IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. SCI 5648 of 2012

BUPA AUSTRALIA PTY LTD (ACN 000 057 590) Plaintiff

v

GLORIA LORRAINE SHAW Defendants

and

JAMES HAROLD WALKER

(as Joint Executors of the Estate of Norman Edwin Shaw, deceased)

JUDGE:	ALMOND J
WHERE HELD:	Melbourne
DATES OF HEARING:	29 and 30 July 2013
DATE OF JUDGMENT:	26 September 2013
CASE MAY BE CITED AS:	Bupa Australia Pty Ltd v Shaw (as Joint Executor of the Estate of Norman Shaw) & Anor
MEDIUM NEUTRAL CITATION:	[2013] VSC 507

INSURANCE – Subrogation – Interpretation of insurance policy – Policy to be viewed as a whole – Whether the insurer's right of subrogation was excluded, modified or expanded by terms of the policy – Whether payments by insurer were made by way of indemnification under policy – Construction of 'benefits are not payable' – Whether payments by insurer were made in error – Benefits *prima facie* payable – Payments made by way of indemnification but not strictly within terms of policy – *King v Victorian Insurance Company* [1986] AC 250 applied – Whether right of subrogation prejudiced by terms upon which negligence claim settled – Whether insurer is prevented from exercising right of subrogation due to its own conduct – Insured liable to repay payments made by insurer.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr G. Dalton	Arnold Bloch Leibler
For the Defendant	Mr M. Scott SC	Holman Webb Lawyers

HIS HONOUR:

1 In September 2005, Mr Norman Shaw underwent surgery to remove a tumour from the lining of his oesophagus. During the surgery, the surgeon performed a full gastrectomy, as a result of which Mr Shaw required hospital and general treatment. Mr Shaw made claims under his health insurance policy with his insurer, Bupa Australia Health Pty Ltd ('Bupa') to recover hospital and general treatment expenses which he incurred from 11 September 2005 to 2 May 2010.[1] As a consequence, Bupa paid in total $338,953.56 for the benefit of Mr Shaw.[2] On about 31 May 2010, Bupa assigned all of its rights in respect of the policy to the plaintiff, Bupa Australia Pty Ltd.[3]

2 In September 2008, Mr Shaw commenced court proceedings seeking damages for medical negligence against the surgeon ('the negligence proceeding').[4] He alleged that the surgeon had breached his duty of care by performing a full gastrectomy instead of an oesophagectomy, and by failing to warn Mr Shaw that he would perform a gastrectomy and the consequences of such an operation. Mr Shaw sought damages from the surgeon to cover expenses associated with his past and future care as well as damages to cover his medical and like expenses, which would include expenses claimed from Bupa.[5] Bupa first became aware of the negligence proceeding in March 2010 when Mr Shaw's solicitors, Arnold Thomas & Becker ('ATB'), requested details of all medical expenses paid by the insurer in relation to the surgery.[6]

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1 Further Amended Statement of Claim, 2 May 2013 (as amended on 29 July 2013), [8] ('Further Amended Statement of Claim'); Amended Defence to Further Amended Statement of Claim, 29 July 2013, [8] ('Amended Defence'). Mr Shaw took out a health insurance policy with Bupa (which formerly traded as HBA) in around October 1977.

2 Plaintiff's Outline of Submissions, 29 July 2013 ('Plaintiff's Submissions'), [2].

3 As nothing turns on the difference between the two companies, it is convenient to refer to both entities as 'Bupa'.

4 Norman Shaw, 'Statement of Claim', *Shaw v Blamey,* S CI 2008 8270, 8 September 2008, Exhibit P1, 6–11.

5 Gloria Shaw as Executrix of the Estate of Norman Shaw, 'List of Special Damages', *Shaw (as Executrix of the Estate of Norman Shaw) v Blamey,* S CI 2008 8270, 13 August 2010, Exhibit P1, 159–162.

6 Letter from ATB to Bupa, 12 March 2010, Exhibit P1, 16.

3 In response, Bupa provided ATB with a schedule of benefits which itemised the relevant expenses paid and asked to be kept informed as any benefits which related to Mr Shaw's claim would have to be refunded to Bupa in the event that his claim was successful.[7]

4 Mr Shaw died on 2 May 2010.[8] Following his death, the negligence proceeding was continued by Gloria Shaw (Mr Shaw's wife) as substitute plaintiff on behalf of Mr Shaw's estate. In or about December 2011, the joint executors of the estate settled the negligence proceeding with the surgeon.[9]

5 Unaware of the settlement, on 16 February 2012, Bupa emailed ATB (who became the solicitors for Mr Shaw's estate) enquiring as to the progress of the matter.[10] ATB advised Bupa that the negligence proceeding had settled in December 2011 and that '[a]s part of the terms of settlement the Insurer of the [surgeon had] agreed to indemnify [the estate] against repayment to Bupa'. Accordingly, ATB recommended Bupa contact the solicitors for the surgeon's insurer.[11] Subsequently, Bupa was provided with terms of settlement executed by the joint executors of Mr Shaw's estate which are contained in a Deed of Release dated 2 February 2012.[12]

6 It is common ground that Bupa paid in total $338,953.56 for the benefit of Mr Shaw for medical expenses incurred by him as a consequence of the conduct of the surgeon.[13]

7 Despite demands from Bupa, the joint executors of Mr Shaw's estate (the defendants in this proceeding), have denied liability to repay Bupa for payments previously made to Mr Shaw ('the insured').[14]

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7 Letter from Bupa to ATB, 19 March 2010, Exhibit P1, 17–77.
8 Further Amended Statement of Claim, [2], Amended Defence, [2].
9 Letter from ATB to Bupa, 20 February 2012, Exhibit P1, 273.
10 Emails from Bupa to ATB, 16 February 2012, Exhibit P1, 27–272.
11 Letter from ATB to Bupa, 20 February 2012, Exhibit P1, 273.
12 Deed of Release signed by Gloria Shaw and James Walker as Joint Executors of the Estate of Norman Shaw, 2 February 2010, Exhibit P1, 268 – 270 ('Deed of Release').
13 Plaintiff's Submissions, [20]–[21]; Further Amended Statement of Claim, [9]; Amended Defence, [9]; Transcript of Proceedings, 29 July 2013 ('Transcript'), 20.17–23.
14 Further Amended Statement of Claim, [22]–[23]; Amended Defence, [22]–[23]. Note: as a result of the

8 The following questions arise for determination in this proceeding:

(1) Were the payments for medical and like expenses made by way of indemnification under the policy of insurance thereby giving rise to an entitlement in Bupa to exercise its right of subrogation?

(2) If yes to Question (1), was Bupa's right of subrogation prejudiced by the terms upon which the negligence proceeding was settled?

(3) If yes to Question (1), is Bupa prevented from exercising its right of subrogation as a consequence of its own conduct?

Question (1): Was Bupa entitled to exercise its right of subrogation?

9 Bupa, through its counsel, submits that as it had made payments to the insured under a policy of insurance, which indemnified the insured for medical and like expenses, it is entitled to exercise the right of subrogation.[15]

10 The relevant equitable principles governing the doctrine of subrogation are uncontroversial and well established. In *State Government Insurance Office (Q) v Brisbane Stevedoring Pty Ltd,*[16] Barwick CJ said:

> It is settled law that an insurer who has paid the amount of a loss under a policy of indemnity is entitled to the benefit of all the rights of the insured in the subject matter of the loss and by subrogation may enforce them. This right of subrogation is inherent in the contract of indemnity. …
>
> It is also settled law that an insured may not release, diminish, compromise or divert the benefit of any right to which the insurer is or will be entitled to succeed and enjoy under his right of subrogation. On occasions an attempt by the insured to do so will be ineffective against the insurer because of the knowledge of the circumstances which the person under obligation to the insured may have. On other occasions when the insured's act has become effective as against the insurer, the insured will be liable to the insurer in damages, or possibly, on some occasions for money had and received.[17]

Deed of Release, the former solicitors for the surgeon's insurer are defending this proceeding on behalf of the defendants.

15 Plaintiff's Submissions, [5], [7].

16 (1969) 123 CLR 228.

