

## **RIGHTS OF SECOND INSURERS TO ENFORCE THE RIGHT OF SUBROGATION AGAINST THE FIRST INSURER**

*Speno Rail Maintenance Australia Pty Limited v. Metals & Minerals Insurance Pte Limited* [2009] WASCA 31 concerns the equitable right of contribution between co-insurers, and addresses matters of relevance to insurers involved in dual insurance situations.

However, the decision is probably most notable for its consideration of where there is double insurance, and insurer one indemnifies the insured, can insurer two (who has paid a contribution to insurer one) exercise a right of subrogation?

### **FACTS**

Speno Rail Maintenance Australia Pty Ltd's employees were injured while they were performing work under a contract between Speno and Hamersley Iron Pty Ltd. The contract required Speno to indemnify Hamersley against Hamersley's liability to injured workers. It also required Speno to arrange public liability insurance on Hamersley's behalf. Speno took out this policy with Zurich Australia Insurance Ltd.

Following a District Court trial, Speno and Zurich were each ordered to indemnify Hamersley against its liability to the workers. Zurich indemnified Hamersley against this amount, which totalled more than \$1.2 million. However, Speno did not make any payment to Hamersley. As a result of a waiver of subrogation clause in Zurich's policy, Zurich could not subrogate to Hamersley's rights and pursue Speno under the judgment.

Consequently, Zurich had to look to other avenues to recover its losses and sued Metals & Minerals Insurance Pte Ltd (M&M), Hamersley's own insurer, for contribution under the principles of double insurance. M&M denied it was liable to Zurich because of an 'underlying insurance' clause in its policy.

In the clause, M&M acknowledged that it was customary for Hamersley to effect, or for contractors to effect on Hamersley's behalf, insurance specific to a particular project or contract. The clause said that if Hamersley was indemnified under such a policy, the insurance provided under M&M's policy was excess insurance only.

As a precaution however, M&M asked the Court for a declaration that, if it was liable to contribute, it would also be entitled to subrogate to Hamersley's rights against Speno. Its intention was to enforce the District Court's judgment against Speno to the extent that Speno was required to contribute, and thereby M&M would have no net exposure in the claim.

The trial judge found that section 45(1) of the *Insurance Contracts Act 1984* voided the underlying insurance clause in M&M's policy, and ordered M&M to contribute to Zurich. However, the trial judge also held that M&M could exercise a right of subrogation and allowed M&M to enforce the District Court judgment against Speno for the amount M&M had to contribute.

## **APPEAL**

The decision in *Speno* is most notable as a rare judgment considering the general principle of double insurance, where there is a double insurance and insurer one indemnifies the insured, can insurer two (who has paid a contribution to insurer one) exercise a right of subrogation?

### **SUBROGATION PRINCIPLES**

Subrogation provides two rights to an insurer: first, a right to require the insured to pursue any remedy available to the insured against a third party for the benefit of the insurer; and secondly, a right to recover from the insured any amount received by the insured from the third party as compensation for the loss against which the insured has been indemnified. The insurer's right of subrogation does not occur until the insurer has paid, or at least offered an indemnity for, the full amount of the insured's loss.

In writing the leading judgement, Beech AJA stated that in cases of double insurance, a contributing co-insurer does not obtain a right of subrogation to the insured's rights against third parties. His Honour identified his reasons for this to be:

1. The contributing co-insurer has not paid the full loss under its policy of insurance
2. The payment by the contributing co-insurer was not made to the insured in satisfaction of the indemnity but to the other insurer by way of contribution
3. The indemnifying insurer paid the full amount of the indemnity and obtained the right of subrogation.

### **COURT OF APPEAL DECISION**

In this case *Speno's* insurer had waived subrogation against its insured, including *Speno*, but then sought contribution from *Hamersley's* insurer. This had the practical effect of exposing *Speno* to a claim from the contributing insurer, on the purported basis that it was subrogated to *Hamersley's* contractual indemnity rights against *Speno*. The net effect would have been to deprive *Speno* of the benefit of the waiver of subrogation.

The Court held that the waiver of subrogation only meant that *Speno's* insurer itself would not pursue any right which *Hamersley* might have against *Speno*. The insurer's duty of utmost good faith does not stretch so far that it must subjugate its interests to those of *Speno*.

### **COMMENTARY**

One of the consequences of the finding in *Speno* is that, in cases of double insurance, the insurer who indemnified the insured for the full amount of the loss will have an exclusive right of subrogation. This is normally the insurer from whom the insured seeks indemnity.

The Court acknowledged this but did not think that this situation would necessarily produce an injustice.

Insurance Professionals should always make certain that a contributing insurer always ensures potential rights of recovery against third parties are taken into account before making a contribution.