good faith, of course, predates statute. As Emmett J said in *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185; 146 FCR 447 at [88]–[89], the concept of utmost good faith or *uberrima fides* has always been present in the law of insurance, and encompasses notions of fairness, reasonableness and community standards of decency and fair dealing, and may be breached by capricious or unreasonable conduct which falls short of dishonesty. That part of his Honour's reasons was agreed with by Moore J and, on appeal, by Gleeson CJ and Kirby and Crennan JJ: *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1 at [15] and [128].

85 His Honour made the factual finding that Lawcover had not failed to provide reasons and therefore no breach had occurred in this regard.[80]

86 Sackar J held Lawcover was entitled not to pursue the appeal in order to avoid its risks of an adverse costs order from the appeal, and exposure to greater damages. His Honour noted that Lawcover was under the Policy to pursue its own commercial interests in making such a decision. [81] His Honour drew noted the distinction between the duty of utmost good faith and the duty of a fiduciary in this regard.[82]

87 Of the QC dispute resolution clause, his Honour appears to have considered it stood side by side with duty of utmost good faith, finding:

> [A]dverting to an independent expert does not, in my view, do violence to the Insurance Contracts Act, in particular the duty to act in utmost good faith. Indeed, it enhances it.[83]

---

[78] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [112].

[79] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [113] to [114].

[80] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [189]

[81] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [210].

[82] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [209]

[83] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [212]

88 His Honour observed that, arguably, the duty of utmost food faith requires the insurer to file a notice of intention to appeal, irrespective of whether they decide to appeal or not. This preserves the right of the insured to pursue an appeal at its own costs, if the insurer is entitled to deny indemnity under the policy for such an appeal.[84]

VIII. Allianz Australia Insurance Ltd v Smeaton [2016] ACTCA 59

89 It is convenient to end this note with two decisions on section 54 delivered in late 2016.

90 The first, is the decision of the ACT Court of Appeal in *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59.

91 Mr Whittington was seriously injured in a jet ski accident on the Ross River in QLD in 2010.[85]

92 The jet ski was insured by Allianz, which provided cover for the activities of Scott Mr Smeaton whilst operating the jet ski with permission of the owner, his brother, Todd Smeaton.[86]

93 At the time of the accident jet ski was under the control of Scott Smeaton who was unlicensed in QLD to drive a jet ski (he had a NSW Boat Licence but didn't have an appropriate PWC licence). Both Smeaton brothers however had extensive boating experience.[87]

94 The relevant insurance policy provided that indemnity was excluded when under the control of an unlicensed person.[88]

95 The Court of Appeal noted that the: "The single issue on this appeal is whether the First and Second Respondents discharged the onus of proof cast upon them by virtue of s 54(3)".[89] That is, whether Todd Smeaton had proven that no part of the loss was caused by the omission of Scott Smeaton to have a licence.

96 The trial judge found that the evidence established that it didn't matter whether Scott Smeaton had a licence or not, on the facts, made no difference to the loss.[90] Therefore, the onus cast on the insured to prove that the loss was not casually connected was discharged.

---

[84] *Lawcover Insurance Pty Ltd v Muriniti* [2017] NSWSC 1557 at [171]

[85] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [1]

[86] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [2]

[87] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [10] to [11].

[88] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [15].

[89] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [7]

[90] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [32].

97 The Court of Appeal found no error in the primary judges finding.[91]

98 This case is a rare example of appellate consideration of the proof required by section 54(3) of the *Insurance Contracts Act*.

IX. Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd [2016] FCAFC 150

99 I end this note on the decision of the Full Federal Court in *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* (2016) 244 FCR 5.

100 The Court summarised the issue before it as follows:

> This appeal concerns the operation of s 54 of *the Insurance Contracts Act 1984* (Cth) (the Act) in circumstances where one insurer's policy (without any effect on its operation by s 54) responds fully to a claim by the insured, and that insurer seeks to recover a proportionate share of its liability from another insurer in a contribution action in circumstances where, unaffected in operation by s 54 if it were to be engaged, the second policy would not respond to the claim were it to be made by the insured, but the policy would respond if a claim were made on it, and s 54 invoked by the insured.[92]

101 The Court elaborated on the line of authority represented by *FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 and *Maxwell v Highway Hauliers Pty Ltd (2014)* 252 CLR 590. To briefly summarise, those authorities provide that when a Court is considering s 54 it must determine whether the restrictions or limitations an insurer is relying on to decline indemnity are inherent in the claim having regard to the cover provided under the contract. If so, section 54 provides no relief. If not, then section 54 (subject to the balance of its elements being met) can apply.

102 The Full Federal Court held that:

> The process of understanding what are the restrictions or limitations that are inherent in the claim is one that involves the construction of the policy, not merely as to what its constituent words mean, but in a broad sense so as to characterise as a matter of substance what is the essential character of the policy. Once that essential character is decided upon, the restrictions or limitations that necessarily inhere in any claim under such a policy (to which s 54 does not apply) and the restrictions

[91] *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59 at [47].

[92] *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* (2016) 244 FCR 5 at 2.

> or limitations that do not necessarily inhere in any claim under such a policy (to which s 54 may apply) can be ascertained.[93]

103 The Court found that:

> The process of characterisation or construction in the broad sense will, to a significant degree, be influenced by the expression of the parties of the terms of the insurance.[94]

104 The Court also found that section 54 may be applied to give effect to a claim for contribution between insurers where, if engaged for the benefit of the insured, the insurer would not be able to refuse to pay the claim. The Court referred to the equitable principles upon which s 54 is based and considered in those circumstances the application of section 54 ought to extend to insurers' in contribution claims.[95]

[93] *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* (2016) 244 FCR 5 at 17.

[94] *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* (2016) 244 FCR 5 at 17.

[95] *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* (2016) 244 FCR 5 at 19.