17 Ibid, 240–241.

11 In *AFG Insurance Ltd v City of Brighton,*[18] Mason J said of the doctrine of subrogation:

> The doctrine comes into operation when the insurer meets his liability under the policy by making payment to the insured in respect of his loss. The insurer is then subrogated to the relevant rights of the insured. Unless and until the insurer makes good the loss the doctrine has no application. … The rationale of the doctrine is the avoidance of a double indemnity.[19]

12 The plaintiff submits that the doctrine of subrogation gave it two distinct rights:

(a) the right to require the insured to pursue any rights available against a third party for the benefit of the insured; and

(b) the right to recover from the insured any benefit received in diminution or extinction of the loss against which the insured has been indemnified. In this respect, where an insured settles with a third party after having been indemnified by an insurer and by doing so prejudices the insurer's right of subrogation, the insured is liable to compensate the insurer for the amount by which that right has been diminished.[20]

13 Senior Counsel for the defendants concedes that the Bupa health insurance policy is a policy of indemnity,[21] but submits that:

(a) Bupa's policy governs its entitlement to repayment of benefits from the estate such that the terms of the policy exclude or modify Bupa's right of subrogation or its exercise;

(b) Bupa did not have an obligation to indemnify the insured under the policy, meaning that benefits paid to the insured must have been paid in error. Since the benefits were not paid by way of indemnification under the policy, the right of subrogation did not arise in this case; and

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18 (1972) 126 CLR 655.

19 Ibid, 663. See also *Castellain v Preston* (1883) 11 QBD 380, 401–2.

20 Plaintiff's Submissions [7]–[8]. See cases cited therein: *Insurance Commission of Western Australia v Kightly* (2005) 30 WAR 380, [26], [49]; *Santos Ltd v American Home Assurance Co* (1986) 4 ANZ Insurance Cases 60-795 at 74,876.

21 Transcript, 64.9–13.

(c) the only means for Bupa to recover any payments made to the insured in error is by informing the insured within two years of payment, and since Bupa did not do so, the payments are no longer recoverable.

The Rules

14 Bupa's Fund Rules[22] comprise the terms of the policy between the insurer and each policy holder for the provision of hospital or general treatment.[23] The Rules consist of General Conditions and Schedules which set out the benefits payable for particular treatments.[24] Whether a policy holder is eligible for a benefit and the amount of the benefit payable is determined by the rules in force on the date a treatment is rendered to the insured person.[25]

15 In substance, the Rules fully cover, inter alia, the cost (less excesses) of hospital charges raised by 'Public hospitals' and 'Private agreement hospitals' (as those terms are defined); the costs that a member incurs for a 'Pharmaceutical Benefits Scheme' item received while admitted in such a hospital; and ancillary charges.[26]

16 The Rules relevantly provide:

> E. **BENEFITS**
>
> ***E1 General Conditions***
>
> E1.1 The *rules* in force on the date a treatment is rendered to an insured person will determine whether the person is eligible for and the amount of benefits payable.
>
> E1.2 Benefits for goods and services cannot exceed the actual charge for the goods and services received.
>
> E1.3 Where the *Company* has paid an amount to a *policy holder* which was

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22 See Bupa Australia Health Pty Ltd Fund Rules, 'General Conditions', Exhibit P1, 518–545 ('Rules'). The Rules effective from 1 April 2009 are referred to throughout this judgment. For the purposes of the trial, the parties agreed that it was appropriate to work from the Rules effective from 1 April 2009, as there were no material differences to Rules that applied at different periods in time. (Transcript, 14.30–15.3, 46.30–47.4).

23 Rule A2.2 and definitions in B2.1, Rules, Exhibit P1, 520, 524. Further Amended Statement of Claim, [5(a)]; Amended Defence, [5(a)].

24 Schedule of Hospital Tables, Exhibit P1, 311–349; Schedule of Ancillary Tables, Exhibit P1, 350–398.

25 Rule E1.1, Rules, Exhibit P1, 534.

26 Refer generally to the Schedule of Hospital Tables (particularly definition of H2 4 Hospital payments, H2 6 Pharmaceutical Benefits Scheme PBS Pharmaceuticals, Exhibit P1, 316); Schedule of Ancillary Tables, Exhibit P1, 350–398; Schedule Combined Hospital & Ancillary Tables, Exhibit P1, 399–438.

not then lawfully due to the *policy holder* as the result of an error, and the *Company* has informed the *policy holder* within 2 years of the date of payment, the *Company* shall be entitled to recover the amount from the *policy holder.*

…

E1.6 The *Company* may, in its sole discretion make ex-gratia payments in respect of claims that would not otherwise attract benefits under these *rules.*

…

E1.8 No person may receive benefits in respect of the same treatment from more than one policy of the *Company.*

F. LIMITATION OF BENEFITS

…

F7.1 Benefits are not payable in respect of a condition, injury or ailment which is the subject of a claim where a *policy holder* or *dependant child* has claimed and received or established a right to receive a payment by way of compensation or damages from a third party.

…

F7.3 Where the *Company* believes that a condition, injury or ailment is one which may give rise to a claim for compensation or damages or benefits have been paid which relate to such a claim, the *Company* may require the *policy holder* or *dependant child* to sign an undertaking, in a form acceptable to the *Company,* before payment or further payment of benefit occurs. The undertaking will require the *policy holder* to make a claim for compensation or damages, to pursue the claim with all diligence, and to include in such claim all hospital, medical, dental, paramedical and related expenses. Proceeds from the claim are to be used to reimburse the *Company* for any benefits that were paid for the condition, injury or ailment.

F7.4 Benefits are not payable if it appears to the *Company* that the *policy holder* or *dependant* child may be entitled to payment by way of compensation or damages but has not yet established the right to such payment. The *policy holder* will be required to establish such right. If it is established that there is no right to compensation or damages, then benefits are payable.

F7.5 Where a *policy holder* or *dependant child* establishes a right to compensation or damages and accepts a settlement, and such settlement includes terms specifying that moneys paid do not relate to past or future expenses in respect of which benefits would otherwise be payable, or part of the claim is abandoned or compromised so that such expenses are excluded or represented by a nominal amount only,

then benefits are not payable.[27]

Do the Rules exclude or modify the right of subrogation or its exercise?

17 An insurer's right of subrogation, whether as a contractual term implied by law, or a right that arises in equity as a necessary incident of an indemnity contract, may be expanded, modified or excluded either expressly or impliedly by the terms of the contract.[28] The right of subrogation may be excluded either wholly or in part by express terms or as a result of inconsistency with the terms of the contract.[29]

18 It is clear that there are no express terms in the Rules which exclude or waive the right of subrogation.

19 The defendants submit that the Rules (particularly Rules F7.1 to F7.5) are a code which regulates entitlements to benefits such that Bupa's right of subrogation or its exercise is excluded or modified. As such, the only means that Bupa has to recover payments is on the terms stated in the Rules, namely E1.3. In support of this proposition, the defendants point to the 'scope of the Rules and their comprehensive coverage of the permutations and combinations in which claims might be made for compensation'.[30]

20 Further, the defendants submit that Rule E1.3 when read in the context of the Rules as a whole is inconsistent with the maintenance of an equitable or implied right of subrogation. At trial, the argument was elaborated upon as follows:

(a) the Rules list specific circumstances in which 'benefits are not payable' (Rules F7.1, F7.4 and F7.5) or require an undertaking 'before payment or further payment of benefit occurs' (Rule F7.3);

(b) where payments are made to policy holders in circumstances in which Bupa was not obliged to pay under the Rules (including by virtue of Rules F7.1 to

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27 Rules, Exhibit P1, 534, 543–544.

28 *Woodside Petroleum Development Pty Ltd v H & R-E and W Pty Ltd* (1997) 18 WAR 539, 568-570 (Anderson J); *Woodside Petroleum Development Pty Ltd v H & R-E and W Pty Ltd* (1999) 20 WAR 380, 389–390 (Malcolm CJ, Pidgeon, Ipp JJ).

29 Ibid. See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 449 (McHugh and Gummow JJ).

30 Defendants' Submissions, [30]–[31].

F7.5), the only legal explanation is that the payments were made under a mistake of fact, or in error (regardless of whose error or the reason for such error);

(c) a right of subrogation only arises when an insurer *indemnifies* the policy holder. A possible consequence of the Rules in F7 on payments that have already been made is that the obligation to indemnify did not actually arise or, in the case of Rule F7.4 (where a policy holder is required to establish a right of compensation or damages before benefits are payable), the obligation to indemnify is forestalled;

(d) consequently, the insurer is able to immediately demand repayment of any benefits already paid to a policy holder, and in the case of Rule F7.4, refuse to make any further payments until the policy holder has established a right to compensation or damages;

(e) having regard to Rule F7.4, the Rules are 'very harsh and onerous' because the policy holder would have to carry the cost of any medical expenses (as benefits would not be payable); immediately repay any previous payments to Bupa and cover the costs of any litigation which the policy holder would be expected to prosecute for the benefit of the insurer;

(f) the only protection that policy holders have from being presented with an immediate repayment of years of previous payments is Rule E1.3, which restricts the clawing back of payments made in error to two years;

(g) an equitable right of subrogation does not fit within Rule E1.3 and should not be implied in circumstances where Bupa does not comply with Rule E1.3 to claim back funds from the insured.

