SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Insurance Australia Limited v Allianz Australia Insurance Limited**
Citation:	**[2022] ACTSC 75**
Hearing Date:	9 March 2021
Submissions last received:	18 March 2021
Decision Date:	14 April 2022
Before:	McWilliam AsJ
Decision:	See [124]
Catchwords:	**CIVIL LAW** – INSURANCE – Doctrine of double insurance – motor vehicle accident involving employees from same company as driver and passenger – where driver negligent – where employer did not own vehicle driven by employees but was vicariously liable for acts of employee driver – where employee passenger sustained injuries and claimed damages for personal injury against compulsory third party insurer – where third party insurer settled claim and sought contribution from employer of driver – whether double insurance applies – effect of s 20(b) of the *Road Transport (Third Party Insurance) Act 2008* (ACT) **STATUTORY INTERPRETATION** – s 20(b) of the *Road Transport (Third Party Insurance) Act 2008* (ACT) – where claim for personal injury damages sustained in a motor vehicle accident during the course of employment made against compulsory third party insurer – where claim settled and then contribution sought from workers compensation insurer towards settlement sum paid – where legislation defines who is a compulsory third party insured person – whether statutory definition alters the operation of the doctrine of double insurance
Legislation Cited:	*Court Procedures Rules 2006* (ACT) r 1619, sch 2 *Motor Accidents Compensation Act 1999* (NSW) s 10 *Motor Accidents Injuries Act 2019* (ACT) s 219 *Motor Traffic Act 1936* (ACT) (repealed) s 54 *Road Transport (Third Party Insurance) Act 2008* (ACT) ss 16, 18, 19, 20, 21, 80, 81, 93 *Workers Compensation Act 1951* (ACT) ss 31, 114, 144, 182C, 183, 184 *Workers Compensation Act 1987* (NSW) s 151Z
Cases Cited:	*Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342 *Allianz Australia Workers Compensation (NSW) Ltd v NRMA* [2007] ACTSC 2; 207 FLR 153 *AMP Workers' Compensation Services (NSW) Ltd v QBE Insurance Ltd* [2001] NSWCA 267; 53 NSWLR 35 *Burke v LFOT Pty Ltd* [2002] HCA 1; 209 CLR 282

Cockburn v GIO Finance Ltd [No 2] [2001] NSWCA 177; 51 NSWLR 624
Commercial and General Insurance Co Ltd v Government Insurance Office of New South Wales (1973) 129 CLR 374
Dering v Earl of Winchelsea (1787) 1 Cox 318; 29 ER 1184
Esanda Finance Corporation Ltd v Colonial Mutual General Insurance Co Ltd (1993) 217 ALR 180
Friend v Brooker [2009] HCA 21; 239 CLR 129
GIO General Limited v Insurance Australia Limited t/as NRMA Insurance [2011] ACTSC 91
Haider v Gudelj [2021] ACTCA 9
HIH Claims Support Ltd v Insurance Australia Ltd [2011] HCA 31; 244 CLR 72
Jausnik v Nominal Defendant (No 5) [2016] ACTSC 306
Mannall v Howard (No 2) [2019] ACTSC 113
Mercantile Mutual Insurance (Australia) Ltd v QBE Workers Compensation (NSW) Ltd [2004] NSWCA 409; 61 NSWLR 655
QBE Insurance (Australia) Ltd v CGU Workers Compensation (NSW) Ltd [2012] NSWSC 377; 83 NSWLR 589
QBE Insurance (Australia) Ltd v Insurance Australia Ltd [2011] ACTSC 40; 247 FLR 333
QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd [2009] VSCA 124; 24 VR 326
QBE Insurance Australia Limited v Allianz Australia Insurance Ltd [2020] FCA 589
State Government Insurance Commission v Switzerland Insurance Australia Ltd [1995] SASC 5118; 64 SASR 537
Tuscan Capital Partners Pty Ltd v Trading Australia Pty Ltd (in liq), in the matter of Trading Australia Pty Ltd (in liq) (Proof of Debt) [2021] FCA 1061
WorkCover Queensland v Suncorp Metway Insurance Ltd [2005] QCA 155; 2 Qd R 210
Zurich Australia Insurance Ltd v GIO General Ltd [2011] NSWCA 47
Zurich Australia Insurance Ltd v The Workers Compensation Nominal Insurer [2013] NSWSC 915; 64 MVR 258

Parties: Insurance Australia Limited t/as NRMA Insurance (Plaintiff)

Allianz Australia Insurance Limited (Defendant)

Representation:

Counsel

B Wilson (Plaintiff)

K Rewell SC (Defendant)

Solicitors

HWL Ebsworth (Plaintiff)

Moray & Agnew (Defendant)

File Number: SC 135 of 2020

McWilliam AsJ:

1. These proceedings concern a dispute between two insurance companies as to the application of the doctrine of double insurance (sometimes called "dual insurance"). The dispute arises following a claim made by Mr Corey Bailey, who sustained injuries in a motor vehicle accident on 2 August 2017 (**the accident**). At the time of the accident, Mr Bailey was a passenger in a truck being driven by one of his fellow workers. The truck collided with the back of another vehicle (a CAT grader), while driving on the Majura Parkway in the ACT.

2. Both Mr Bailey and the driver were employed by Capital Construction Labour Hire Pty Ltd (**Capital**) who was insured through a workers compensation insurance policy with the defendant, Allianz Australia Insurance Limited (**Allianz**). It can be called, the WC policy.

3. The plaintiff, Insurance Australia Limited, trading as NRMA (**NRMA**), is the compulsory third-party (**CTP**) insurer for the truck involved in the accident. Importantly for the arguments in this proceeding, the truck was owned by Rapid Formwork Constructions Pty Ltd (**Rapid**) and the CTP policy was issued by NRMA to Rapid as the registered owner. Rapid is neither owned nor controlled by Capital. The two companies are unrelated.

4. Mr Bailey made a claim against Capital (which was indemnified by Allianz) for workers compensation payments (effectively statutory benefits). Mr Bailey also brought a claim for common law damages under the CTP policy issued by NRMA, which was settled informally between Mr Bailey and NRMA for the sum of $1,000,000 (inclusive of previous payments made by NRMA and workers compensation payments, plus costs agreed at $100,000 (**Settlement Sum**).

Relief sought

5. NRMA now seeks that Allianz contribute 50% of the settlement amount, invoking the doctrine of double insurance. It primarily seeks declaratory relief that Capital has double insurance in respect of Mr Bailey's claim for loss and damage, and that both NRMA and Allianz share co-ordinate liabilities. As a consequence, NRMA seeks a further declaration that Capital is entitled to be indemnified by both NRMA and Allianz in respect of Mr Bailey's claim for loss and damage against Capital, and that Allianz is liable to contribute to NRMA 50% of the Settlement Sum.

The Issue for determination

6. As Bollen J so pithily put it the opening words of *State Government Insurance Commission v Switzerland Insurance Australia Ltd* [1995] SASC 5118; 64 SASR 537 at [1]:

   > "Double insurance" or not. That is the question here.

