

Ritchie v Insurance Australia - [2022] NSWCA 278

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: **Ritchie v Insurance Australia Ltd [2022] NSWCA 278**

Hearing dates: 31 October 2022

Date of orders: 19 December 2022

Decision date: 19 December 2022

Before: Ward P at [1];
Meagher JA at [2];
Mitchelmore JA at [35]

Decision:

1. Grant leave to appeal.
2. Dismiss the appeal.
3. Applicant to pay the respondent's costs.

Catchwords: INSURANCE – liability insurance – exclusions – where endorsement excluded cover for liability arising out of specified cutting or welding activities unless carried out in compliance with relevant Australian Standard – where those activities included use of “spark producing equipment” – where use of power cutter to cut steel produced sparks which caused bushfire – whether primary judge erred in concluding power cutter was within description “spark producing equipment”

Legislation Cited: *Civil Liability (Third Party Claims against Insurers) Act 2017 (NSW)*, ss 4, 5,
Supreme Court Act 1970 (NSW), s 101(2)(r),

Cases Cited: *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629; [1947] HCA 17,
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65,
Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17,

Category: Principal judgment

Parties: Margaret Ritchie (Applicant)
Insurance Australia Ltd t/as CGU Insurance (Respondent)

Representation: Counsel:

P Braham SC with D Birch (Applicant)
S Donaldson SC with C Coventry (Respondent)

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Decision under appeal Court or tribunal:
Supreme Court of New South Wales
Jurisdiction:
Common Law
Citation:

[2022] NSWSC 330,

Date of Decision:
31 March 2022
Before:
Davies J
File Number(s):
2017/126664

[This headnote is not to be read as part of the judgment]

On 17 February 2017, two employees of Advanced Plumbing & Drains Pty Ltd (in liq) (**APD**) were engaged in the installation of reinforcing steel into trenches, as part of residential building works at a site in Carwoola in New South Wales. One was using a Husqvarna K970 power cutter fitted with a cutting blade to cut reinforcing steel. That use involved frictional abrasion between the cutting blade and the steel, which produced sparks. Those sparks were directed (unwittingly) to nearby dry grass and resulted in a bushfire.

The applicant commenced proceedings for herself and on behalf of group members who suffered loss or damage to property or personal injury as a result of that bushfire. After APD went into liquidation, the applicant sought and was granted leave to proceed directly against its insurer CGU.

CGU's policy contained a Welding Endorsement. That endorsement provided that cover would not extend to liability arising out of or in any way connected with listed activities, including the use of "spark producing equipment", unless that activity was conducted in strict compliance with Australian Standard AS 1674, Part 1 - 1997 'Safety in Welding and Allied Processes – Fire Precautions'.

The question for the primary judge was whether the use of the power cutter fell within the description "spark producing equipment". If it did, it was accepted that the Standard had not been complied with, so that the policy did not respond to the applicant's personal or representative claims. The primary judge held that the exception was engaged. On appeal, the sole issue remained whether the primary judge erred in so finding.

The Court (Meagher JA, Ward P and Mitchelmore JA agreeing) held, granting leave to appeal and dismissing the appeal:

1. The words "spark producing equipment" were to be read as referring not only to equipment which itself generates sparks for the purpose of its cutting or other process, as the applicant contended, but also as referring to equipment which produces sparks when used in a particular way, as did the Husqvarna K970 power cutter. The commercial object of the endorsement was to exclude cover for listed activities which carried a risk of fire unless they were carried out in compliance with the Standard. How or when the fire risk arose was not relevant to the achievement of that object, which was directed to any fire risks arising from the activity. Specifically, it could arise from sparks generated through the direct application of heat to metal, or sparks produced from friction between a cutting blade and a metal surface, as with the Husqvarna K970 power cutter: at [1] (Ward P); [21]-[22], [27]-[29] (Meagher JA); [35] Mitchelmore JA.

2. Unlike the list of activities which preceded them in the endorsement, the words "spark producing equipment" did not describe an activity. Accordingly, for their inclusion to make grammatical sense it was necessary to read the endorsement as applying to "... [the use of] spark-producing equipment by or on behalf of the Insured". But that activity, being the use of equipment, did not describe a process and was satisfied by the use of any piece of equipment which produced sparks. The words "spark producing equipment" were agnostic as to how or when in any cutting or welding or other process the sparks might be produced: [1] (Ward P); [30]-[31] (Meagher JA); [35] Mitchelmore JA.