21 The plaintiff rejects the defendants' argument that the insurer's right of subrogation has been modified or displaced by the Rules and submits that the Rules are consistent with the insurer not only preserving its right of subrogation, but

expanding upon its right of subrogation.[31] To support its argument, Bupa points to the fact that the principle against double recovery finds expression in the Rules. In particular:

(a) a policy holder is required to inform Bupa as soon as practicable of any actual or potential claim against a third party regarding any illness (Rule C4.1(4) and C4.2);[32]

(b) benefits are not payable if in Bupa's reasonable opinion the policy holder may receive any compensation, damages or benefits from another source (Rule E4.1(11));[33]

(c) Bupa's obligation to pay benefits to the policy holder was limited in circumstances where the policy holder had or may have a right to compensation against a third party (Rule F7).[34]

22 The plaintiff also rejects the defendant's submission that Rule E1.3 provides the only means of recovery under the policy and contends that it only applies where payments are made as a result of Bupa's error. Bupa submits that Rules F7.3, F7.4 and F7.5 apply, *inter alia*, in situations where the insured may be entitled to recover from a third party and has yet to be indemnified under the policy. As such, Bupa contends that these Rules expand its subrogation rights by conferring on it rights to require the insured to make a claim for compensation where it appears to Bupa that such a claim exists, even before it has made payment under the policy (a right which does not exist under the general law doctrine of subrogation).[35] In my view, this is the preferable construction.

23 In the circumstances, I do not accept that Rule E1.3 or the Rules read as a whole are inconsistent with the right of subrogation, and that the right (or its exercise) is

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31 Plaintiff's Submissions, [37]–[47].

32 Rules, Exhibit P1, 528.

33 Rules, Exhibit P1, 539.

34 Rules, Exhibit P1, 543–544. I note also that benefits for goods and services under the policy cannot exceed the actual charge for the goods and services received (Rule E1.2 , Rules, Exhibit P1, 534).

35 Plaintiff's Submissions [45]; Rules F7.3, F7.4 and F7.5, Exhibit P1, 543–544.

therefore excluded. Nor do I accept the defendants' wide construction of Rule F7 to retrospectively render any previous payments made by the insurer under the policy to a payment made in error. (I deal with the construction of these terms in further detail in the next section.)

24 Rule E1.3 only applies in circumstances where Bupa made a payment that it was not lawfully obliged to make under the policy because of an 'error' that it made; it does not automatically apply to any payment made by Bupa that it was not obliged to make under the policy. It follows that Rule E1.3 can co-exist with a right of subrogation and does not act as a precondition to recovery (such that Bupa must inform a policy holder of Bupa's entitlement to reimbursement within two years of the date of the payments).

25 Accordingly, I consider that a right of subrogation, albeit in modified and expanded terms, arises in equity or is implied by law in the terms of Bupa's insurance policy.

Were the payments made in 'error'?

26 The defendants submit that Bupa's obligation to indemnify had not arisen since the only basis that benefits could be payable in the circumstances of the insured was pursuant to Rule F7.3; that is, in conjunction with an undertaking given by the insured to make a claim for compensation which includes all relevant health expenses. Unless Bupa obtained an undertaking from the insured under Rule F7.3 before payment or further payment of benefits, no obligation to indemnify arose unless the insured established that there was no right to compensation or damages (Rule F7.4) Accordingly, the defendants submit that the payments made by Bupa were made in error, and therefore irrecoverable because Bupa did not inform the insured about the error within two years of the date of payment (Rule E1.3). Alternatively, the defendants submit that the payments were made *ex gratia*, (Rule E1.6) and were therefore irrecoverable.[36]

27 The plaintiff submits that:

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[36] Defendant's Submissions, [33]–[34], Amended Defence, [16].

(a) as the defendants' admitted in their pleadings that the claims were made, and the insured was paid, pursuant to the terms of the policy, the defendants' cannot subsequently argue that no obligation to indemnify had arisen;[37]

(b) payments were made by way of indemnification in that each expense was submitted for payment by the insured and each payment by Bupa indemnified the insured against the relevant expense;

(c) even if the payments were not made by way of indemnification under the strict terms of the policy, the payments were reasonable and were made in good faith in response to claims made by the insured at a time when the insured did not inform the insurer that he had a claim for compensation against a third party;[38]

(d) Rule E1.3 has no application in this case as Bupa did not make an error in making the payments to the insured.[39]

28 In my view, the defendants' submission that benefits were paid in error, and not by way of indemnification under the policy (the consequence being that no right of subrogation arises or is exercisable), is untenable in light of admissions made by the defendants. Specifically, the defendants admit in their pleadings that:

(a) the insurance policy was current and in full force and effect during the relevant period;[40]

(b) the insured incurred expenses as a result of hospital and general treatment;[41]

(c) the terms of the policy provided that benefits are payable to the insured to cover the costs of hospital treatment and general treatment;[42] and

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37 Further Amended Statement of Claim, [9]; Amended Defence, [9].
38 Plaintiff's Submissions, [35].
39 Plaintiff's Submissions, [49]; Defendant's Submissions, [11], [13].
40 Amended Defence, [7].
41 Amended Defence, [8].
42 Amended Defence, [5a].

(d) the payments were made by Bupa pursuant to the terms of the policy and as a consequence of the claims made by the insured.[43]

29 The defendants did not seek to withdraw their admissions at trial. Had they sought to do so, it is unlikely that leave would have been granted. In my view the admissions appear to have been properly made.

30 Notwithstanding the admissions in their pleadings, the defendants' also plead that on the true construction of the policy, the payments were made in error. I am not persuaded by this submission.[44]

31 Under the terms of the policy, benefits for hospital treatment and general treatment are *prima facie* payable to recompense the policy holder for those expenses. It is common ground that the insured incurred expenses of that nature. Benefits under the policy are payable for a wide range of treatments. For example, the Schedule of Hospital Tables sets out in detail the extent of cover for hospital charges, pharmaceutical benefits and the like. The contractual obligation on the insurer to indemnify the insured is made very clear, although it is expressed in non-legalistic terms. For example, in relation to hospital payments (subject to the payment of any applicable excess), the Schedule provides that 'benefits fully cover the cost of hospital charges raised by Public hospital and Private agreement hospitals'.[45]

32 The defendants' argument that the payments were made in error is dependent on a wide construction of the expression 'benefits are not payable' where it occurs in the Rules.[46] The effect of such a construction is to broaden the circumstances in which the Rules will operate to effectively exclude or limit the insurer's *prima facie* obligation to indemnify the insured.

33 The appropriate principles of construction to apply in relation to exclusion or

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43 Amended Defence, [9].

44 Amended Defence, [16(b)(ii)]. The defendants also pleaded that the payments were made ex gratia, however, this allegation was not developed in argument at trial. Suffice to say that I am not satisfied that there is any evidence to show that any payment was made by the insurer ex gratia.

45 Schedule of Hospitable Tables, H2 4 (definition of Hospital payments), Exhibit P1, 316.

46 See E4.1, F7.1, F7.4 and F7.5, Exhibit P1, 539, 543–544.

limitation clauses are widely accepted. In *Darlington Futures Ltd v Delco Australia Pty Ltd,*[47] the Court (Mason, Wilson, Brennan, Deane and Dawson JJ) held that:

> the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity. …[T]he same principle applies to the construction of limitation clauses.[48]

34 This principle applies equally to insurance contracts. In *Australian Casualty Co Ltd v Federico*,[49] Gibbs CJ stated that:

> [t]he ordinary rules of interpretation apply to a policy of insurance. As in the case of any other commercial contract, a court may depart from the strictly literal meaning of a particular expression to place upon it an alternative construction which is more reasonable and more in accord with the probable intention of the parties if the words will bear that construction.[50]

35 In a similar vein, in *McCann v Switzerland Insurance Australia Ltd*,[51] Gleeson CJ stated that:

> A policy of insurance, even one required by statute, is a commercial contract and should be given a business-like interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure.[52]

36 Applying these principles of construction, the Rules which limit the circumstances in which benefits are payable must be construed in light of the policy as a whole. According to the defendants' construction of the Rules, any payments made by Bupa which were not strictly payable at the time (including those payments made before Bupa was aware of the negligence proceeding and any possible application of Rules 7.3 or 7.4) are not considered to be made by way of indemnification under the policy.