7. The doctrine (discussed by reference to the authorities below) arises when an insured is entitled to indemnity from two different insurers in respect of the same liability. The rationale behind the doctrine is that payment by one insurer benefits the other, and fairness or equity requires that the burden be shared. The central issue for determination in the present proceedings is whether both insurance policies covered the *same insured* for the *same risk* (that is, liability). If that is so, then NRMA and Allianz

will share co-ordinate liabilities. Applying the doctrine, this attracts a right to contribution as between the insurers.

8. The difficulty is determining whether the doctrine applies in the circumstances of this case and whether "the insured" is the same entity.

9. Under the WC policy issued by Allianz, "the insured" is Mr Bailey's employer, Capital. The CTP policy was issued by NRMA to Rapid as the registered owner of the truck. Capital neither owned nor used the vehicle involved in the accident itself. An employee of Capital, not Rapid, used the vehicle.

10. That might seem to lead to a conclusion that "the insured"' was not the same, with the result that there is no double insurance. However, the position is not that straightforward because of the now repealed *Road Transport (Third Party Insurance) Act 2008* (ACT) (***TPI Act***), which governs rights under the CTP policy.

11. At the time of the accident, the driver of the vehicle, Mr Matthew Jachno, was also employed by Capital. Mr Jachno was also at work at the time and carrying out duties in the course of his employment. Capital accepted that it was vicariously liable for the driver's actions, which had the consequence of bringing it within the statutory definition of an "insured" by reason of s 20(b) of the *TPI Act*, the terms of which are set out below.

12. The dispute is about what consequence the application of s 20(b) of the *TPI Act* has for the doctrine of double insurance. As will be seen from the reasons that follow, I have concluded that the effect of s 20(b) in statutorily extending the CTP insurance to cover the employer of the driver, has brought about the application of the doctrine of double insurance in this case.

The facts giving rise to the dispute

13. The facts were largely agreed by the parties. Additional evidence was given to establish certain corporate relationships, which is also included in the factual findings that follow.

14. Capital was a labour hire company. It employed Mr Bailey and Mr Jachno.

15. Capital had a labour-hire agreement with ACT Formwork Pty Ltd (**ACT Formwork**), through which it hires employees out to ACT Formwork. Under that agreement, Mr Bailey and Mr Jachno had worked for ACT Formwork for a period of about 8 months.

16. On 2 August 2017, the date of the accident, Mr Bailey's and Mr Jachno's labour had been hired out by Capital to ACT Formwork. Mr Bailey and Mr Jachno were at work on that day. In the course of carrying out their employment duties, Mr Bailey was a passenger in an Izuzu flat top truck, bearing registration YGZ 02H (**the truck**), driven by Mr Jachno along Majura Parkway.

17. Through what was agreed to be the negligence of Mr Jachno as the driver, the truck collided into the rear of a CAT grader being driven in the same direction.

18. Capital had taken out a policy of ACT workers compensation insurance (so described under the legislation set out below, which deals with compensation for a worker's injury) with Allianz on 8 August 2016. Certificates of currency were issued by Allianz to Capital on 2 June 2017 and 3 August 2017 respectively.

19. The truck was owned by Rapid and was insured at the time under a CTP policy issued by NRMA.

20. In relation to the injuries sustained in the accident, Mr Bailey lodged an ACT workers compensation claim form pursuant to the *Workers Compensation Act 1951* (ACT) (***WC Act***) with Capital on 4 August 2017. Allianz accepted liability for the claim under the *WC Act* and has since made workers compensation payments to Mr Bailey in the sum of $239,713.84.

21. Mr Bailey also made a claim for common law damages under the CTP policy issued by NRMA in relation to the injuries sustained in the accident. The claim was settled as between NRMA and Mr Bailey as described in [4] above, pursuant to a Deed of Settlement executed by both parties (**the Settlement**).

22. The Settlement included:

    (1) A statutory recovery payment made to Allianz by NRMA in the sum of $220,523.76 on 18 October 2019, pursuant to s 183 of the *WC Act*.

    (2) NRMA's payments to, or on behalf of, Mr Bailey pursuant to the *WC Act* to the sum of $106.76.

23. Allianz does not dispute that the Settlement was reasonable.

24. On 17 February 2020, NRMA wrote to Allianz requesting that it concede that dual insurance applies to the claim made by Mr Bailey. On 12 March 2020, Allianz responded, advising that it does not concede that dual insurance applies.

The relationships between Capital, ACT Formwork and Rapid

25. Mr Kevin Anderson ("Kevin"), without any intended disrespect) gave evidence as to the relationships between the entities, which I have accepted, but will mention it relatively briefly, as it does not ultimately bear upon what is a question of statutory interpretation and application to the policies of insurance.

26. Kevin is the general manager and sole director of ACT Formwork. The business of that company is doing formwork for concreting at building sites.

27. Kevin is also the sole director of Rapid. At the time of the accident, Kevin was the director of Rapid but his father, Mr Barry Anderson, was the director of ACT Formwork. The evidence was that Mr Barry Anderson is now retired.

28. Rapid was incorporated about 12 years ago to carry on the business of formwork and steel fixing. Rapid owned a number of assets, including trucks and the industrial yard from which the business operated.

29. ACT Formwork came into existence five or six years ago (as at the date of the hearing), effectively as the successor of Rapid. ACT Formwork became the trading company while Rapid ceased all functions other than holding assets. The trucks and the yard were not transferred into the name of ACT Formwork but remained in the name of Rapid because the assets still had loans against them. Kevin said it was easier from a business perspective to keep Rapid as an asset company instead of refinancing the loans.

30. Demand for formwork in the Territory was variable. ACT Formwork therefore used labour hire companies, such as Capital, to deal with the variable need for workers.

There were other advantages in this arrangement for ACT Formwork, in that employer responsibilities such as the costs of hiring workers, paying wages, superannuation and workers compensation insurance, were all borne by the employer.

31. Capital was one of a number of labour hire companies that ACT Formwork engaged in August 2017. Other than hiring labour from Capital, Kevin had never had any other relationship with that company.

The two policies

32. The policies of insurance in this case are governed by statute: the *TPI Act* for NRMA, and the *WC Act* for Allianz.

33. The material parts of the relevant sections are as follows (emphasis added):

> **18 What is a CTP policy?**
>
> In this Act:
>
> *Compulsory third-party policy* (or CTP policy) means an insurance policy –
>
> (a) the subject of which is something mentioned in section 19; and
>
> (b) insures someone mentioned in section 20; and
>
> (c) insures against the risk mentioned in section 21; and
>
> (d) does not insure against a risk mentioned in section 22.
>
> **19 What is insured under a CTP policy?**
>
> A CTP policy has the following subjects:
>
> (a) a registered motor vehicle;
>
> (b) …
>
> **20 Who is insured under a CTP policy?**
>
> **A CTP policy insures—**
>
> (a) a person who uses an insured motor vehicle; and
>
> (b) **anyone else who is vicariously liable for the person's use of the insured motor vehicle**; and
>
> (c) anyone else prescribed by regulation; and
>
> (d) if a person mentioned in paragraph (a), (b) or (c) is dead—the person's estate.

