

# Insurance CaseFlash

June 2009

## A further look at Section 45 of the Insurance Contracts Act

### Decision of the Western Australian Court of Appeal in *Speno Rail Maintenance Australia Pty Limited v Metals And Minerals Insurance Pty Limited* [2009] WASCA 31

#### Introduction

A dispute between two insurers over their liability for personal injury suffered by Mr Nolan at the hands of their insured, has been determined in a recent decision of the Western Australian Court of Appeal.

One of the issues before the Court concerned a provision in an insurance policy which partially offended section 45 of the Insurance Contracts Act. Did the section permit a Court to sever the offending words from the rest of the provision and thereby allow the provision to stand?

The Court held that it did.

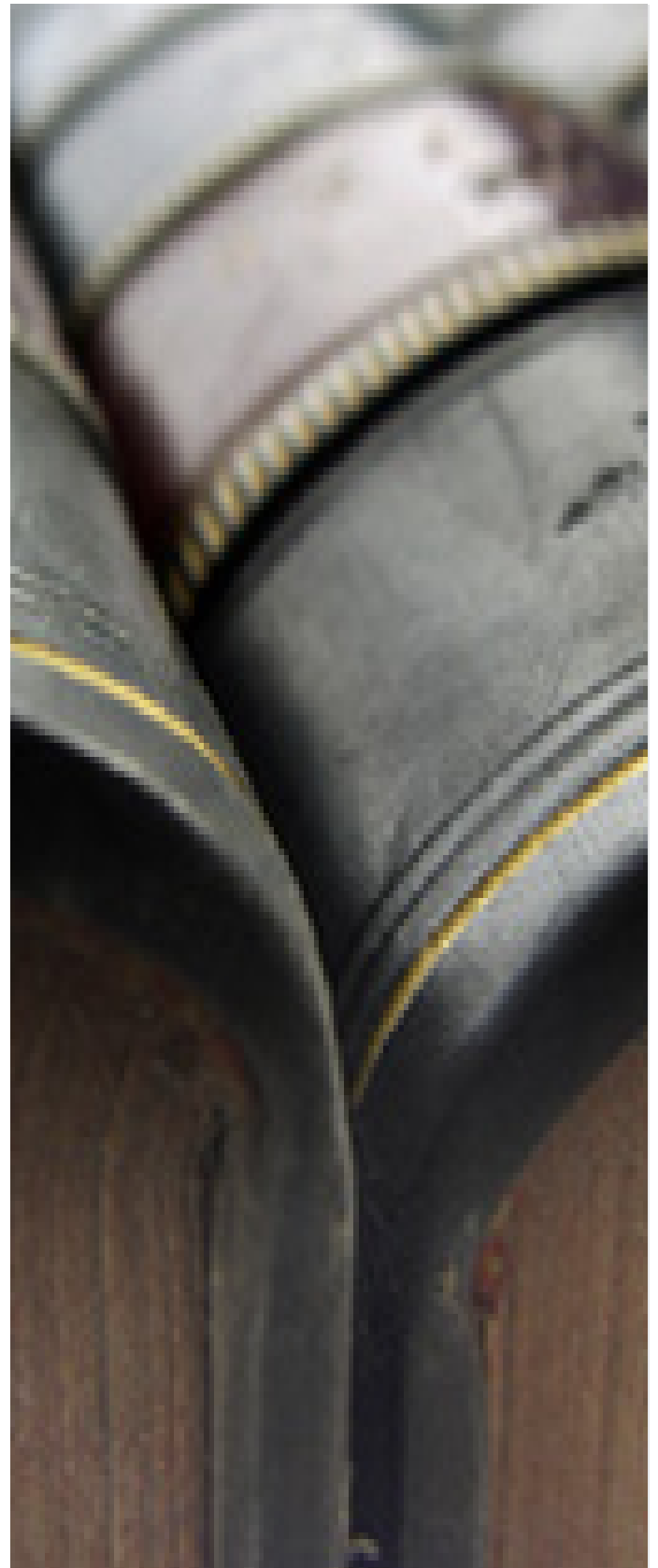
*"One issue concerned a provision in an insurance policy which partially offended section 45 of the Insurance Contracts Act. Did the section permit a Court to sever the offending words from the rest of the provision and thereby allow the provision to stand?"*

#### Background Facts

Section 45 of the Insurance Contracts Act provides:

1. *Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of the State or Territory, the provision is void;*
2. *Sub-section (1) does not apply in relation to a contract that provides insurance cover in respect of some or all or so much*

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of a loss that it is not covered by a contract of insurance that is specified in the first mentioned contract.

Two policies of insurances responded to a personal injury claim by Mr Nolan against the insured, Hamersley Iron Pty Ltd.

The provision of one policy purported to make itself an excess policy where the insured had either acquired or was a beneficiary under another policy. The insurer of the second policy argued that such a provision offended section 45 and was void. Both insurers, the argument continued, were liable to indemnify the insured for such damages as it was found liable to pay Mr Nolan.

### Judgment

The provision offended section 45 to the extent that it spoke of any other similar policy that the insured had acquired. But what about a policy, such as the second policy in this matter, which some one else had acquired for the insured's benefit? The provision did not offend section 45 to the extent that it spoke of such a policy.

So was the provision void?

It is here that the Court of Appeal and trial judge reached different views. Contrary to what the trial judge had concluded, the Court of Appeal held that as it was possible to sever from the provision those words which concerned any other policy which the insured had acquired, the provision could still stand in respect of those policies which the insured did not acquire but still benefited from.

The first policy therefore operated as an excess policy. It only responded if Mr Nolan's claim exhausted the second policy.

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### Conclusion

This is an important case. It may have been thought that section 45 would render completely void any provision which purported to prefer the operation of one policy over and above the operation of another.

This decision demonstrates otherwise.



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