37 In my view, this interpretation is too wide and produces incongruent results. By

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47 (1986) 161 CLR 500.
48 Ibid, 510.
49 (1986) 160 CLR 513.
50 Ibid, 520 (citations omitted).
51 (2000) 203 CLR 579.
52 Ibid, 589 (citations omitted).

way of illustration, Rule F7.1 provides that benefits are *not* payable where a policy holder has claimed and received or established a right to receive a payment by way of compensation or damages. However, if the policy holder has not claimed and received or established a right to a payment by way of compensation or damages at the time the policy holder makes a claim under the policy, then benefits *are* payable. If it subsequently appears to Bupa that the policy holder may be entitled to payment by way of compensation or damages but the policy holder has not yet established the right to such payment, the consequence is, on the defendants' construction, that those benefits are considered to be made 'in error' and are immediately reimbursable (despite the fact that they were properly paid under the terms of the policy).

38 Rules F7.1, F7.4 and F7.5 (unlike Rule F7.3) do not contemplate reimbursement of benefits previously paid. It does not appear to me that the parties objectively intended that Rules F7.1, F7.4 and F7.5 would apply to benefits that have already been paid. Had it been intended that the policy operate retrospectively to deny entitlement to benefits previously paid, this would have been manifested clearly in the terms of the policy. The same applies if the payment of benefits was intended to be conditional or provisional.

39 Rules F7.1, F7.4 and F7.5 properly construed, having regard to the purpose, objective and commercial context of the insurance policy, neither operate so as to nullify the indemnity previously given, nor do they require the policy holder to immediately reimburse Bupa for benefits previously paid.

40 Rule F7.3 operates differently. Rule F7.3 applies where Bupa believes that a condition, injury or ailment is one which may give rise to a claim for compensation or damages, or where benefits have been paid which relate to such a claim. In those circumstances, Rule F7.3 provides that Bupa may require the policy holder to sign an undertaking in a form acceptable to Bupa before a payment or further payment of benefits under the policy occurs. The Rule specifies that any such undertaking will compel the policy holder to make a claim for compensation or damages, pursue the claim with all diligence, and include in that claim all hospital, medical, dental,

paramedical and related expenses. Proceeds from the claim are to be used to reimburse Bupa for any benefits that were paid under the policy.

41 For present purposes, it is sufficient to note that Rule F7.3 is merely permissive. It does not require Bupa to obtain an undertaking from the policy holder as a pre-condition to pay or continue to pay benefits. No undertaking was sought from the insured in the present case. Bupa was unaware of the negligence proceeding until March 2010.[53] At that time, viewed objectively, Bupa would have had a basis for a belief that the insured had a condition, injury or ailment which may give rise to a claim for compensation for damages. By then, the negligence proceeding was well advanced and was apparently being progressed diligently by ATB, who had taken the initiative to request details of the medical expenses paid by Bupa in relation to the surgery so that they could be incorporated into the claims in the negligence proceeding. In those circumstances, it is not surprising that Bupa did not procure an undertaking from the insured. In the absence of an undertaking, Rule F7.3 does not apply and, in my view, has no relevance.

42 In summary, I reject the defendants' submission that where Bupa believes that the policy holder may have a claim for compensation or damages, payment or further payment of benefits can only be made under the Rules if an undertaking is sought under Rule F7.3. I also reject the defendants' submission that there is no indemnity unless and until a claim for compensation is resolved one way or another.[54] In my view, such constructions are unrealistic and impractical.

43 The purpose and object of the health insurance policy is to indemnify policy holders for medical and like expenses. Such expenses are likely to be incurred at a time when the policy holder is vulnerable or unwell, perhaps unable to work or earn an income, and in need of immediate cover for the expenses of medical treatment which might be required unexpectedly. In my view, a reasonable person in the position of

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53 Letter from ATB to Bupa, 12 March 2010 (but appears to have been received on 18 March 2010), Exhibit P1, 16.

54 Defendants' Submissions [33].

the parties would have understood from the Schedule of Hospital and Ancillary Tables that insurance cover (save for any relevant waiting periods) would be immediate and comprehensive and that claims would be met to discharge liabilities incurred. On the defendant's construction, a reasonable policy holder would be dissuaded from later making a claim for compensation or damages, because benefits received under the policy (and already spent) would become immediately reimbursable to the insurer. Such a construction would not be commercially sensible and would operate as a disincentive to policy holders to make legitimate claims for recovery of compensation or damages from third parties. In my view, that outcome cannot have been intended.

44 Policy holders might not contemplate making a claim for compensation or damages until fully recovered and well after claims have been made on their policy and benefits have been paid. Taking a purposive and commonsense approach, I do not accept that the policy operates so that upon the making of a claim for compensation or damages, benefits that are payable under the policy (and already paid) metamorphose into benefits that are not payable under the policy and become immediately repayable.

45 Callum Cook, Bupa's legal manger, gave evidence that Mr Shaw had a right to claim from 10 September 2005 as he was a member who had fully paid his premiums and was undergoing surgery. Mr Cook testified that Bupa was not aware there was a claim on foot in relation to a third party until March 2010. It was not suggested that Bupa had become aware of the negligence proceeding any earlier. In my view, there is insufficient evidence from which to infer that payments made (either before or after Bupa became aware of the negligence proceeding) were made as a result of an error. One could equally infer that Bupa made or continued to make the payments for reputational or commercial reasons, without taking a strict view of the ambit of the policy, having already honoured claims over a lengthy period and in the knowledge that claims in the negligence proceeding would include the full amount of claims it had paid. In my view, the defendants have not established that Rule E1.3

has any application in this case. On the proper construction of the Rules, an obligation to indemnify under the policy had arisen in September 2005. Bupa provided indemnity under the policy at least until it became aware of the negligence proceeding in March 2010. As a corollary it is entitled *prima facie* to rely on its right of subrogation.

Can Bupa exercise its right of subrogation when benefits are not strictly payable?

46 The plaintiff submitted that even if the benefits were not payable under the strict terms of the policy, upon making the payments, Bupa became subrogated to the rights of the insured against the negligent surgeon.[55]

47 The plaintiff relied on *King v Victoria Insurance Company Ltd*[56] as authority for the proposition that where an insurer has accepted a claim made by an insured which the insurer was not strictly obliged to pay under the terms of the policy, upon making the payment, the insurer nevertheless becomes entitled to rely on the doctrine of subrogation.

48 In *King,* a bank entered into a policy of insurance which included cover for risks from fire and flood over a quantity of wool 'from sheep's back until water-borne at Townsville'.[57] The wool was lost or damaged while it was onboard a wharfinger's lighter which came adrift from its anchorage points in a storm. It is not entirely clear why the damage done to the wool was not within the terms of the policy, but for the purposes of analysis this does not matter as their Lordships assumed (as the Court below had assumed), that the insured could not, by the terms of the policy, have compelled the insurers to indemnify it.

49 Before the Privy Council, the appellant argued, among other things, that the loss sued upon was not within the terms of the insurance policy; that the respondent insurers stood in the position of mere strangers making a voluntary payment to the insured and that they had no title which a court, either of law or equity, would have

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55 Plaintiff's Submissions, [31].
56 (1896) AC 250 ('*King*').
57 *King* (1896) AC 250, 252.

recognised.

50 This argument was rejected in emphatic terms. Relevantly, Lord Hobhouse said:

> it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must shew that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling; …
>
> As regards the question whether the loss was or was not within the terms of the policy, their Lordships will make no observation but this, that whatever might have been the result of a dispute between the parties to it, there is nothing to suggest that the claim was not one which the insured might not honestly and reasonably make, or to which the insurers might not honestly and reasonably accede. They will assume, as the Court below has assumed, that the bank could not by the terms of the policy have compelled the insurers to indemnify them. Still if, on a claim being made, the insurers treat it as within the contract, by what right can a stranger say that it is not so? The payment would not be made if no policy existed; and it seems to their Lordships an extravagant thing to say that a payment made under such circumstances is a voluntary payment made by a stranger, and that it would be at least an excess of refinement to hold that it is not a payment on the policy, carrying with it the legal incidents of such a payment.
>
> …[A] payment honestly made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured.[58]

51 In Meagher, Gummow & Lehane *Equity: Doctrines and Remedies,* the learned authors dealt with the issue in the following way:

> A payment by an insurer reasonably and in good faith and accepted by the insured, but not in truth within the four corners of the policy, will still be regarded as a payment on the policy and as giving rise to the doctrine of subrogation: *King v Victoria Insurance Co Ltd* [1896] AC 250. This is consistent with the view that subrogation arises to give effect to the equities between the parties upon payment rather than in working out strict contractual rights…What is required on any basis is the contract of indemnity plus a payment which if not called for is at least bona fide and reasonable.[59]

52 In substance, the plaintiff submits (without conceding) that even if the benefits were

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58 *King* (1896) AC 250, 254–256.

59 Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies*, (2002), 4th ed, [9–210].

not strictly payable under the terms of the policy, the payments were honestly and reasonably made in consequence of a policy granted by Bupa and in satisfaction of claims made by the insured.