34. The insurance is against "the risk of liability for personal injury caused by a motor accident": s 21 of the *TPI Act.*

35. The arguments of Allianz directed attention to fine distinctions between who is 'insured', 'an insured', a 'CTP insured person' or 'the insured' under a contractual policy of insurance. Accordingly, ss 16 and 18 of the *TPI Act* are also relevant to the dispute:

> **16 Who is a CTP Insured person?**
>
> In this Act:
>
> ***CTP insured person*** means a person who is insured under a CTP policy.
>
> *Note* the people insured under s CTP policy are mentioned in s 20.

36. Section 80 of the *TPI Act* provides:

> **80 Who is an insured person?**

In this Act:

insured person**,** for a motor accident claim, means –

(a) a CTP insured person; or

(b) a person for whose acts and omissions the nominal defendant is liable under s 61 …

Note ***CTP insured person*** is defined in s 16.

37. Section 31(1) of the *Workers Compensation Act 1951* (ACT) (***WC Act***) provides:

> (1) An employer is liable to pay compensation under this Act if a worker of the employer suffers personal injury arising out of, or in the course of, the worker's employment.

38. Section 144 of the *WC Act* states that if an employer is liable to pay compensation under the *WC Act* to a Territory worker, or to pay any other amount in respect of the employer's liability independently of the *WC Act* for an injury to a Territory worker, the workers compensation insurer is to indemnify the employer. Here, there was no argument that "liability independently of the *WC Act*" includes a reference to common law liability and thus a personal injury claim for damages.

39. Section 182C of the *WC Act* then provides:

182C Meaning of damages claim

(1) For this part, "damages claim "means a claim for damages in relation to a work-related injury to a worker caused, or claimed to have been caused by—

(a) the negligence or other tort of the employer or a person for whose acts the employer is vicariously liable; or

(b) a breach of contract by the employer.

(2) Also, "damages claim" includes a claim for damages in relation to an injury caused, or claimed to have been caused, by negligence or another tort even if the damages are claimed in an action for breach of contract or other action.

The competing arguments of the parties

40. The starting point is the agreed fact that Capital was vicariously liable for the relevant actions of its employees, including Mr Jachno. As seen from the legislation set out above, the policies each covered the risk, being liability to Mr Bailey as injured worker arising out of Mr Jachno's negligence.

41. The arguments of both parties turn on the impact that s 20(b) of the *TPI Act* has for the doctrine of double insurance. That section is to be construed in the context of the *TPI Act* as a whole.

42. NRMA argues that, applying s 20(b) of the *TPI Act*, Capital is deemed to be "the insured" under the CTP policy, because it was vicariously liable for a person's use of the vehicle. Capital is also "the insured" under the WC policy issued by Allianz.

43. NRMA submits that the consequence of this interpretation is that Capital was an insured, as defined under the *TPI Act*, for the purposes of the CTP Policy, and expressly "the insured" under the workers compensation policy. NRMA contends that in such circumstances, the doctrine of double insurance applies, notwithstanding that Capital was not the policy holder for NRMA's CTP policy.

44. Allianz submits that the legal position is not that simple. It submits that Rapid, as the registered owner of the truck and the contractual policy holder, was "the insured" under the CTP policy and Capital was "the insured" under its WC policy. Section 20(b) of the *TPI Act* does not have the effect of elevating entities such as Capital, which would otherwise stand outside the contractual indemnity relationship, to the status of "the insured" under the terms of the CTP policy.

45. Allianz argued that Capital's status in relation to the CTP policy is, at best, a "CTP insured person" *for the purposes of the TPI Act*. The point Allianz made was that if Mr Bailey made a claim against Capital for motor accident damages, the CTP policy issued by NRMA to Rapid will extend to cover Capital's liability because of s 20(b) of the *TPI Act*, but that does not make Capital "the insured" under the CTP policy. Accordingly, there is no common "insured", which is a pre-requisite for a right of contribution to arise.

46. The parties relied on a number of key authorities which are discussed in the course of these reasons below. However, the parties were agreed that none of the authorities deal directly with the issue presently before the Court. There is no statutory equivalent to s 20(b) of the *TPI Act* in any other compulsory third party insurance legislation in any other state or territory, and s 20(b) has not itself been the subject of any judicial consideration in the ACT, although it has been referenced in cases such as *Mannall v Howard (No 2)* [2019] ACTSC 113 and *Jausnik v Nominal Defendant (No 5)* [2016] ACTSC 306. The point is not without importance, as although the *TPI Act* has since been repealed, s 219 of the *Motor Accidents Injuries Act 2019* (ACT) has replicated what was s 20(b) of the *TPI Act*.

The doctrine of double insurance

47. It is necessary to have some understanding of the doctrine of double insurance before considering the proper construction and effect of the *TPI Act* on the application of the doctrine in the ACT. In setting out the applicable legal principles in some detail below, I have endeavoured to highlight not only the features that attract the doctrine, but the basis or rationale for the application of the doctrine, as that is relevant when construing the effect of the statutory framework.

What is double insurance?

48. The leading Australian authority articulating the doctrine is *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342 (***Albion***). In the judgment of the plurality, Barwick CJ, McTiernan and Menzies JJ at 345:

> There is double insurance when an assured is insured against the same risk with two independent insurers. To insure doubly is lawful but the assured cannot recover more than the loss suffered and for which there is indemnity under each of the policies. The insured may claim indemnity from either insurer. However, as both insurers are liable, the doctrine of equitable contribution between insurers has been evolved… There is no reason why the doctrine should not apply to insurance against liability to third parties and there is every reason in principle that it should. The doctrine, however, only applies when each insurer insures against the same risk, although it is not necessary that the insurances should be identical.

49. In the case before their Honours, it was common ground that the same insured was indemnified under each insurance policy. However, the subject matter of the two policies of insurance and the respective rights and liabilities of the parties under each policy had some differences. In their Honours' view, there was double insurance

because payment by one insurer would have the effect of discharging the liability of the other insurer at 346 (emphasis added):

> … It seems to us that each policy did cover the very risk against which the policy holder did seek indemnity from one of the insurers. The matter can, we think, be decided simply enough **by inquiring whether payment by one insurer of the policy holder's claim for indemnity would provide the other insurer with a defence to a like claim against it. It clearly would, and it would simply because the policy holder had by the payment made been indemnified against the risk insured against.** He had received all that he was entitled to receive under both policies so the payment by one insurer would discharge both. Thus, payment by one is made for the benefit of both, and, contribution is equity.

50. The emphasised words draw attention to how the plurality tested the facts in that case, as well as to the use of the words "policy holder".

51. Kitto J, with whom Windeyer J agreed, also held that double insurance applied. His Honour's judgment focused more on the roots of double insurance as being founded on concepts of fairness and justice: see 350. His Honour explained that it was a doctrine of equitable contribution applying both at common law and in equity, going on to state that double insurance reflected two fundamental principles of law (at 349-350):

    (1) first, "that persons who are under co-ordinate liabilities to make good the one loss … must share the burden pro-rata"; and

    (2) second, "where several insurers have separately insured the one person against the one loss that person, though he may upon suffering the loss sue any or all of the insurers, may not recover more in total than a single reparation for the loss…".

52. Kitto J went on to discuss kinds of indemnity insurance where the doctrine had been applied (marine and fire) and conclude in the same paragraph as follows:

> …the corresponding point in regard to accident insurance is made by saying that each policy must insure the same person against the very loss that in the event he has sustained, or the very liability that in the event he has incurred.