3. This construction was congruent with the requirement for strict compliance with the Standard. The definition of “Hot work” in the Standard was apt to capture grinding, welding and other “heat-producing or spark-producing operations”, irrespective of the way in which or when in the relevant process sparks were produced: at [1] (Ward P); [24]-[25], [32] (Meagher JA); [35] Mitchelmore JA.

Judgment

1. **WARD P:** I agree with Meagher JA.
2. **MEAGHER JA:** This proposed appeal concerns the interpretation of an exception in a “Welding Endorsement” to a policy of General and Products Liability insurance issued by the respondent CGU (**the CGU policy**). The effect of that endorsement was that the indemnity provided by the general insuring clause would not extend to liability arising out of or in any way connected with specified cutting or welding activities unless the relevant activity was conducted by the insured in “strict compliance” with Australian Standard AS 1674 Part 1 1997 Safety in Welding and Allied Processes - Fire Precautions. The issue for the primary judge (Davies J) was whether the application of that exception was engaged by the use on a building site of a power cutter (a Husqvarna K970) to cut reinforcing steel to size.
3. That issue turned on whether the power cutter fell within the description “spark producing equipment” as used in the endorsement. If it did, it was accepted that the Standard was not complied with. The primary judge held that the exception was engaged. It followed that Advanced Plumbing & Drains Pty Ltd (in liq) (**APD**) was not insured against the liability for compensation which was the subject of the applicant Ms Ritchie’s personal and representative claims (*Ritchie v Advanced Plumbing and Drains Pty Ltd* [2022] NSWSC 330).
4. The applicant seeks leave to appeal from the orders dismissing those claims against CGU. Leave is required because the quantum of Ms Ritchie’s personal claim is below the monetary threshold in s 101(2)(r) of the *Supreme Court Act 1970 (NSW)* . Leave is also required because Ms Ritchie seeks to challenge answers to common questions affecting the basis on which the claims of the class members against CGU are determined. Leave to appeal is not opposed and should be granted because the relevant issue is dispositive of Ms Ritchie’s personal action and the representative claim, each brought against the insurer pursuant to the *Civil Liability (Third Party Claims against Insurers) Act 2017 (NSW)* (**Third Party Claims Act**). For the reasons which follow, the appeal should be dismissed.
5. Before addressing that question of construction it is necessary, albeit briefly, to explain in more detail the factual and procedural context in which it arises.

Background

6. Ms Ritchie and the group members on whose behalf she brought the underlying proceedings suffered loss or damage to property or personal injury as a result of a bushfire which started at 28 Brindabella Place, Carwoola in New South Wales on 17 February 2017, and burnt over an area of approximately 3500 ha (**the Carwoola bushfire**).
7. Her further amended statement of claim alleged that bushfire was caused by employees of APD, and specifically Mr Elliott and Mr Orford, who on 17 February 2017 were engaged in the installation of reinforcing steel into trenches which were part of residential building works being undertaken at that address. In particular, during the morning of that day Mr Orford, assisted by Mr Elliott, was using a Husqvarna K970 power cutter fitted with a cutting blade suitable for cutting reinforcing steel. In that use, the cut was performed by frictional abrasion between the cutting blade and the steel which in turn produced sparks. Those sparks were directed (unwittingly) towards a paddock vegetated with long dry fully cured grass. That resulted in a fire, the area of origin of which was 5 metres from the edge of a cleared area where the power cutter was being used. That fire spread and became the Carwoola bushfire.
8. The proceedings were first commenced against APD on 28 April 2017. That company was insured under the CGU policy, relevantly during the period 29 March 2016 to 29 March 2017. On 19 December 2017 APD was placed into liquidation, and on 16 August 2019 Ms Ritchie, for herself and on behalf of the group members, was granted leave to proceed directly against CGU pursuant to ss 4 and 5 of the *Third Party Claims Act*.
9. The issues between Ms Ritchie and CGU included whether, if APD was liable to Ms Ritchie and the group members, APD was indemnified against that liability under the policy. The bases upon which CGU denied liability included, apart from the exception in the Welding Endorsement, that the bushfire was not an occurrence happening in connection with APD's "Business" because the activities undertaken by Messrs Orford and Elliott did *not* answer that description. The primary judge rejected each of the ways in which that argument was made (esp at J[61]- [73]). CGU has filed a notice of contention challenging that conclusion, thereby seeking to have his Honour's orders affirmed in the event that Ms Ritchie's appeal might otherwise be allowed. As I would dismiss that appeal, it is unnecessary to consider the arguments made in support of that notice.

