

## CASE EXAMPLES

### CONTRACTUAL INDEMNITIES & OBLIGATIONS TO INSURE

#### NSW Arabian Horse Association Inc v Olympic Coordination Authority [2005] NSWCA 210

*New South Wales Court of Appeal, 23 June 2005*

#### **Facts**

The Olympic Coordination Authority (“the authority”) had the management, care and control of the Sydney International Equestrian Centre (“SIEC”) and car park, located at Horsely Park, New South Wales. The authority entered into a written agreement with the New South Wales Arabian Horse Association Inc (“the association”), whereby the association as the event organiser acquired rights to use the SIEC for the purposes of staging an event known as the East Coast Arabian Championships 2001 (“the contract”).

A husband and wife, who had attended at the SIEC for the championships, made their way back to their parked car via a lit pathway at approximately 9.30pm. Before they reached their car, they fell into a drainage culvert adjacent to the car park and sustained injuries. They both commenced proceedings against the authority for personal injuries. The authority brought a cross-claim against the association. Clause 6 of the contract required the association to take out public liability insurance “for the Event” for no less than \$10m and the authority was to be “named on this policy as an interested party”. The association took out a policy that included a hand written note naming the ‘Sydney International Equestrian Park’ as a co-insured, which was clearly not the name of the authority.

The authority settled both claims brought by the husband and wife for \$70,000 and \$39,500 respectively. The cross claim by the authority against the association for breach of Clause 6 of the contract proceeded to a hearing.

#### **Trial Decision**

The trial judge found in favour of the authority and held that the association was in breach of its obligation to take out public liability insurance as required by Clause 6 of the contract. Damages for the breach were quantified as the amount claimed against the authority by the two individuals who were injured. The association appealed the decision.

#### **Appeal Decision**

The association argued that Clause 6 should be read and confined by Clause 22 of the contract. Clause 22 provided that the association, as the event organiser, indemnified and released the authority from all liability, except to the extent that such liability resulted from the negligence of the authority.

The association submitted that Clause 22 confined Clause 6 to insurance in respect of those liabilities that arise out of the indemnity in Clause 22 but not otherwise. The Court of Appeal did not accept that Clause 6

was to be read and confined by Clause 22 and held that such a construction was untenable. Instead, the Court of Appeal found that the purpose of Clause 6 was to ensure the authority had insurance cover where Clause 22 did not provide indemnity, that is, when liability arose from the authority's own negligence.

The Court of Appeal interpreted the words in Clause 6 that the authority "is to be named on the policy as an interested party" to mean that the authority was to be named in the policy "as a person to whom the insurance cover provided by the contract extends" as per section 48 of the Insurance Contracts Act 1984 (Cth).

The association also argued that the expression "for the Event" in Clause 6 should be confined to the actual event, namely the equestrian activities at Horsely Park, and not extend to accidents which occurred in the area between the arena and the carpark. This argument was dismissed by the Court of Appeal, which, in accepting that the word "for" may be treated as an equivalent to the expression "in respect of", found those words were capable in an appropriate context of having the widest possible meaning. The Court of Appeal found that parking was an integral part of the event as parking requirements were provided for in the event application form and there was provision for the association to receive 40% of the parking revenue from the event. Accordingly, the Court of Appeal held "the Event" extended to the parking area and the area between the parking area and the arena, including the path from where the husband and wife fell.

The Court of Appeal upheld the trial judge's finding that the association had breached Clause 6 of the contract in failing to take out insurance cover for the authority and dismissed the appeal brought by the association in full and awarded costs on an indemnity basis.

Read the full judgment [here](#)

## **Samways v WorkCover Queensland & Ors [2010] QSC 127**

*Queensland Supreme Court, 28 April 2010*

### **Facts**

Mr Samways was a construction worker employed by the first defendant. The first defendant was contracted to work on a site controlled by De Luca. De Luca had contracted with Lynsha to supply it with a bobcat and operator to work on the site.