53. Canvassing the development of the principles upon which double insurance rested led Kitto J ultimately to hold at 352 (emphasis added, citations omitted):

> **What attracts the right of contribution between insurers**, then, is not any similarity between the relevant insurance contracts as regards their general nature or purpose or the extent of the rights and obligations they create, but is simply the fact that each contract is a contract of indemnity and **covers the identical loss that the identical insured has sustained**; for that is the situation in which "the insured is to receive but one satisfaction" (to use Lord Mansfield's expression) and accordingly all the insurances are "regarded as truly one insurance": *Sickness and Accident Assurance Association Ltd v General Accidence Assurance Corporation Ltd*.

54. The High Court confirmed these elements of the doctrine of double insurance in *Commercial and General Insurance Co Ltd v Government Insurance Office of New South Wales* (1973) 129 CLR 374 at 379-380. The judgments of both the plurality and Kitto J have been subsequently referred to in cases such as *Burke v LFOT Pty Ltd* [2002] HCA 17; 209 CLR 282 (***Burke***) at 292, where Gaudron ACJ and Hayne J said at [14]-[15] (citations omitted):

> [14] In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage…

> [15] The doctrine of equitable contribution applies both at common law and in equity. It is usually expressed in terms requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to "make good the one loss". More recently, in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*, the right to contribution was said to depend on whether the liability was "of the same nature and to the same extent".

55. Relevant to the resolution of the question on the facts currently before the Court, Gaudron ACJ and Hayne J at [17] referred to culpability as being a factor bearing on the right to equitable contribution. Their Honours referred to the rule that a person who has been guilty of fraud, illegality, wilful misconduct or gross negligence is not entitled to such contribution. An example of such conduct was given, which itself was a hypothetical discussed in a case in 1787 called *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184 at 1185. It concerned the requirement in equity that to obtain contribution, the applicant should have "clean hands". Gaudron ACJ and Hayne J stated at [18] (emphasis added):

> …the example…directs attention to causation, in the sense of **legal responsibility for the loss in question**. The same consideration may have some bearing on the law's acceptance that **contribution cannot be obtained if the person against whom contribution is sought is entitled to indemnity from the applicant**.

56. From the above, it can be seen that the doctrine of double insurance is a manifestation of the broader doctrine of equitable contribution. Recently in *Haider v Gudelj* [2021] ACTCA 9 (***Haider***) at [99]-[139], the ACT Court of Appeal set out a comprehensive history of the development of the doctrine, when it is available, and what circumstances might displace "co-ordinate liability". Due to the nature of the facts before the Court of Appeal, the focus was on co-guarantors, but it is helpful to have an appreciation of the broader doctrine within which the cases concerning double insurance sit. Having traversed *Albion* and *Burke* and a number of the cases discussed below, the Court of Appeal in *Haider* summarised the position as follows at [139]-[140]:

> [139] From the above cases, we distil the following propositions.
>
> > (a) The doctrine of contribution among sureties is founded in equity.
> >
> > (b) Contribution is available where the claimant and the respondent are under "co-ordinate liability" to make good the one loss. This is because payment by the claimant to the creditor also discharges the respondent's liability and, as the respondent derives the benefit of release from liability to the creditor, they should also bear the burden proportionately.
> >
> > (c) The operation of the principle should not be defeated by "too technical an approach". It is no answer to a claim for contribution that the claimant supplied monies to the principal debtor for the purpose of the principal debtor discharging the liability to the creditor (as in *Mahoney*), or that "co-ordinate liability" derives from different sources of legal liability (such as statute and contract).
> >
> > (d) The rationale for "co-ordinate liability" is the parties' imputed intention to share the common obligation equally. This inference will not be displaced lightly. However, if at the time when the obligation is undertaken, it is the parties' express or imputed common intention that, as between themselves, the burden should be borne by only one of them, there is no "co-ordinate liability". The circumstance that only one party will benefit from the transaction may inform the imputation of intention.
> >
> > (e) A claimant will fail in their claim for contribution if their conduct has "an immediate and necessary relation to the equity sued for" such that they do not come to equity with "clean hands", for example (as referred to in *Dering*) where they bored the hole in the ship that caused the loss of the ship and its cargo.

> [140] It is not clear that "notions of equal or comparable culpability and equal or comparable causal significance", of themselves, have a role to play in determining whether a claimant may obtain contribution. Nor is there an established discretionary power to withhold equitable relief on the basis of abstract considerations of justice and fairness.

What does "co-ordinate liability" mean?

57. If a claim for contribution depends on the existence of "co-ordinate liabilities", it is essential to know what that means. Perram J recently collected the authorities and summarised co-ordinate liability as meaning "liabilities owed to the same person that are of the same nature and extent": *Tuscan Capital Partners Pty Ltd v Trading Australia Pty Ltd (in liq), in the matter of Trading Australia Pty Ltd (in liq) (Proof of Debt)* [2021] FCA 1061 (***Tuscan Capital***) at [35], citing *Friend v Brooker* [2009] HCA 21; 239 CLR 129 (***Friend***) at [40] per French CJ, Gummow, Hayne and Bell JJ; *Burke* at [15] per Gaudron ACJ and Hayne J, and at [49] per McHugh J; *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31; 244 CLR 72 (***HIH Claims Support***) at [39] and [56] per Gummow ACJ, Hayne, Crennan and Kiefel JJ.

58. Similarly, in *QBE Insurance (Australia) Ltd v Insurance Australia Ltd* [2011] ACTSC 40; 247 FLR 333 (***QBE v Insurance Australia***), Refshauge J referred to both *Albion* and *Burke* before explaining at [61] (emphasis added):

> The liabilities of insurers are co-ordinate when the insurers are each liable to insure **the same insured** against the same loss: *Accident Compensation Commission v Baltica General Insurance Co Ltd* [1993] VicRp 33; [1993] 1 VR 467 (at 481). …

59. The categories of co-ordinate liabilities sufficient to ground a claim are not closed: *Burke* at [49]. Cases are decided "on bases which are heavily fact dependent": *Tuscan Capital* at [35].

A caution as to the application of the doctrine

60. In *Burke* at [43], McHugh J referred to the difficulty in defining which liabilities meet the definition of "co-ordinate liability". His Honour said at [43] (references omitted, emphasis in original):

> …contribution will not lie simply because the respective liabilities of parties arise out of *similar* relationships or *related* transactions.

61. In the next paragraph, McHugh J then said (relevantly) at [44] (bold emphasis added, references omitted):

> Similarly, the doctrine will not apply if the obligations in question are merely owed to the same party or are "otherwise connected in time or circumstance." **Nor will it apply merely because the claimant's payment has benefited or relieved the other party financially**. In *Ruabon Steamship Co v London Assurance*, Lord Halsbury LC… [examined] the cases in which contribution had been permitted, [and] described the common feature as being that:
>
> > "the liability to each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation *binding them all to equality of payment or sacrifice in respect of that common obligation.*"
>
> …

62. McHugh J went on to discuss the decision of *Cockburn v GIO Finance Ltd [No 2]* [2001] NSWCA 177; 51 NSWLR 624, where a finding of co-ordinate liability was overturned by the NSW Court of Appeal. His Honour (at [47] in Burke) used that authority as an illustration of (emphasis added):

> …the practical difficulty that arises from using the term "co-ordinate liabilities" to determine rights of contribution. Rather than focusing on the **community of interest** between parties – which makes it equitable that they **share in the discharge of any burden** – the phrase "co-ordinate liabilities" directs attention to the burden itself.