The Welding Endorsement

10. Clause 1.1 of the CGU policy, the general insuring clause, provides that CGU "will indemnify the Insured against the legal liability of the Insured" to pay compensation in respect of injury to any person or property damage, in either case occurring within the geographical limits of the policy and during the period of insurance "as a result of an Occurrence happening in connection with the Insured's Business".
11. Clause 8, headed "Endorsements to the Policy", provides that the "following" endorsements (being those specified in cl 8.1 and 8.2) to the "standard cover" will be deemed to be

incorporated in the policy only when specified in the Schedule by the appropriate number and title.

12. The Policy Schedule is dated 24 March 2016 and issued by a broker, Aon Risk Services Australia Limited. Relevantly it includes the following:

ENDORSEMENTS

8.1 Products sent to the USA/Canada Not Applicable

8.2 Errors and Omissions Not Applicable

WELDING ENDORSEMENT

The liability of the Insurer to indemnify the Insured pursuant to Clause 1.1 and to pay other costs and expenses pursuant to Clause 1.2 shall not extend to any liability arising out of or in any way connected with any arc or flame cutting, flame heating, arc or gas welding, electric, oxyacetylene, laser cutting and/or spark producing equipment by or on behalf of the Insured or similar operation in which welding equipment is used, unless such activity is conducted in strict compliance with the:

1. Australian Standard AS 1674, Part 1 - 1997 'Safety in Welding and Allied Processes – Fire Precautions' issued by the Standards Association of Australia
2. AS 1674.2 Safety in Welding and Allied Processes - Part 2: Electrical, and/or
3. AS/NZS 2211.1:2004 Safety of laser products Equipment classification, requirements and user's guide.

13. The endorsement operates as a conditional exception in respect of CGU's liability to indemnify under cl 1.1, and to pay other costs and expenses pursuant to cl 1.2. That indemnity does not extend to any liability arising out of or in any way connected with, relevantly, "[the use of] spark producing equipment by or on behalf of the Insured" *unless* that activity is conducted in strict compliance with the Standard.

14. As Australian Standard AS 1674 forms part of the endorsement, its terms are at least part of the textual context in which the words "spark producing equipment" are to be understood.

15. Australian Standard AS 1674 relevantly provided:

Australian Standard

Safety in welding and allied processes

Part 1: Fire precautions

SECTION 1 SCOPE AND GENERAL

1.1 SCOPE This Standard specifies precautions to be taken prior to and during hot work (including welding and allied processes), to prevent the possibility of fire or explosion, which may result in harm to persons or property. In particular, such precautions apply to hot work during manufacturing, construction, maintenance, repairs, demolition and where plant or equipment has contained flammable, combustible or explosive material.

...

1.3 DEFINITIONS For the purpose of this Standard, the definitions given in AS 2812 and those below apply.

...

1.3.3 Hot work - grinding, welding, thermal or oxygen cutting or heating, and other related heat-producing or spark-producing operations.

...

SECTION 2 GENERAL PRECAUTIONS

2.1 SUPERVISION Hot work shall be carried out under the control of a person who is responsible for the safe execution of all operations and has authority to enforce the requirements of this Standard with respect to other employees, outside contractors and other people in the area. Before hot work is commenced in any location, this person shall ensure that -

- (a) the hazards of the location are identified;
- (b) a means of managing the hazards is in place;
- (c) the equipment complies with the requirements of Section 4 ;
- (d) the equipment is located so that, in the event of malfunction of the equipment, a fire or explosion hazard is not created; and
- (e) there is no inherent hazard due to the nature of the item on which the hot work is to be performed.

NOTE : Where hot work is being carried out by a contractor, the person responsible for the hot work should be approved by both the principal and the contractor,

2.2 HAZARDOUS AREAS Hot work in hazardous areas shall be carried out in accordance with Sections 2 and 3.

...

2.11 GRASS FIRES AND BUSHFIRES Before hot work commences near dry grass or bush, the immediate area shall be cleared or wetted sufficiently to prevent the hot work from starting a grass fire or a bushfire.

...

SECTION 4 HOT-WORK EQUIPMENT

...

4.4 GRINDING MACHINES Work that includes the use of grinding machines driven by either electric power or compressed air shall be regarded as hot work within the meaning of the Standard.