53 In response, the defendants relied on *Wellington Insurance Co Ltd v Armac Diving Services Ltd*,[60] a decision of the British Columbia Court of Appeal. In that case, the owner of a boat that had capsized claimed an indemnity for the loss from its insurer. The insurer denied liability. The boat owner sued the insurer. As a compromise, the insurer paid half of the amount claimed. Subsequently, the owner recovered damages for the loss from a third party and the insurer unsuccessfully asserted that it had a right of subrogation.

54 The Court acknowledged *King* in the following way:

> None of the authorities deviate from the principle that before the right of subrogation arises, the insurer must have made a payment pursuant to its contract of indemnity with the insured. The only qualification, if it can be called that, is the rule that where, with the benefit of hindsight it emerges that the payment made may not have been legally required under the policy, the right to subrogation remains if the payment was honestly intended to be in satisfaction of a loss under the policy: *King v Victoria Ins. Co., Ltd.,* [1896] A.C. 259 (P.C.).[61]

55 Applying the principle in *King* to the facts in *Wellington,* the Court said:

> In the case at bar, the insurer's payment cannot be said to have been made with the intention of reducing the loss claimed under the policy. The insurer unequivocally denied any liability to pay that loss. The payment made to the insured was not made in partial satisfaction of the claim of loss, but rather in consideration for a complete abandonment by the insured of its claims under the policy. The insured's action on the policy was dismissed by consent "as if evidence had been heard and judgment pronounced on the merits".
>
> …
>
> In such circumstances it cannot be said that the insurer was intending to make a payment indemnifying the insured for a loss coming within a risk issue by the policy.[62]

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60 (1987) 38 DLR (4th) 462 (*'Wellington'*).
61 Ibid, 465.
62 *I*bid.

56 In *Wellington*, the payment made by the insurer to the insured was made to compromise the litigation and not as a payment under the insurance policy. *Wellington* is clearly distinguishable on its facts and does not assist the case of the defendants.

57 By contrast, in this case it can be inferred that the insurer intended to indemnify the insured for a risk covered under the policy. Although Mr Cook was unable to point to any correspondence in which Bupa expressly states that it was indemnifying the insured or his estate, an inference can be drawn from the circumstances of the claims made and benefits paid. Mr Shaw had incurred costs as a result of the surgery and subsequent medical treatment. Bupa made payments in response to claims made progressively over more than five years without any denial of its liability to pay the amounts claimed. The itemised 'HBA claims listing for Norman Shaw, Cover Number 12769253 for the period from 10 September 2005 – 2 May 2010' is a 66-page annexure to the statement of claim which shows that the insured claimed for more than 1500 items and that more than 1500 benefits were fully or partly paid, which covered the fees charged by relevant speciality service providers.[63] In my view, it is clear that the insurer intended to make payments indemnifying the insured for a loss coming within the risk under the policy.

58 As their Lordships in *King* observed, the payments would not have been made if no policy existed. In my view, it was not unreasonable for the insurer in this case to accede to the claims made for benefits under the insurance policy. I respectfully adopt the view expressed by their Lordships in relation to the payments made in this case 'that it would be at least in excess of refinement to hold that it is not a payment on the policy, carrying with it the legal incidents of such payment'.[64]

59 A question arises whether payments made by Bupa after it became aware of the negligence proceeding should be treated differently to payments made before it became aware. Of the total amount of $338,953.56 paid for the benefit of the insured,

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63 Annexure A to the Further Amended Statement of Claim.

64 *King* (1896) AC 250, 254–256.

Bupa paid $34,458.11 after it became aware of the claims made in the negligence proceeding.[65]

60 Under Rule F7.4, benefits are not payable under the policy if it appears to the insurer that the policy holder 'may be entitled to payment by way of compensation or damages' but has not yet established a right to such payment. There was no direct evidence given at trial as to whether it appeared to Bupa that Mr Shaw 'may be entitled to payment by way of compensation or damages' from the negligence proceeding. Mr Cook, the witness called for Bupa, was not personally involved in any evaluation of the claim in this matter. It seems to me that, objectively considered, this precondition to the operation of Rule F7.4 was satisfied once Bupa was on notice of the negligence proceeding and became aware in March 2010 that hospital, medical and pharmaceutical expenses incurred by Mr Shaw would be included in the claim. It follows that benefits were not payable within the terms of the policy with respect to claims made after Bupa became aware of the negligence proceeding (but were nevertheless paid to the insured by Bupa).

61 Those payments were made in the following context. In about March or at least by April 2010, Bupa had been made aware of the negligence proceeding and that Mr Shaw had a significantly shortened life expectancy, was extremely ill and had been hospitalised. Bupa must be taken to have known the terms of its own policy. Bupa could have taken a strict approach and denied liability. In my view, in light of the insured's dire circumstances, it was not unreasonable for Bupa to continue to accede to claims (as it had done since September 2005) even though the insured could not have compelled Bupa to indemnify him (for those claims) under the Rules. There is no doubt that the payments were made in good faith. In my view, relying on the principles in *King*, Bupa is entitled to the remedies of the insured for the amount paid after becoming aware of the negligence proceeding as well as for the amounts paid beforehand. Were this not so, and had the insured succeeded in his claim against the surgeon, the insured could have theoretically obtained double

65 Exhibit P1, 77.

indemnity for part of his claim, having first received indemnity from Bupa and potentially later receiving damages in the negligence proceeding with Bupa being partially denied a right to subrogation. That would result in the undesirable consequence of discouraging insurers from making payments reasonably and in good faith that are accepted by the insured but are not within the four corners of an insurance policy.

62 For the above reasons, the answer to Question 1 is Yes.

Question (2): Did the Deed of Release prejudice Bupa's right of subrogation?

63 The answer to this question depends on two central issues of construction:

(a) whether the $400,000 settlement sum includes or excludes the payments claimed by Bupa; and

(b) whether the release given by the insured released rights to which Bupa would otherwise be entitled to enjoy under its right of subrogation.

64 An insured is not required to account to the insurer for benefits received from a third party that do not touch upon the loss or liability for which the insurer indemnified the insured.[66]

65 Counsel for the plaintiff submits that on the proper construction of the Deed of Release the settlement amount of $400,000 was in respect of all loss the subject of the negligence proceeding including the payments claimed by Bupa, and therefore the estate is required to account to the plaintiff.

66 Senior Counsel for the defendants submits that no component of the $400,000 settlement amount relates to the Bupa payments and the estate is not therefore required to account to Bupa.

67 The Deed of Release between the 'Plaintiff' (Mrs Shaw as executrix of Mr Shaw's estate), 'the Estate of the Deceased' (Mr Shaw's estate), and the 'Defendant' (surgeon)

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66 *Transport Accident Commission v CMT Construction of Metropolitan Tunnels* (1988) 165 CLR 436, 442.

relevantly provides:

> THE PLAINTIFF AGREES:
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> 1. To forthwith withdraw the action against the Defendant in the Proceedings, in consideration of the Plaintiff and the Estate of the Deceased and Defendant each agreeing to settle the Proceedings and any claim that the Estate of the Deceased may have against the Defendant in consideration of the Defendant promise to pay Four Hundred Thousand Dollars ($400,000.00) plus payment of the Plaintiffs party/party legal costs and disbursements as agreed or in the absence of agreement to be taxed in accordance with the appropriate scale of costs ("the Settlement Amount") and in accordance with the terms of this Deed of Release.
>
> 2. To forthwith file and serve a Notice of Discontinuance of the proceedings.
>
> 3. In consideration of the promise by the Defendant to pay the Settlement Amount and the Plaintiff and the Estate of the Deceased's agreement to accept the Settlement Amount the Plaintiff and the Estate of the Deceased both forthwith release and forever discharge the Defendant from any and all liability arising out of and following the medical treatment provided by the Defendant or the failure by the Defendant to provide proper medical treatment in the period from approximately 3 September 2005 until approximately 9 February 2006 when the Deceased was a patient of the Defendant and which the Plaintiff alleges caused the Deceased together with the Estate of the Deceased's Injury, loss and damage as pleaded in the proceedings together with the Plaintiff's and the Estate of the Deceased's release in respect of any other claim, whether at common law or under any statute, except as identified in this Deed of Release, from any and all liability arising from the injuries, loss and damage to the Deceased or to the Estate of the Deceased howsoever claimed in the proceedings including any other proceedings which may be commenced for recovery of monies, compensation and other benefits (howsoever described) paid as a result of the proceedings including, but not limited to, any payment made to date or on behalf of the Deceased, the Plaintiff or the Estate of the Deceased by Medicare, or any Social Security legislation of the Commonwealth of Australia.
>
> 4. That the Plaintiff acknowledges that the Estate of the Deceased has been informed that it is liable to repay amounts under the *Health and Other Services (Compensation) Act* 1995 (C'Wealth), *Health & Other Services (Compensation) Care Act 1995* (C'Wealth) and/or *Health and Other Services (Compensation) Consequential Services Act* 1995 (C'Wealth) to Medicare or the Health Insurance Commission and that the Plaintiff agrees it will deduct the amount required for this repayment from the Settlement Amount and will make that repayment to Medicare. The Plaintiff also warrants that it will further indemnify the Defendant in respect of any claim to be made against him by Medicare or the Health Insurance Commission in respect of medical treatment provided to the Deceased for the injuries claimed in the Proceedings.