63. In *Friend*, French CJ, Gummow, Hayne and Bell JJ confirmed the importance of a common burden for the right to contribution to arise. At [39], their Honours held that there must be more than a mere financial benefit for one party to trigger contribution:

> The equity to seek contribution arises because the exercise of the rights of the obligee or creditor ought not to disadvantage some of those bearing a common burden; the equity does not arise merely because all the obligors derive a benefit from a payment by one or more of them.

64. The plurality stressed that although equity looks to substance rather than form, this approach should not take the contribution principle beyond the confines of "legal structures". In their Honours' view, to do so "may too easily produce an outcome in a given case which is no more than an idiosyncratic exercise of discretion" (at [47]).

65. This expression of caution in the application of the contribution principle has continued in more recent High Court decisions. In *HIH Claims Support*, Gummow ACJ, Hayne, Crennan and Kiefel JJ made it clear that co-ordinate liabilities are not limited to circumstances involving double insurance, and that the search for a common obligation or burden should not be overly technical (at [38]-[39]). However, it was emphasised that the requirement of a common legal burden was essential and could not be avoided by evoking the approach of substance over form at [47] (citations omitted):

> The authorities show that no court has departed from the requirement that the equity to contribute depends on obligors bearing a common burden, the basis for co-ordinate liabilities in respect of the one loss. A proposition… – that equity looks to substance rather than to form – has never been invoked successfully to achieve a departure from, or modification of, that requirement.

The point at which the Court assesses co-ordinate liability

66. In *AMP Workers' Compensation Services (NSW) Ltd v QBE Insurance Ltd* [2001] NSWCA 267; 53 NSWLR 35 (***AMP v QBE***), an employer, Mudgee Refrigerated Transport Pty Ltd (**Mudgee**), held a workers compensation policy with AMP for its common law liability to its workers *and* a compulsory third-party policy with QBE over a truck that it owned. The facts were similar to the present proceedings, although in a jurisdiction with a different legislative regime. An employee of Mudgee was injured in the course of employment as a result of the negligent driving of the truck by a fellow employee. The difference in *AMP v QBE* was that Mudgee was the policy holder of both policies.

67. The injured employee sued and obtained judgment against the negligent employee and the CTP insurer satisfied the judgment, but Mudgee (the employer) was never made a party, although it would have been vicariously liable. The NSW Court of Appeal held that double insurance existed and that the CTP insurer was entitled to contribution from the workers compensation insurer even though no claim had been made against the employer: see *AMP v QBE* at [24]. This was because the question of double insurance should be determined "at the time of the casualty" (at [17]).

68. At the time of the accident, Mudgee was liable to its injured employee, and both policies covered that risk. The injured employee could therefore have claimed under the CTP

policy or the workers compensation policy. At [24], Handley JA, with whom Mason P and Beazley JA agreed, stated (emphasis added):

> In this case **the employer had double insurance** and [the injured employee] could choose his defendants, but in principle this should make no difference. The insured's decision to claim against one insurer rather than the other or both was not allowed to unjustly enrich the other, but contribution should be enforced so that all would share the burden equally. **Similarly the more or less arbitrary decision by [the injured employee] to sue the driver and not the employer or both jointly should not be permitted to impose the whole burden on [the compulsory third party insurer] to the exoneration of [the workers compensation insurer]…**

69. Unlike the facts in the case presently before the Court, the employer in *AMP v QBE* (Mudgee) was a common insured under both policies, in that Mudgee held both the workers compensation policy and the CTP policy over the truck as owner. Thus, the employer undeniably had double insurance.

70. The *AMP v QBE* decision has been interpreted as extending the contribution principle where the insured had a choice, to a case where someone else had a choice which could also be exercised, to leave one insurer with the whole burden: *Mercantile Mutual Insurance (Australia) Ltd v QBE Workers Compensation (NSW) Ltd* [2004] NSWCA 409; 61 NSWLR 655 (***MMI***) at [11]. What made it an "extension" of the principle was that the party through whom contribution was sought (the employee) was not doubly insured.

71. In *QBE Insurance (Australia) Ltd v CGU Workers Compensation (NSW) Ltd* [2012] NSWSC 377; 83 NSWLR 589 (***CGU***), Beech-Jones J also described the *AMP v QBE* decision as extending the principle of double insurance, but only in a limited way. In *CGU*, there was argument as to whether or not an injured man's employer, Megbuy Pty Ltd (**Megbuy**), which held workers compensation insurance, also was "an insured" under a compulsory third party policy in respect of the forklift in which the man was injured despite it not being the registered owner. The case ultimately turned on whether Megbuy satisfied the definition of "owner" under the NSW Act dealing with third party insurance. However, at [10] of the judgment, his Beech-Jones J stated (bold emphasis added):

> In describing claims for contribution between insurers in the case of double insurance in *Albion*, Kitto J stated (at 352) that: *"[w]hat attracts the right of contribution between insurers … is simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained."* **In …*AMP v QBE*, the Court of Appeal extended the principle's operation to encompass some situations where the two insurers covered the same loss but did not indemnify the "identical insured" but only because of a choice exercised by the injured plaintiff as to which party to sue**. This extension was not directly relevant to this matter as this part of QBE's case involved an alleged liability of an alleged "common insured", namely Megbuy.

Co-ordinate liability: What constitutes "a common insured"?

72. NRMA and Allianz disagree as to whether the "common insured" or "the same insured" must be the person that effected the policy (by entering into the insurance contract) in order for the doctrine of double insurance to apply.

73. Allianz argues the common insured must be the entity taking out the policy (i.e. the policy holder). On the other hand, NRMA maintains that all that is needed for the doctrine of double insurance to apply is a common person over which coverage for

indemnity extends under both policies. Further submissions were filed on the point after oral hearing.

74. The authorities discussed below are considered in some detail because the point in question is novel in the context of the ACT legislation, and the principles to be applied to the present facts emerge from a number of cases.

Esanda Finance Corporation Ltd v Colonial Mutual General Insurance Co Ltd (1993) 217 ALR 180 (***Esanda v Colonial Mutual***).

75. *Esanda v Colonial Mutual* involved a property that had been damaged by fire. The property owner, Firmline Developments Pty Ltd, had insurance for property damage through Colonial Mutual. The certificate of insurance bore a notation of Esanda's interest in the property as mortgagee. Esanda also separately arranged insurance over the property through the State Insurance Office of Victoria (**SIO**), which issued a mortgagee policy covering all risks of damage to the property.