The reasoning of the primary judge

16. Ms Ritchie’s argument, also made in this Court, was that the meaning of the words “spark producing equipment” should be determined having regard to features or characteristics shared by the listed “activities”, that being their description as used in the endorsement – “arc or flame cutting, flame heating, arc or gas welding, electric, oxyacetylene, laser cutting” – immediately preceding them in the endorsement. Those activities were said to describe processes which in each case “involve the direct application of heat to the material being worked on in order to create the cut or the weld” (per the expert evidence of Dale Rankin extracted by the primary judge at J[110]). As that heat source was generated by the equipment being used, it was said that the expression “spark producing equipment” should also be read as referring only to equipment which itself generates the sparks.
17. The primary judge rejected this argument for a number of reasons. First, citing the judgment of Dixon J in *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 647; [1947] HCA 17, his Honour concluded that the words “spark producing equipment” were not of uncertain scope and, for that reason, the maxim *noscitur a sociis* could not be invoked in construing those words or relied on as justifying a departure from their ordinary meaning (J[116]- [120]).
18. Secondly, whether the preceding list refers to activities or describes processes, the words “spark producing equipment” do not describe a process. They describe equipment which in its operation or application has a particular consequence, and irrespective of the underlying cutting, welding or other process that has that consequence. Accordingly, there is no reason for those words being read as referring only to equipment which itself produces the sparks as part of that process (J[121]).
19. Thirdly, the processes associated with that list of activities are directed at “two separate operations... being cutting and welding. What the APD workers were doing was cutting, and in doing so they were using spark producing equipment” (J[127]). If there was any common feature to those processes, it was not that they were “heat producing, but rather that they were processes ... likely to result in a fire” (J[128]). Equipment which answers the description “spark producing equipment” shares that characteristic (J[129]).

20. The primary judge concluded that the words “spark producing equipment” did not have any uncertain meaning. They described equipment which when used in a particular application or applications “produces sparks”, as was the case when the Husqvarna K970 power cutter was used to cut metal. An essential element of that “equipment” was its cutting blade, an abrasive blade used to cut metal (J[120], [123]).

The argument in this Court

21. In her submissions to this Court, Ms Ritchie accepts that standing alone, the words “spark producing equipment” could be used to describe cutting equipment which produces sparks when used in a particular way (as does the Husqvarna K970 power cutter), as well as cutting equipment which itself generates sparks as part of its cutting process. However, when used in the endorsement, as part of a list of activities or processes, the textual context indicates that the expression is to be understood as only referring to equipment of the latter kind.
22. This submission draws a very fine distinction, as Mr Rankin’s evidence reveals (see J[110]). That distinction is also one which has little or no significance in circumstances where the common feature shared by the listed activities and their underlying processes is that each carries a real risk of causing a fire. When cutting metal, the arc, electric and oxyacetylene cutting processes involve the direct application of heat to the metal until it becomes molten, thereby producing the ‘cut’. At that point, the molten metal is then deliberately blown away. The existence of that molten material represents the or at least a fire risk associated with this process. Whereas these processes involve the application of heat, the power cutter creates friction between its cutting blade and the metal surface, which in turn creates heat. It does not, however, involve any direct application of that heat to create the cut. The friction in turn creates sparks, which may usually be in a directed stream. It is those sparks which represent the primary fire risk in that process. Stepping back, in each of the processes a fire risk arises, in one from the molten waste material produced, and in the other from the sparks, again produced as an outcome of the process.
23. Ms Ritchie accepts that the purpose of the endorsement is to exclude the listed activities because they constitute fire risks, unless those activities are conducted in accordance with the Standard. That would suggest that the language describing any particular activity should not be read down if the effect of doing so is to exclude a fire risk that will arise from the conduct of that activity.
24. With reference to the terms of that Standard, two matters were relied on as relevant to the construction of the endorsement. The first was that the endorsement does not adopt the definition of “Hot work” when seeking to define the activities to which the indemnity is not to extend unless the activity is conducted in compliance with the Standard. It follows that the endorsement should not be read as if it were an attempt to except or exclude any liability caused by *any* heat-producing or spark-producing operation or activity to which the Standard applies. That must be so, simply because the language of the endorsement is different and more specific than that of the Standard.