…

THE DEFENDANT AGREES:

A. The Defendant promises and undertakes to pay to the Plaintiff, care of the Plaintiff's solicitors, the sum of Four Hundred Thousand Dollars ($400,000.00) plus payment of the Plaintiff's party/party legal costs and disbursements as agreed or in the absence of an agreement to be taxed in accordance with the appropriate scale of costs to which it is agreed by the Plaintiff that upon receipt of the Settlement Amount by the Plaintiff's solicitors represents proper receipt of the Settlement Amount.

B. The indemnity provided by the Plaintiff and the Estate of the Deceased to the Defendant in paragraph 3 of this Deed of Release does not apply to any claim, any formal demand or recovery action to be made by the HBA or BUPA as against the Estate of the Deceased in respect of a recovery of funds paid by either the HBA or BUPA for medical treatment or hospital expenses to or on behalf of the Deceased however described and the Defendant agrees, if called upon, to indemnify the Plaintiff and the Estate of the Deceased from any recovery action for any recovery amount howsoever calculated which amount is to include all legal costs and disbursements associated with any purported demand or legal proceeding commenced by the HBA or BUPA in respect of a recovery of funds paid by it to or on behalf of the Deceased in respect of medical treatment or hospital expenses to the Injuries the subject of these proceedings.[67]

68 In paragraph 3 of the Deed of Release, the executors of the estate purport to release the surgeon from any and all liability with respect to the negligence proceeding and any other claim arising from the injuries or loss and damage claimed in the proceeding or that which may be claimed in any other proceeding.

69 Paragraph 3 of the Deed of Release deals only with the subject of releases (in respect of the negligence proceeding and any other claim) while Paragraph 4 deals with the subject of indemnities. Paragraph 4 includes a promise by the executors to indemnify the surgeon in respect of any claim to be made against him by Medicare or the Health Insurance Commission in respect of medical treatment provided to the deceased for the injuries claimed in the negligence proceeding.

70 In paragraph B of the Deed of Release, the surgeon agrees that '[t]he *indemnity* provided by the Plaintiff and the Estate of the Deceased in paragraph 3 of this Deed

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[67] Deed of Release, Exhibit P1, 268–270.

does not apply to any claim…made by [Bupa]' (emphasis added).

71 The defendants submit that when paragraphs 3 and B are read together:

(a) any claim that Bupa may have against the estate is left undisturbed;[68]

(b) the word *indemnity* in the opening words of paragraph B actually means *release*; and

(c) the release given in paragraph 3 is modified by paragraph B to exclude Bupa, that is to say, no release is given with respect to the recovery of the Bupa payments.

72 The plaintiff submits that:

(a) the defendants' construction is untenable;

(b) on its proper construction, paragraph B means what it says and limits the ambit of the indemnity, rather than the ambit of the release, given by the insured;

(c) if the second word 'indemnity' in paragraph B were to be replaced by the word 'release' (as the defendants contend), it would mean that the release provided by the estate to the surgeon would not apply to any recovery claim made by Bupa (a non-party) against the estate;

(d) any limitation of the release to that effect does not make sense as it was not within the power of the estate in the negligence proceeding to release itself from the present case;

(e) the limiting words in paragraph B mean that the indemnity provided by the insured in respect of payments related to health expenses applies to Medicare but not to Bupa, and confirms that it is the surgeon who is indemnifying the estate against any recovery claim made by Bupa; and

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68 Defendants' Submissions [39]–[41].

(f) the release in paragraph 3 is not subject to paragraph B and that they operate alongside each other for different purposes.

73 It is obvious that there is an error in paragraph B of the Deed of Release which relates either to an incorrect use of the word *indemnity* (when the parties meant *release*) or to an incorrect reference to paragraph *3* (when the parties meant paragraph *4)*. In my view, Bupa's submissions have more force and should be accepted. It is consistent with the letter dated 20 February 2012 from the solicitors for the insured to Bupa that as part of the terms of settlement the insurer of the surgeon had agreed to indemnify the insured against repayment to Bupa.[69]

74 Even if the defendants' construction were accepted, the purported limitation to the release would only have preserved claims by Bupa against the estate 'in respect of a recovery of funds paid by [Bupa] for medical treatment or hospital expenses' (paragraph B). This construction does not address whether the estate released claims *against the surgeon* to which Bupa was subrogated. Despite some inelegance in its drafting, it is clear under the Deed of Release that the estate released all rights of action that arose out of the insured's medical treatment provided by the surgeon, thereby extinguishing any right of action Bupa might otherwise have been able to pursue standing in the shoes of the insured. The Deed of Release provided that its terms could be pleaded as a defence or bar to any further proceeding brought by 'any person claiming on behalf or through the Plaintiff or the Estate of the Deceased in relation to the matters alleged in the court action' (paragraph 6).

75 Further, as the plaintiff contended, any claim sought to be brought by Bupa against the surgeon pursuant to Bupa's right of subrogation would almost certainly be met with a defence that the claim is statute barred.

76 It follows that on either construction of the Deed of Release, the insured released, diminished and compromised the benefit of the right to which Bupa was entitled to succeed and enjoy under its right of subrogation in this case. In the circumstances, I

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69 Exhibit P1, 273.

am satisfied that the insured prejudiced the plaintiff's exercise of its right of subrogation by the terms upon which it settled the negligence proceeding as set out in the Deed of Release.

77 For the above reasons, the answer to Question 2 is Yes.

Question (3): Does Bupa's conduct prevent it from exercising its right of subrogation?

Inaction

78 The defendants submit that Bupa elected to not exercise, or waived, its right of subrogation based on communications between Bupa and the solicitors for the insured and the fact that Bupa took no step to intervene and take over the running of the negligence proceeding.

79 Regarding the failure to act, the defendants submits that Bupa was afforded every opportunity to take steps to press its right to recovery under the Rules and chose not to do so in circumstances where:

(a) 'it would have been obvious to anyone attentive to the state of the proceedings and the position of the estate, that settlement was going to result';

(b) that 'the risk was abundantly clear' that it could either indemnify and intervene by seeking consent to running the proceeding or could protect its rights by seeking an injunction to prevent its interests being compromised; and

(c) that Bupa had to make a decision one way or another. [70]

Correspondence

80 It is necessary to examine relevant correspondence during the period March 2010 to March 2012 in some detail. As noted above, Bupa first became aware of the

[70] Transcript, 131.19–28; 133–134.

negligence proceeding in March 2010 when it received a letter from ATB seeking details of all medical expenses paid by Bupa in relation to the surgery and advising that the solicitors were 'attending a settlement conference in the near future and will therefore be obliged the receive the notice setting out expenses as a matter of urgency'.[71] Bupa responded by letter dated 19 March 2010 attaching a Schedule of Benefits and asked to be kept informed of any further relevant issues in relation to the matter.[72]

81 By letter dated 14 April 2010, ATB advised that their client had been hospitalised and had a significantly shortened life expectancy and requested that Bupa provide a 'Notice of Past Benefits as a matter of urgency'.[73] By letter dated 21 April 2010, ATB again wrote to Bupa, noting they were yet to receive a 'Notice of Charge', requesting it to be forwarded as a matter of urgency.[74]

82 By letter dated 22 April 2010, Bupa wrote to ATB attaching an updated claims list showing services that had been paid since the last list sent on 19 March 2010, and requesting that Mr Shaw review the list, tick the items relevant to the claim and return it to enable Bupa to issue a Notice of Charge. Bupa again asked to be kept informed of any further relevant issues in relation to the matter.[75]

83 By letter dated 28 April 2010, ATB advised that all of the items on the list were relevant and requested Bupa to issue a 'Notice of Charge' as a matter of urgency.[76] On the same day, Bupa sent a letter to ATB marked 'Notice of Charge' advising that Bupa would 'accept reimbursement of $259,891.76 for services paid and verified by [Mr Shaw] as relating to his compensable claim' and stating that it 'looked forward to receipt of [a] cheque made payable to [Bupa] in the near future'.[77]

84 By letter to Bupa dated 29 April 2010, ATB:

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71 Letter from ATB to Bupa , 12 March 2010, Exhibit P1, 16.
72 Letter from Bupa to ATB, 19 March 2010, Exhibit P1, 17–77.
73 Letter from ATB to Bupa, 14 April 2010, Exhibit P1, 144.
74 Letter from ATB to Bupa, 21 April 2010, Exhibit P1, 145
75 Letter from Bupa to ATB, 22 April 2010, Exhibit P1, 146.
76 Letter from ATB to Bupa, 28 April 2010, Exhibit P1, 150.
77 Letter from Bupa to ATB, 28 April 2010, Exhibit P1, 149.