76. After the fire, Esanda claimed on the policy issued by Colonial Mutual. The parties did not agree as to what should be paid under that policy, and accordingly, Esanda commenced proceedings against Colonial Mutual. Colonial Mutual joined SIO as a third party, alleging SIO was liable to contribute to the indemnity claimed by Esanda. SIO argued that no contribution was required because, as Esanda's interest was merely noted under the Colonial Mutual policy, Esanda was not the same "insured" under both policies. Hayne J rejected this argument. His Honour held that, although there was no double insurance because there were different insureds, there was still a right to contribution (at 189-190, citations removed):

> I do not consider that a right to contribution is necessarily confined to cases of "double insurance" … in my view, nothing turns upon the fact that under the Colonial Mutual policy Esanda's rights were rights as a party whose interest was noted on the policy. Its interest having been noted, Esanda was entitled to be indemnified by Colonial Mutual against the loss which it has suffered by reason of the fire at the premises. Once Colonial Mutual indemnifies Esanda under that policy, SIO would have an answer were Esanda then to sue it on its policy …

77. NRMA in this proceeding confirmed during oral argument that it made no discrete claim for contribution pursuant to principles other than double insurance.

WorkCover Queensland v Suncorp Metway Insurance Ltd [2005] QCA 155; 2 Qd R 210 (***WorkCover Qld v Suncorp***)

78. In *WorkCover Qld v Suncorp*, a majority in the Queensland Court of Appeal held that double insurance applied even where there were technically two different contractual insureds (that is, two different policy holders). WorkCover Qld insured the partnership of Mr and Mrs White. The White partnership operated a transport business, which employed Mr Carter as a truck driver. Suncorp insured Mr White individually as owner of the truck that Mr Carter was driving when he was injured. Mr Carter sued the partnership as his employer, alleging the Whites were jointly and severally liable, and a settlement was reached. Workcover provided indemnity to the partnership and claimed contribution from Suncorp on the basis of double insurance.

79. Suncorp argued that double insurance could not apply because WorkCover Qld only insured the partnership and Suncorp only insured Mr White as the registered owner of the vehicle, pursuant to the relevant CTP legislation. The insureds were therefore separate entities.

80. Jerrard JA, with whom McMurdo P and Douglas J relevantly agreed (although McMurdo P dissented in the result), applied *AMP* to find that an identical insured was not necessary for double insurance to apply in the circumstances. Jerrard JA adopted the approach of Handley JA in *AMP v QBE* (at [46], emphasis added):

> There Handley J.A., giving the judgment of the court, wrote that the right of contribution only exists in respect of insurances which are contracts of indemnity, where two or more insurers are on risk in respect of the same loss or liability. The learned judge cited *Albion Insurance* at 346, 349–350. **That statement of principle does not refer to the necessity for an identical insured, but rather the identical loss or liability.**

81. His Honour then went on at [50] to find that (emphasis added):

> The two insurers here insured in respect of the same loss or liability, and **in fact there was an identity of insured persons**. Both insurers were obliged to indemnify Mr White in full. The principles which justify contribution, discussed in *Burke v. LFOT Pty Ltd* at [14]-[22]; [38]-[41]; and [141]-[144], justified an order in this matter.

82. *WorkCover Qld v Suncorp* turned on the distinction between individual partner and partnership. Although there were different insureds, as a matter of fact, Mr White was a member of the partnership. In such circumstances, it was held that there was sufficient identity of insured persons.

Allianz Australia Workers Compensation (NSW) Ltd v NRMA [2007] ACTSC 2; 207 FLR 153 (***Allianz v NRMA***)

83. *Allianz v NRMA* is a relevant case in the ACT jurisdiction that deals with double insurance.

84. In that case, again the dispute was between Allianz as workers compensation insurer and NRMA as CTP insurer. The injured worker was employed by a company, Truform Pty Ltd (***Truform***). Allianz had issued a workers compensation policy to Truform. The injury occurred while the employee was unloading a semi-trailer (meaning there was no driver involved). The semi-trailer was owned under the general law by Truform but registered in the name of the director and shareholder of that company, Mr Abbey, for what was accepted to be reasons of administrative convenience at the time of registration. The statutory third-party policy only extended to cover the driver and the owner (see [19]-[20] of the judgment and s 54(1)(b) of the *Motor Traffic Act 1936* (ACT) (repealed)). Accordingly, there was a lack of identity of insureds under the policies. However, different legislation applied and there was no equivalent of s 20(b) of the *TPI Act*.

85. Master Harper held at [39]-[40] that there was no double insurance. Having earlier referred to *Albion*, *AMP v QBE*, *Workcover Qld v Suncorp* and a number of other cases, his Honour tested the facts before the Court in a similar way as the plurality in *Albion* at 346 (see [49] of these reasons). Critically, the third-party policy did not insure Truform against liability. There being no relevant driver, only the "owner" of the insured motor vehicles was insured, which was defined in the legislation there under consideration as the person whose name was specified in the certificates of registration as the owner.

86. In making that finding, Master Harper expressed some sympathy for the plaintiff (the workers compensation insurer) who failed in claiming contribution on the basis of the doctrine, notwithstanding that its insured (Truform) was the general law owner of the vehicle involved and that vehicle was also covered by a third-party policy of insurance.

Zurich Australia Insurance Ltd v GIO General Ltd [2011] NSWCA 47 (***Zurich v GIO***)

87. *Zurich v GIO* is another case where double insurance was held to exist in circumstances where each of the policy holders, being the registered owner of the vehicle and the employer were not the same entity. They were, however, related: a bus and coach business operated by one family through two companies, Caringbah Bus Services Pty Ltd (**Caringbah**) and Tiger Tours Pty Ltd (**Tiger**).

88. Zurich was the third-party insurer of a coach registered in the name of Caringbah. GIO was the workers compensation insurer of Tiger. A driver employed by Tiger sued Caringbah for an injury he suffered while working on the coach, claiming motor accident damages under the *Motor Accidents Compensation Act 1999* (NSW) on the basis that Caringbah was the owner. The driver did not sue his employer, Tiger. Caringbah admitted liability and the injured man recovered damages in the NSW District Court, proceedings in which neither Tiger nor GIO as its insurer were a party. Zurich conducted the defence of the District Court proceedings as Caringbah's insurer.

89. Subsequently, Zurich sought contribution from GIO, relying on *AMP v QBE* to argue that the two different insureds could each be liable for the same injury, depending on the claimant's choice of who to sue. Although unsuccessful in seeking an entitlement to contribution at first instance, the Court of Appeal held (per Giles JA, Allsop P and Young J agreeing) that double insurance applied: see [45], [64], and [81].

90. This decision provides an example of double insurance being held in circumstances where the registered owner of the subject vehicle (Caringbah) was not the employer of the injured worker (Tiger). However, the two companies were related, and as Allsop P emphasised in a separate concurring judgment at [2], Zurich was Caringbah's insurer as the registered owner, but on the facts, it was also the insurer of Tiger in its capacity as owner. The payment discharged Tiger from a liability it had as owner to the injured claimant, and thereby relieved Tiger's common law insurer, GIO, of any liability it had to Tiger as the workers compensation insurer.

Zurich Australia Insurance Ltd v The Workers Compensation Nominal Insurer [2013] NSWSC 915 (***Zurich v WC Nominal Insurer***)

91. In *Zurich v WC Nominal Insurer*, a passenger in a minibus vehicle was injured when the minibus veered off the road and overturned. Both the passenger and the driver were employees of Aimee's Group Pty Ltd (**Aimee**). The vehicle in which the claimant was a passenger was not owned by Aimee but by a different company, R&S Australia Pty Ltd (**R&S**). R&S was not owned or controlled by Aimee.