25. The second matter relied on focusses upon the expression “spark-producing operations” in cl 1.3.3 of the Standard, which also is not taken up in the endorsement. The applicant accepts that expression describes any operation which produces sparks, whether as the outcome of a process which directly generates heat and sparks for the purpose of cutting or shaping, or as the outcome of friction between a cutting blade and metal surface. However, the expression “spark producing equipment” is said to be narrower and only to describe the former.
26. A further matter is said to have the consequence that CGU’s interpretation is not sensible or “businesslike” and for that reason to be rejected (*McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 at [22]). It is that the endorsement would operate with respect to *any* use of the Husqvarna K970 power cutter and irrespective of whether that use produces sparks. So construed, the endorsement would exclude a liability arising from a particular use of that equipment notwithstanding that it did not involve any fire risk. This argument should not be accepted. If the use of the equipment does not produce sparks, that use would not constitute use of “spark producing equipment” so as to engage the endorsement. Furthermore, if the equipment is construed as answering that description, the Standard would not apply to that particular use because it would not be a “spark-producing operation”. In such a case the exception would not be construed as applying because there would be no standard with which the activity was required to comply.

Disposition

27. In seeking to understand and give meaning to the words of the endorsement it is necessary to identify their commercial object and purpose. The language describes a series of “activities” (adopting the description of the draftsman) which on their face involve some form of fire risk, as the references to arc, flame, gas, heating, electric, oxyacetylene and sparks conjure up. That is confirmed by the requirement for “strict compliance” with an Australian Standard which addresses “Safety in Welding and Allied Processes - Fire Precautions” if the conduct of those activities is to be covered.
28. With the exception of the words “spark producing equipment”, each of the preceding groups of words describes an activity in terms which *also* identify the process which that activity engages and whether it is directed to cutting or welding or something else. The endorsement applies to each of those activities and accordingly the indemnity does not extend to liability arising out of or in any way connected to the conduct of any of them, in the absence of compliance with the Standard.
29. The fire risk to which the endorsement is directed is that arising from the conduct of the activities and irrespective of how or when that risk arises in the process which the activity engages. To take an example by reference to Mr Rankin’s evidence, a or the fire risk in the arc, electric, oxyacetylene and laser cutting processes arises from the application of heat to the metal material being worked on, which results in small globules of molten waste metal generally no bigger than the head of a match, which depending on where it ends up may cause a fire. Whilst each of those activities engages a process which involves the direct application

of heat, the fire risk is not limited to that part of the process and includes the by-products of that process.

30. The words “spark producing equipment” do not describe an activity or operation, and to engage the words of the endorsement commencing “by or on behalf of... unless such activity is conducted in strict compliance with [the Standard]” requires that some word or words be added to make grammatical sense of that part of the provision. The applicant suggests, correctly and uncontroversially, that this part of the endorsement is to be read as saying “... laser cutting and/or [the use of] spark producing equipment by or on behalf of the Insured”. As counsel submitted, the addition of those words makes “spark producing equipment” into an activity in the same way that the preceding groups of words describe an activity.
31. However unlike the preceding listed activities, that activity, being the use of a piece of equipment, does not identify any particular process. Rather, the activity takes its character from an outcome of the use of equipment, namely that when used it is “spark producing”. That outcome does not distinguish between sparks produced by the equipment for the purpose of its cutting or other process, or as a result of that process. The latter is the case in respect of the power cutter’s process, which when applied to metal relies on friction that in turn produces sparks. The description “spark producing equipment” is agnostic as to where in the underlying process the sparks are produced. Nor is that distinction of any significance to the achievement of the object and purpose of the endorsement, which is to specify activities involving fire risks and require that there be compliance with the Standard before the consequences of those activities are insured.
32. It remains to consider whether, construing the expression “spark producing equipment” in this way produces a coherent outcome with respect to the requirement for compliance with the Standard (*Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16]). It does. The definition of “Hot work” in the Standard includes, in addition to “grinding, welding, thermal or oxygen cutting or heating” other “related heat-producing or spark-producing operations”. It is accepted that the latter describes the outcome of particular “operations” of equipment and irrespective of the way in which and when in the relevant process the sparks are produced.

Conclusion

33. The primary judge was correct to conclude that the use of the Husqvarna K970 power cutter to cut reinforcing steel was a use of “spark producing equipment” by the Insured and accordingly within the endorsement.
34. In the result, leave to appeal should be granted and the appeal dismissed.
35. **MITCHELMORE JA:** I agree with Meagher JA.

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Decision last updated: 19 December 2022 .