(a) advised that Mr Shaw would not be in a position to make repayment of any amount until the claim settled or proceeded to trial;

(b) noted that the total amount of medical expenses repayable was $338,340.31 and that this would 'pose a huge stumbling block to settlement of the case at Mediation';

(c) advised that their client was extremely unwell and may only have months to live, and that it would therefore be in Mr Shaw's interests to achieve a settlement at mediation, rather than proceeding to trial; and

(d) asked whether the insurer was willing to 'agree to a reduction in repayment if settlement could be achieved to avoid the risk, delay and expense in proceeding to trial.'[78]

85 By letter to ATB dated 29 April 2010, Bupa advised that it was not in a position to accept a reduction in repayment prior to mediation taking place and asked to be kept informed and 'notified should the [surgeon] put forward an offer to settle prior to mediation'.[79]

86 On about 13 October 2010, ATB advised that:

(a) Mr Shaw had died on 2 May 2010 and that they were continuing to pursue the claim on behalf of Mr Shaw's estate;

(b) the 'very substantial medical expenses which are repayable will create a significant difficulty in relation to settlement of the claim';

(c) a mediation would take place on 21 October 2010;

(d) they would need to be able to contact Bupa on that day 'to discuss any offers made and the possibility of reduction of the amount repayable to attempt to

78 Letter from ATB to Bupa, 29 April 2010, Exhibit P1, 151.
79 Letter from Bupa to ATB, 29 April 2010, Exhibit P1, 152.

achieve a settlement'.[80]

87 On about 13 October 2010, ATB advised that the solicitors for the surgeon had requested a copy of Bupa's insurance policy.[81] Bupa then forwarded a copy of its Rules and asked to be kept informed.[82]

88 By letter dated 19 October 2010, ATB acknowledged receipt of the Rules and advised that it appeared that on the basis of the Rules that Bupa did not have an entitlement to enforce repayment of medical expenses 'by the Estate of a deceased insured person', that there appeared 'to be no definition of insured person', and that the issue needed 'to be clarified as a matter of urgency prior to the mediation'.[83]

89 By email dated 22 October 2010, ATB advised Bupa that they were unable to proceed with the mediation but would be scheduling a further mediation shortly and that they looked forward to receiving a reply from Bupa's legal department.

90 By letter dated 27 October 2010 to ATB, Bupa set out a brief history of the correspondence between the parties, including:

(a) the fact that the insured had requested Bupa to issue a 'Notice of Charge in respect of reimbursement of $259,891.76' in relation to the claim;

(b) noting that the solicitors had suggested that Bupa was not entitled to recovery of that amount from the estate;

(c) that it disagreed with the suggestion that it was not entitled to recovery from the estate and stating that it failed to understand the basis upon which it was being made.[84]

91 On about 3 November 2010, ATB responded:

It is the [surgeon's] solicitors who are alleging that BUPA have no legal

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80 Letter from ATB to Bupa, 13 October 2010, Exhibit P1, 166.
81 Letter from ATB to Bupa, 13 October 2010, Exhibit P1, 167.
82 Letter from Bupa to ATB, 15 October 2010, Exhibit P1, 168–244.
83 Letter from ATB to Bupa, 19 October 2010, Exhibit P1, 245.
84 Letter from Bupa to ATB, 27 October 2010, Exhibit P1, 249.

> entitlements to recover any medical expenses incurred by BUPA from the Estate of Mr Shaw not us.
>
> It would therefore be of assistance to us if you would clarify which sections of the policy document and/or any other agreement between the Plaintiff and BUPA which gives BUPA a right to recover against the Estate.[85]

92 On about 2 December 2010, ATB wrote to Bupa enclosing a copy of correspondence received from the surgeon's solicitors and requested a response to the allegation made by those solicitors that Bupa has no right to recover medical expenses against the estate. ATB suggested that Bupa 'consider briefing Counsel to ascertain whether it had a right to intervene in the proceedings to pursue [Bupa's] entitlement if enforceable'.[86]

93 By letter dated 28 March 2011, Bupa wrote to ATB setting out the background to the matter and the legal position as Bupa saw it, essentially to the effect that the Rules, properly construed, did not limit or preclude the operation of the doctrine of subrogation. In relation to the future conduct of the matter, Bupa stated:

> We understand that the action against Dr Blamey is listed for mediation on 30 March 2011 and trial commencing on 15 August 2011. In light of these proceedings and the position outlined above, we ask that your client:
>
> - has regard to Bupa's interests, pursues the compensation claim in good faith and does nothing which prejudices the right of subrogation referred to in Part 2 above;
> - informs us if and when the medical expenses or other damages are paid by Dr Blamey (or his professional negligence insurer); and
> - accounts to Bupa in respect of amounts recovered from Dr Blamey (or his professional negligence insurer).
>
> In summary, your client should treat Bupa as it would the Health Insurance Commission in respect of medical expenses paid by Medicare for the treatment of compensable injuries.[87]

94 In response, ATB advised that all queries relating to the entitlement of Bupa to recover the medical expenses had been made at the request of the solicitors for the surgeon in the negligence proceeding 'as it is the [surgeon's] solicitors who have

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85 Letter from ATB to Bupa, 3 November 2010, Exhibit P1, 250.
86 Letter from ATB to Bupa, 2 December 2010, Exhibit P1, 253–254.
87 Letter from Bupa to ATB, 28 March 2011, Exhibit P1, 257–259.

alleged that Bupa have no right of recovery in relation to medical expenses'.[88]

95 By letter dated 6 April 2011, Bupa acknowledged that arguments raised by the solicitors for the surgeon were not arguments being put by the insured, and disagreed (with an argument which had been put by the insured) that Bupa did not have an entitlement to enforce repayment of medical expenses by the estate of a deceased insured person. The author of the letter advised the solicitor for the estate that he would telephone them in order to discuss the matter and to request an update in relation to the mediation.[89]

96 By emails dated 16 February 2012, Bupa wrote to the solicitors of the estate:

> Our records indicate the last advice we received from your office was that the matter had been adjourned until February 2012. Could you please advise if the matter has since progressed?'[90]

97 In response, Bupa received a letter from ATB advising that the negligence proceeding had settled in December 2011 and that: '[a]s part of the terms of settlement the Insurer of the [surgeon] agreed to indemnify the [estate] against repayment to Bupa'.[91]

98 By letter dated 1 March 2012, Bupa replied to ATB and pointed out that Bupa's right to repayment was a right to recover from the estate, rather than from the surgeon's insurer. In that letter, Bupa demanded that the estate repay 'the relevant sum'.[92]

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88 Letter from ATB to Bupa, (incorrectly) dated 9 March 2011, received on 30 March 2011, Exhibit P1, 260.

89 Letter from Bupa to ATB, 6 April 2011, Exhibit P1, 261–262.

90 Email from Bupa to ATB, 16 February 2012, Exhibit P1, 271.

91 Letter from ATB to Bupa, 20 February 2012, Exhibit P1, 273.

92 Letter from Bupa to ATB, 1 March 2012, Exhibit P1, 274.

Observations

99 It is apparent from the correspondence that the defendant's submission that '[i]t would have been obvious to anyone attentive to the state of the proceeding and the position of the estate that settlement was going to result' is overstated.[93]

100 It is evident from the correspondence, considered as a whole, that:

(a) the estate was not seriously disputing Bupa's entitlement to reimbursement;

(b) the resistance was coming from the insurer of the surgeon in the negligence proceeding;

(c) Bupa sought to ensure that the estate had regard to Bupa's interests;

(d) Bupa wanted to be kept informed;

(e) Bupa expected the estate to account to Bupa in respect of amounts recovered from the surgeon or his insurer.

101 Whilst Bupa was on notice that the surgeon's insurer took issue with Bupa's entitlement to recover benefits paid, in light of the previous correspondence between the parties, I am of the view that Bupa could have had no knowledge or forewarning that the estate would proceed to settle the matter at mediation without involving Bupa. As events transpired, the solicitors for the estate failed to notify Bupa of the outcome of the mediation until some months after the matter had settled.