92. The passenger claimed against Aimee as his employer for workers compensation benefits. GIO, managing the policy on behalf of the WC Nominal Insurer, paid $650K to the passenger in respect of his workers compensation entitlements. The passenger also sued R&S as the owner of the vehicle. Zurich, as the CTP insurer of the vehicle accepted liability and ultimately paid $1.7M inclusive of costs (inclusive of the $650K paid in workers compensation entitlements).

93. Zurich claimed the WC Nominal Insurer (managed by GIO) was liable to contribute by way of equitable contribution. It is important to appreciate the wording of the CTP policy (found in s 10 of the *Motor Accidents Compensation Act 1999* (NSW)) and set out at [11] of Rein J's reasons) which was relevantly:

> …The insurer insures the owner of the motor vehicle and any other person who at any time drives the vehicle (whether or not with the consent of the owner) against liability in respect of the death of or injury to a person caused by the fault of the owner or driver of the vehicle…
>
> (a)…in the use or operation of the vehicle in any part of the Commonwealth (whether or not on a road), …

94. That is, the statutory policy insured only the owner and the driver of the vehicle, not the driver's employer.

95. Rein J then considered the terms of the workers compensation policy and found (at [13]) that Aimee's common law liability, such as its vicarious liability for negligent acts of an employee causing injury to a third party, was covered under the GIO managed policy.

96. Rein J rejected the argument that the facts of the case gave rise to double insurance. The critical aspect of his Honour's reasoning is contained in [22] (emphasis added):

> I accept Mr Darke's central point which is that for the extended principle, as laid down in *AMP v QBE*, to apply there must, as a starting point, be double insurance. That is there must be **two insurers of the one person**, or to put it in reverse, there must be **at least one potential defendant liable to the claimant who, if sued, could make a claim on either policy**. In this case there is no "insured" who could make a claim against both Zurich and GIO if sued by Mr Chen. R&S and the driver could not claim on the GIO policy **and Aimee could not claim under the Zurich policy**. The choice made by Mr Chen to claim against R&S did not relieve GIO of any liability to indemnify R&S, so there was no "second layer of choice". That there must be "common insured" is made clear in the summary of principles for contribution in *QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd* [2009] VSCA 124; (2009) 24 VR 326 at [70] that for contribution to apply "both insurers must insure a common insured".

97. Rein J went on to hold (at [26]) that it was not open to the Court to extend the principle of contribution to a situation where there is no common obligation owed by two insurers to a single insured. Ultimately the claim by Zurich succeeded, but on a contractual argument, not on the basis of the doctrine of double insurance.

98. The words emphasised in the extract of Rein J's reasons above are to highlight the different situation that is before the Court here. Although Rapid could not make a claim on the WC Policy issued here by Allianz, because of statutory intervention, Capital could make a claim both on the NRMA policy issued to Rapid and on its WC policy issued by Allianz, if sued by Mr Bailey.

QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd [2009] VSCA 124; 24 VR 326 (***QBE v Lumley***) and *QBE Insurance Australia Limited v Allianz Australia Insurance Ltd* [2020] FCA 589 (***QBE v Allianz***)

99. *QBE v Lumley* and *QBE v Allianz* both concerned insurance policies issued to principal contractors and subcontractors involved in construction work. In both circumstances, the principal contractor's policy also covered the negligence of any subcontractor it engaged for the works. The subcontractor also held an insurance policy in its own right, covering any negligence on its part. In both cases, it was held that double insurance applied, and that contribution should be made between the insurers.

100. In *QBE v Lumley*, the Victorian Court of Appeal summarised the principles of contribution as relevantly including the requirement of "a common insured". As to what constitutes a common insured, at [70] the Court held:

> … It does not matter if one or both policies insure other persons or if, where they do so, not all insureds are covered by both policies. Nor does it matter if the common insured is a party to the insurance contract under one policy and a person referred to in s 48 of the IC Act [*Insurance Contracts Act 1984* (Cth)] in respect of the other policy.

101. This led the Court to conclude that, due to the effect of the statute, the subcontractor was included as an insured under the principal contractor's policy for double insurance even in the absence of any act of authorisation or ratification on its part: see [75]. The subcontractor had a right to indemnity under that policy as well as its own, so the insurers had a common obligation to discharge the liability.

102. Similarly, in *QBE v Allianz*, Allsop CJ held that a right to contribution existed between the insurers of each contractor, despite the fact the subcontractor was not a contracting party to the principal's insurance contract. The central issue in the case was whether the contribution extended to defence costs. In reaching the conclusion that it did, his Honour carefully construed the principal contractor's contract of insurance. Under the policy, the phrase "the Insured" was defined as including the named insured on the policy as well as its sub-contractors in defined circumstances: at [26]-[27].

103. As submitted by Senior Counsel for Allianz in the present proceedings, both of these cases concerned private construction contracts and the principal/sub-contractor relationship, which are facts quite different to the present case. In those decisions, the insurance policies were of the same genre and the terms of the contracts contemplated that both contractors would have their own insurance.

Other authorities

104. The parties referred the Court to a number of other authorities which I have not found to be of assistance in either formulating principle or applying it to the facts presently before the Court. For completeness, it suffices to note that there are two other authorities in this jurisdiction dealing with the doctrine of double insurance and the interplay between workers compensation insurance and CTP insurance. They are *QBE v Insurance Australia* (discussed at [58]) and *GIO General Limited v Insurance Australia Limited t/as NRMA Insurance* [2011] ACTSC 91. Both decisions were focused more on when liability of an insurer crystallised and whether the risk was the same, and drew upon the first instance decision of Barrett J, which was overruled by the NSW Court of Appeal in *Zurich v GIO* around the same time as the first of those judgments was delivered. While there is some force in the parties' submissions that they would now be taken to be impliedly overruled in principle, further consideration (or such a conclusion) is immaterial to the application of principle to the facts of this case.

Applying the authorities – is there an identity of "insured" here?

105. The points that I have drawn from the authorities above are:

    (1) The rationale for the doctrine is fairness and it is designed to balance out what would otherwise be a disadvantage to one insurer and a benefit to another, depending on who the claimant chooses to sue, in circumstances where the same person is insured in respect of the same risk and could have been indemnified under either policy.

    (2) For the doctrine to apply, notwithstanding the words used in *Albion* at 346 (in particular, the reference to the policy holder), it is not essential that the

policy holder be the same. What is critical is that the risk that is insured is the same (not in issue here) and that "the insured" is the same.

(3) The time for assessing when the doctrine applies is the time of the accident, not a later date, the point being it does not matter who was actually sued, but who could have been sued.

(4) "The insured" is determined by identifying who is covered under each insurance policy. If there is a potential defendant liable to the claimant who, if sued, could make a claim on either policy (i.e. choose their insurer), double insurance applies.

106. Applying that to the facts of this case:

(1) Under s 18 of the *TPI* Act, the CTP policy insured someone mentioned in s 20.