On 6 December 2005, Samways was injured when he walked into the raised bucket of the bobcat. The bobcat bucket had been raised in order to allow Lynsha to effect some repairs the afternoon before. The repairs had been completed prior to the incident occurring but the bobcat had not been moved and was left near an area where Samways was working.

Samways' supervisor had given a verbal warning to him and his co-worker to watch out for the bucket of the bobcat and he notified De Luca's site supervisor that the bobcat was close to their work area. The De Luca supervisor responded by saying that he didn't have the keys to move the bobcat (they were with the bobcat operator).

Samways made a claim for damages for negligence against:

- His employer - WorkCover (first defendant)
- The occupier of the site – De Luca
- The supplier of the bobcat and its operator - Lynsha

## Decision

All defendants were found to be negligent, while Samways was found to be contributory negligent, which resulted in a reduction in damages of 20%. Liability was apportioned:

WorkCover	10%.
De Luca	30%.
Lynsha	60%.

Lynsha then sought an indemnity from De Luca pursuant to the contract between them. The contract contained the following indemnity clause:

*[De Luca] shall fully and completely indemnify [Lynsha] in respect of all claims by any person or party whatsoever for injury to any person or persons and/or property caused by or in connection with or arising out of the use of the plant and in respect of all costs and charges in connection therewith whether arising under statute or common law.*

The Court held that the indemnity operated so that Lynsha was entitled to be indemnified by De Luca for all claims, including its own negligence.

It confirmed that the words “arising out of” and “in connection with” are of wide meaning, the former indicating a weak, but not remote, causal relationship. In this instance, the causal relationship must be between the injury and the “use” of the bobcat. The court found that the word “use” is not ambiguous and could not be construed to mean that it was being driven or operated at the time. It was sufficient that the bobcat was in an operational condition, having been parked with a view to being deployed on tasks at the direction of the second defendant at the time the accident occurred.

As a result, De Luca was required to indemnify Lynsha. The final apportionment and orders to pay damages was:

WorkCover	10%
De Luca	90%
Lynsha	0% (due to contractual indemnity in its favour)

Read the full judgment [here](#)

## **GIO General Limited v Centennial Newstan Pty Ltd [2014] NSWCA 13**

*New South Wales Court of Appeal, 12 February 2014*

### **Facts**

Centennial Newstan Pty Ltd (“Centennial”) operated a coal mine near Newcastle. Centennial entered into an agreement with Longwall Advantage Pty Ltd (“Advantage”) for the supply of labour from Advantage to Centennial to perform work at Centennial’s mine site (“the agreement”). Relevantly, the agreement included the following clauses:

Clause 8.1 provided that Advantage was obligated to indemnify Centennial for all claims for:

*(a) injury to or death of any of your personnel, except to the extent that a claim for such injury or death arises as a result of the negligence of Centennial or a breach of this contract by Centennial;*

...

*(c) injury to or death of any person (including employees, agents or subcontractors of Centennial)... caused by an negligent act or omission by You or Your Personnel or a breach of this Contract by You.*

Clause 8.3:

*You and your Personnel must maintain workers compensation insurance as required by applicable Laws and public liability and (unless agreed otherwise by Centennial in writing) professional indemnity in accordance with ... Clause 8.4, together with any other insurance specified on the Purchase Order. If requested by Centennial at any time, You must provide such evidence as Centennial reasonably requires that You or Your Personnel are insured in accordance with this Contract.*

Clause 43 of the Site Regulations provided:

43.1 *The Contractor must have insurances referred to in the Contract whenever performing its obligations under the Contract and for the period (if any) set out in the Contract after the Contractor has performed all of its obligations under the Contract.*

43.2 *Special insurance requirements*

...