102 It is only with the benefit of hindsight that it could be seriously contended that Bupa ought to have commenced proceedings to seek an injunction to prevent the executors of the estate from settling without taking account of Bupa's interests. There had been communications between Bupa and ATB (the solicitors for Mr Shaw and later his estate) which, in my view, suggested that Bupa's interests would not be disregarded. It was ATB who requested Bupa to issue a Notice of Charge, claimed the medical expenses in the proceeding, and notified Bupa to say that the insured

93 Transcript, 131.19–28.

was not disputing Bupa's entitlements to reimbursement of claims paid on the insured's behalf. Further, by its letter dated 13 October 2010, ATB advised that they would need to be able to contact Bupa on the day of the mediation to discuss any offers made and the possibility of reduction of any amount repayable to attempt to achieve settlement.

103 The position might have been different had Bupa been notified on or prior to the day the mediation took place that what in fact occurred was likely to occur. In such circumstances, in my view, Bupa could have known the executors of the estate proposed to compromise the proceeding on the terms on which they ultimately did. Had notice been given, there would have been a firmer foundation for an argument that Bupa could have sought injunctive relief but did not do so. As events transpired, the matter was settled without notice to Bupa until well after the fact.

104 By their letter dated 2 December 2010, ATB did not provide a general invitation to intervene; rather they suggested that Bupa ascertain if it had a right to intervene in the negligence proceeding.

105 Counsel for the plaintiff submitted, and I accept, that Bupa did not have the right to intervene. In support of this proposition, the plaintiff relied on the principle set out in *Santos Limited v American Home Assurance Company*,[94] in which White J observed:

> The law is remarkably strict in its rigid separation been assured and insurer. In extreme cases, there might be some hardship to the insurance company because of the inflexibility of the law but there is no evidence of that kind of hardship in this case.
>
> It is only when the insurer has fully indemnified the assured against all losses that the insurer can take over the control of the proceedings in the name of the assured having given an undertaking to indemnify the assured against costs.[95]

106 In the present case, Mr Shaw, and later his estate, claimed under a number of different heads of damages, only part of which were insured by Bupa. In the circumstances, Bupa had no right to take over the running of the negligence

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94 (1986) 4 ANZ Insurance Cases 60-795, 74,877.

95 Ibid, 74877 citing *MacGillivray and Parkington on Insurance Law*, (1983) 7th ed, 1168.

proceeding. Senior Counsel for the defendants ultimately did not challenge this principle and accepted that Bupa did not have the right to take over the running of the proceeding. Nevertheless, Senior Counsel submitted that, 'as a practical matter, the insurer was afforded every opportunity to take steps to press its right to recovery under its Rules and chose not to take up that invitation…and it was obvious that a settlement was going to result'.[96] I do not accept this submission. First, it is based on a construction of the Rules which I do not accept. Secondly, whatever posturing may have taken place prior to the mediation by the parties or their insurers would not necessarily be reflected in the positions they might take at a mediation, including whether to settle the negligence proceeding.

107 If it matters, I accept the plaintiff's additional submission for the purposes of this case that the right to stand in the shoes of the insured by running the claim itself is not inconsistent with a right to recover any benefit (which the insured obtains by continuing to run the claim against a third party); that is, it involves the exercise of different rights which are exercisable in different circumstances.

108 In light of the above, I find that Bupa is not prevented from exercising its right of subrogation as a consequence of any inaction on its part.

Inconsistency

109 The defendants submit that the position taken by Bupa was inconsistent; that Bupa at all times prior to settlement asserted an immediate right to payment and '[n]ow it sues for a right of subrogation, which right can't operate unless they have indemnified us, which is exactly what they said they weren't doing all the way through 2010 and 2011'.[97] Essentially, the defendants submit that Bupa has approbated and reprobated and lost the right to exercise the right of subrogation which, so it was argued, cannot sit indefinitely with an inconsistent position.

110 The plaintiff denies that it has approbated and reprobated, and contends that after

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96 Transcript, 131.16–28.

97 Transcript, 76.6–9

receiving notice in March 2010 of the negligence proceeding, its position was consistent. The plaintiff referred first to its letter to ATB of 19 March 2010 in which it enclosed a schedule of benefits and stated:

> We would appreciate if you keep us informed of any further relevant issues in relation to this matter as any benefits which are related to your client's claim should be refunded to [Bupa] in the event that your client's claim is successful.[98]

111 That position was repeated in identical terms in correspondence from Bupa to the solicitors of the insured and the estate on 22 April 2010,[99] 29 April 2010,[100] 15 October 2010,[101] and in similar terms by letter to ATB dated 28 March 2011 that specifically requested the insured to:

(a) have regard to Bupa's interests;

(b) pursue the compensation claim in good faith and do nothing to prejudice the right of subrogation;

(c) inform Bupa if and when the medical expenses or other damages were paid and to account to Bupa in respect of amounts recovered.

112 Amongst this correspondence was a letter dated 28 April 2010, which relevantly said:

> [Bupa] will accept reimbursement of $259,891.76 for services paid and verified by your client as relating to his compensable claim.
>
> We look forward to receipt of your cheque made payable to [Bupa] in the near future.[102]

113 The defendants rely heavily upon this letter which was characterised by Senior Counsel as an unambiguous demand for immediate repayment.

114 The plaintiff submits that, read in context with all of the other letters, Bupa

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98 Letter from Bupa to ATB, 19 March 2010, Exhibit P1, 17.
99 Letter from Bupa to ATB, 22 April 2010, Exhibit P1, 146.
100 Letter from Bupa to ATB, 29 April 2010, Exhibit P1, 152.
101 Letter from Bupa to ATB, 15 October 2010, Exhibit P1, 168–244.
102 Letter from Bupa to ATB, 28 April 2010, Exhibit P1, 149.

maintained a consistent position and that neither Bupa or the insured understood the letter of 28 April 2010 as an immediate demand for payment.

115 In my view, Bupa's letter of 28 April 2010 should also be seen in the context of the fact that ATB requested Bupa to issue a 'Notice of Charge' by its letter of the same day. Bupa's letter gave a precise dollar figure in response to that request. The letter did not demand immediate payment in express terms. Bupa stated it 'will accept reimbursement' and said it looked forward to receipt of a cheque 'in the near future'. This was all in the context of the insured having recently been hospitalised and having a significantly shortened life expectancy, and ATB requesting Bupa to provide the details of past benefits which had been paid 'as a matter of urgency'.[103]

116 In my view, the letter of 28 April 2010 from Bupa is ambiguous as to whether it is a demand for immediate payment of the identified sum or a demand for future payment of the identified sum out of the proceeds of the insured's claim. If, indeed, it is properly characterised as a demand for immediate payment, it is of no consequence as Bupa immediately retreated from that position the following day in its letter of 29 April 2010, in which it advised it was 'not in a position to accept a reduction in repayment prior to mediation taking place', and asked to be notified 'should the [surgeon] put forward an offer in an attempt to settle prior to mediation'.[104] In my view, Bupa is clearly not insisting upon immediate repayment in that letter. Rather Bupa acknowledges the foreshadowed mediation, asks to be kept informed and asserts that any benefits which are related to the insured's claim should be refunded in the event that the claim is successful).[105]

117 I do not accept the concession initially made by Mr Cook under cross-examination to the effect that Bupa consistently demanded immediate payment throughout Mr Cook's involvement. This concession is not a true reflection of the correspondence discussed above. Indeed, Mr Cook retreated from this concession

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103 Letter from ATB to Bupa, 14 April 2010, Exhibit P1, 144; Letter from ATB to Bupa, 29 April 2010, Exhibit P1, 150.

104 Letter from Bupa to ATB, 29 April 2010, Exhibit P1, 152.

105 Letter from Bupa to ATB, 29 April 2010, Exhibit P1, 152.

later in cross-examination where he said that Bupa's position was set out in the request in part 3 of the letter of 28 March 2011 (discussed above).[106]

118 I am not satisfied that the position taken by Bupa is inconsistent generally or inconsistent with its assertion that it indemnified (or should be taken to have indemnified) the insured at all relevant times.

119 For the reasons given, I find that Bupa is not prevented from exercising its right of subrogation as a consequence of any conduct on its part.

120 It follows that the answer to Question 3 is No.

Conclusion

121 I am satisfied that Bupa indemnified Mr Shaw to the extent of $338,953.56 under the terms of Mr Shaw's health insurance policy and that at all relevant times, Bupa was entitled to exercise its right of subrogation and is not prevented from doing so as a consequence of any conduct on its part. Further, I am satisfied that the defendants prejudiced Bupa's right of subrogation by the terms upon which the negligence proceeding was settled.

122 In the circumstances, I find that Bupa is entitled to equitable compensation in the sum of $338,953.56, together with interest.

123 I will invite counsel to submit orders to give effect to these reasons.

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106 Letter from Bupa to ATB (Part 3 'request as to future conduct'), 28 March 2011, Exhibit P1, 258.