(2) Under s 20(b) of the *TPI Act*, the CTP policy expressly covered Capital, as the employer of the driver and therefore someone vicariously liable for the acts of its employee, the driver.

(3) Under s 80 of the *TPI Act*, Capital was "a CTP insured person", and therefore an "insured person" for a motor accident claim.

(4) Under s 81 of the *TPI Act*, the "insurer" of a person means "if the person is a CTP insured person – the CTP insurer for the person".

107. The consequence is that Capital – as a CTP insured person under the CTP policy – could have been sued as a respondent for personal injury damages arising out of the accident. By the operation of the above statutory provisions, Capital could have chosen to call upon either NRMA or Allianz to indemnify it, notwithstanding that it did not have a direct contractual relationship with NRMA. Had Allianz indemnified Capital and paid the Settlement Sum that NRMA paid, any liability NRMA had to Capital by virtue of s 20(b) of the *TPI Act* would have been relieved. On the authorities as set out above, that means the doctrine of double insurance applies.

108. In reaching such a conclusion, I have accepted many of the arguments made by Allianz. I will explain briefly why they do not bring about the ultimate result for which Allianz contended.

109. First, I accept Allianz's submission that on the proper construction of the *TPI Act*, there is a technical distinction between "an insured" or a "CTP Insured person" under statute and what might be described as "the insured", being the policy holder under the contract itself. The difficulty with that submission is that, as seen from the authorities set out above, the application of the doctrine does not require that the policy holder be the same – what constitutes "the same insured" for the application of the doctrine is broader than that.

110. To find that s 20(b) of the *TPI Act* did not have the effect of including an employer of a negligent driver as "the insured" for the purposes of the doctrine of double insurance would be to ignore what the statute does in substance, which is to extend the coverage of a CTP policy of insurance to the people listed in s 20, who are then defined as a "CTP Insured" under s 16. The authorities (in particular *Burke* at [94]-[96] and *Friend* at [47]), point to an approach of substance over form within the confines of legal

structures, and to look at whether there is a common obligation to make good the one loss.

111. In this case, the legal structure is the contractual CTP policy, but it is a contract that is governed by the *TPI Act*. In light of the very clear words of the statute, it could not be argued that NRMA's policy of insurance did not extend to cover Capital as the employer of the driver, with vicarious liability obligations.

112. Had Mr Bailey sued Capital, the one loss could still have been made good by either NRMA or Allianz. The facts fall squarely within the second layer of choice concept discussed in *AMP v QBE* at [25]. For that reason, while accepting there may be a statutory distinction, it does not make a difference.

113. Second, I have assumed (without deciding) that the reason for introducing s 20(b) was not to fill a perceived gap in the doctrine of double insurance. Allianz submitted that one contextual indicator as to the mischief which this unique provision in the ACT legislation was intended to address relates to the right to add a contributor under s 93 of the *TPI Act*. While that might be so, the underlying rationale for s 20(b) is far from clear, and no assistance is derived from any explanatory statements. Certainly there is no mention of double insurance in any contextual materials that might assist with construing s 20(b) of the *TPI Act*.

114. In light of the uncertainty, the assumption has been made that the legislative intention behind including s 20(b) of the *TPI Act* was unrelated to the doctrine of double insurance. I also accept that in other jurisdictions such as NSW, the different statutory regime means the doctrine would not have applied, because Capital would not have been insured under the CTP policy.

115. However, making the assumption about legislative intention does not advance the argument, because it does not matter what the purpose of s 20(b) if the consequences of the statute are otherwise to bring the facts of a particular case within the doctrine. The task for the Court is not to decide whether the legislature appreciated that including an additional category of insured person under s 20(b) might bring about a different result in terms of double insurance. The task is to work out whether there is a common insured and here, the words of the *TPI Act* are clear as to who is insured and who is not. As summarised in *Haider* at [140], it is not a matter of discretion whether the doctrine applies or should apply.

116. Allianz also drew attention to ss 183-184 of the *WC Act*, which provide (relevantly here) that where a claim is made for workers compensation and the circumstances appear to create a legal liability in a person *other than the employer* to pay damages in relation to the injury, if the worker then receives both amounts under the *WC Act* and damages from the other person, the worker must repay to the employer so much of the amounts as does not exceed the amount of the damages received from the person.

117. On one view, the application of the doctrine of double insurance in this case does subvert the legislative intention to take the burden away from the workers compensation employer and shift it to others, such as the CTP insurer. However, as submitted by counsel for NRMA, those sections do not prevent double insurance in this case. The *WC Act* does not say anything about the situation where the employer is a common insured.

118. Once that fact is established, the same reasoning as that given in relation to construing the *TPI Act* applies, in that the Court does not have a discretion to refuse to apply the doctrine. I am comforted in that reasoning by the fact that similar sections to ss 183-184 of the *WC Act* (for example s 151Z of the *Workers Compensation Act 1987* (NSW)) were also in place in cases where double insurance was held to exist, including *AMP v QBE* and *Zurich v GIO*.

119. The point about *AMP v QBE* was that a choice had been exercised which could have been exercised in a different way. To respectfully reference the language used by Handley J at [24], the more or less arbitrary decision by Mr Bailey not to include the driver's employer as a defendant to the claim, which would have brought about a choice by Capital whether to seek indemnity from Allianz or NRMA (by virtue of s 20(b)), should not be permitted to impose the whole burden on NRMA to the exoneration of Allianz.

Conclusion and Orders

120. For these reasons, NRMA is entitled to declaratory relief. Although a number of declarations were sought in the Amended Statement of Claim, it seems to me that it will suffice to declare that Capital has double insurance in respect of the claim for loss and damage arising out of the motor vehicle accident on 2 August 2017.

121. As far as it appears from the relevant legislation prescribing the statutory policies, there do not appear to be issues about any excess that would impact upon the consequential order sought, being that contribution be ordered in the amount of 50% of the Settlement Sum. I also note that such sum is defined to include the costs of the proceeding between Mr Bailey and NRMA. There was no separate argument that any contribution excluded the agreed costs of the claim.

122. As to the question of costs for this proceeding, given the nature of the proceeding and the result, costs ought to follow the event. To guard against matters relevant to such an order for costs which may be currently outside the knowledge of the Court, I will direct short minutes of order to be brought in to give effect to the reasons, and if any alternate order is sought, it can be addressed through that process.

123. A claim for interest has been made. No party made any specific submission about the claim for interest. It is appropriate to award interest pursuant to r 1619 of the *Court Procedures Rules 2006* (ACT) (***CPRs***) at the applicable rate specified in Schedule 2 of the *CPRs*, and I consider the applicable date to be the date the claim was first filed, being 14 April 2020 (a matter of weeks after the initial request to Allianz for contribution was made, which was the first time Allianz appears to have been on notice of NRMA's claim against it).

124. The orders of the Court are therefore as follows:

    (1) Within 14 days, the parties are to bring in short minutes of order to give effect to these reasons for judgment.

    (2) The matter is listed for the making of final orders and any further argument on costs on 5 May 2022 at 9:30am.

    (3) In the event that the orders are agreed, the listing will be vacated.

I certify that the preceding one hundred and twenty-four [124] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam.

Associate: Zoe Saunders

Date: 14 April 2022