43.2.2 *Unless otherwise agreed in writing by the Principal, public and product liability policies not the Principal and all subcontractors as interested parties and must cover the respective liabilities of each of those parties to each other and to third parties. The policy must cover each indemnified party to the same extent as it would if each of the parties had a separate policy of insurance.*

43.4 *Failure to insure*

*If the contractor neglects, fails or refuses to obtain any insurance policies as required by the Contract or the Standard Contractors Site Regulations the Contractor must indemnify the Principal for any loss or damage suffered by the Principal arising out of or in connection with the Contractor’s failure to obtain the required insurance.*

Advantage maintained a policy of insurance (“the policy”) with GIO General Limited (“GIO”). One of the workers supplied by Advantage was Mr McDonald, who was employed by Longwall Labourforce Pty Ltd (“Labourforce”).

Mr McDonald was injured when his leg was crushed while working as a fitter and turner at Centennial’s coal mine. He bought an action for damages for personal injuries against Labourforce, Advantage and Centennial. Subsequently, Centennial sought indemnity from GIO, claiming indemnity under the policy.

### **Trial Decision**

The trial judge found that Labourforce, Advantage and Centennial were all liable for Mr McDonald’s injuries. For the purposes of contribution, it was found that Centennial was to bear 100% of the liability and damages in the sum of \$550,000 (less workers compensation payments). The trial judge held that GIO was liable to indemnify Centennial in respect of its liability to Mr McDonald. GIO appealed this decision.

### **Appeal Decision**

The primary question on appeal was whether Advantage was required by Clause 43.2.2 to provide insurance cover to indemnify Centennial against its liability for its own negligence. The Court of Appeal unanimously dismissed the appeal and agreed with the trial judge that Centennial was entitled to be indemnified by GIO pursuant to the policy.

The Court of Appeal found that when the agreement was read as a whole, it may be seen that the scheme of its provisions in relation to insurance and indemnity were as follows:

- Under Clause 8.3, Advantage covenanted that it and “Your Personnel” (its employees, agents and subcontractors) would maintain workers compensation insurance and public liability insurance in accordance with Clause 8.4 (which set out the minimum insurance requirements)
- Clause 43.1 reinforced Clauses 8.3 and 8.4 by requiring that Advantage must have the insurance referred to in the contract “whenever performing its obligations under the Contract”
- Under Clause 43.2.2, Advantage was obliged to ensure that the policy noted that “Centennial and all subcontractors” were interested parties and that the policy covered their own interests in the terms specified
- The cover was for the “respective liabilities of each of those parties to each other and to third parties”. “Those parties” is a reference to the “interested parties” under the policy and this included Centennial
- Under Clause 43.4, Advantage was obliged to indemnify Centennial if it failed to obtain the required insurance policies. This indemnity was in addition to the indemnity in Clause 8.1.

GIO had argued that the insurance clause in the agreement was to be construed in the same manner as it was in the case [Erect Safe Scaffolding v Sutton](#), which held that a subcontractor will not be required to “maintain insurance against loss occasioned by the head contractor’s negligence”.

The Court of Appeal distinguished this case from *Erect Safe*, finding that the terms of the agreement here were quite different:

- The indemnities under Clause 8.1 were clear
- Clauses 8.1, 8.3 and 8.4 were supplemented by the special insurance requirement and indemnity clause in the Site Regulations and these provisions must be read together, and where possible, in a harmonious manner
- The insurance clause in *Erect Safe* only covered against the “respective rights and interests” of the head contractor and the subcontractor against liability death or injury to any person in the context of the contractual indemnity given by the subcontractor to the head contractor “arising out of the performance of the works”. In contrast, in this case the special insurance requirements were intended to provide cover to Centennial beyond the scope of the indemnity under Clause 8.1
- The construction of Clause 43.2.2 (that the insurance clause does more than merely secure the indemnity in Clause 8.1) is supported by evidence of the separate indemnity in Clause 43.4. Clause 43.4 would have no work to do if the clause relating to obligation to obtain insurance cover for Centennial merely secured the indemnity afforded by Advantage to Centennial under Clause 8.1

It was concluded that *Erect Safe* was not determinative of the construction to be given to Clause 43.2.2. The appeal was dismissed.

**Read the full judgment [here](#)**