

FAI General Insurance Company Limited v Australian Hospital Care Pty Limited

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On 27 June 2001 the High Court delivered judgment in *FAI General Insurance Company Limited v Australian Hospital Care Pty Limited*. The Court by majority of 4 - 1 (Gleeson CJ dissenting) dismissed the appeal. The case concerned the application of s54 of the *Insurance Contracts Act 1984* (Cth) to a situation where the insured had, during the period of the insurance, become aware of circumstances likely to give rise to a claim. The insured failed to exercise the right available to it under the policy to give written notice to the insurer of the occurrence. The policy provided that, if such notice be given, any subsequent claim in respect to that occurrence would be deemed to have been made during the subsistence of a policy. The actual claim by the third party was not made until after the policy year.

In accordance with the decision of the New South Wales Court of Appeal in *FAI Insurance v Perry*, s54 would have no application to these circumstances. The insured would fail to obtain indemnity because the policy responded only to claims made during the policy period or claims deemed to be made during that period and in the present circumstance there was neither. Gleeson CJ, who sat in *FAI v Perry*, adhered to his views in this case.

However, the majority rejected the reasoning in *Perry* and held that s54 applied to this circumstance. The majority also rejected the reasoning of the New South Wales Court of Appeal in the decision of *Greentree v FAI General Insurance Co Limited* and of Hodgson CJ in Eq in *Permanent Trustee Australia v FAI General Insurance Co Limited*, although agreed with the results in those two cases.

As the law is now stated, three situations may be distinguished:

(1) where the insured has no knowledge of circumstances which might give rise to a claim during the policy period (and so has nothing to notify) and the third party claim is not made until after the period expires: the insurer may refuse to pay the claim and s54 has no application. The reason for the insurer's refusal is that the policy did not extend to a third party demand of the type referred to in the claim for indemnity. The reason for refusal is not some act or omission on the part of the insured or some other person within s54;

(2) where the third party makes the demand on the insured during the period of cover but for whatever reason the insured does not notify the insurer of that

demand until after cover expires, s54 applies. The insurer may refuse to pay the insured's claim only by reason of the insured's failure to notify the fact of demand during the policy period, so s54 has its relieving operation;

(3) where the insured becomes aware of the occurrence during the policy period, fails to notify it to the insurer during that period and the claim is not made until after the policy period, again s54 applies. The effect of the contract of insurance, but for s54, is that the insurer may refuse to pay the claim by reason only of the omission of the insured to notify the occurrence. This brings the case within s54.

Where s54 applies, the insurer may still be able to reduce its indemnity if it can point to prejudice from the act or omission. However, the insurer could point to no prejudice arising in this case from the failure by the insured to notify the occurrence during the policy period and so the insured recovered full indemnity.

A difficulty with s54 as so applied by the High Court is that an insured with notice of circumstances likely to give rise to a claim might choose not to notify the insurer prior to expiry of the policy period in order to obtain a 'clean' renewal from that insurer or to present a clean record to an alternative insurer, thereby obtaining a lower premium. The insurer is prejudiced in its rating of the risk on renewal. It may or may not be that this prejudice can be compensated for under s54. If the third party claim is subsequently made, the insured may then seek to recover indemnity under both policies, in the prior year relying upon s54 and in the subsequent year relying directly upon the words of the claims made policy. The insurer in the later year may invoke non-disclosure but under s28 will need to prove its prejudice from not having the circumstance notified. Dual insurance lurks as a possibility. Multiple policies may need to be pleaded and debated at trial.