

INSURANCE



LEGAL UPDATE

OCTOBER 2005

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Introduction

Welcome to the Middletons National Insurance Group. Middletons has grown significantly in the past year and we are committed to building and expanding the breadth and depth of our expertise. As well as concentrating on the consolidation of the Middletons and Acuiti Legal Insurance practices, our Sydney office more recently celebrated its move to new premises. Middletons now offers a truly national Insurance Group operating out of Melbourne and Sydney.

Consistent with this focus, we have produced a special edition of the Middletons Insurance Legal Update. Our feature article takes a fresh look at a recent decision on advocate's immunity. In other articles, we review a decision which clarifies who are the parties to directors' and officers' insurance policies and examine the liability of professionals who are mere conduits of misleading information provided by clients. We hope you enjoy this edition and future editions of the Middletons Insurance Legal Update.

Collateral Challenge Rule Gives Hope

Key message

The High Court's decision confirms our thinking on this issue... the immunity defence will be available to barristers and solicitors where the claim against them represents a challenge to the result of prior litigation.

Earlier this year, the High Court delivered judgment in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, a case in which Middletons acted in the interest of a barrister accused of professional negligence. The High Court held 6-1 that the barrister and, importantly, the instructing solicitor were entitled to immunity from suit.

The decision has affirmed the application of the advocate's immunity in Australia against the trend in England and New Zealand. It has also affirmed a view we have long held which has influenced the way in which we have conducted the defence of negligence claims against solicitors: that the immunity is all about the undesirability of relitigation, and nothing else. Following *D'Orta-Ekenaike*, the immunity defence will be available to barristers and solicitors where the claim

against them represents a challenge to the result of prior litigation.

Prior to the decision in *D'Orta-Ekenaike*, we had considered that the common law gave solicitors immunity in relation to claims arising from the out-of-court conduct of litigation (for example, drafting documents) to the same extent as barristers.

While there has been no shortage of cases against solicitors in the past 10 years arising out of litigation, the question of a solicitor's entitlement to immunity did not draw much attention in commentary and was not considered in any great detail at an appellate level. There was a general impression that solicitors were not entitled to the immunity except where they were acting as an advocate.

The High Court's decision confirms our thinking on this issue and vindicates the position that we have traditionally adopted on behalf of solicitors. There are two areas of interest that await clarification:

- » whether the immunity applies to negligence occurring in relation to a mediation or other alternative dispute resolution process before trial
- » the extent to which the immunity can be circumvented by plaintiffs relying on conduct occurring early in the litigation process.

As to the first question, the High Court's decision does not shed much light, although the position for solicitors is no worse than before. The lack of clear authority on this point is unfortunate because many claims against solicitors relate to settlement negotiations.

As to the second question, there is cause for hope. The Chief Justice's statement in a case decided before he rose to the High Court (*Keefe v Marks* [1989] 16 NSWLR 713 at 719) seems to have survived, and ought to be a key area of battle in cases to come:

"[A] plaintiff can [not] circumvent the immunity, simply by constructing allegations of damage in a manner which attempts to relate the harm suffered as a consequence of a barrister's alleged negligence to that aspect of his conduct furthest removed from physically standing up and speaking in Court."

While the extent of the immunity remains uncertain, in defending solicitors it will be important to focus attention on the solicitor's conduct which is most closely related to the trial and, therefore, most likely to attract the benefit of the immunity.

For more on advocates' immunity see two articles by Middletons senior associates, Toby Blyth and Stephen Warne:

- » T Blyth, 'Negligence: Collateral challenge may provide a rare safe harbour for legal practitioners', (2000) 38 (5) Law Society Journal 54
- » S Warne, 'Compromise of Litigation and Lawyers' Liability', (2002) 10(2) Torts Law Journal 167

Stephen Warne | Senior Associate
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For D&O Insurers: The Definition Of 'Officer'

Directors' and officers' insurers should be aware of the recent Chartered Secretaries Australia (CSA) submission to the Corporations and Markets Advisory Committee (CAMAC) discussion paper Corporate Duties Below Board Level. CSA supported the extension of directors' duties to some senior managers (as did other submissions), arguing this would best be

achieved by clarifying the Corporations Act ('the Act') definition of 'officer'.

Although CAMAC's final report is not expected to be delivered until next year, policies which rely on the Act's definition of 'officer' may need to be reviewed and legislative developments should be monitored.

Christopher Palmer | Solicitor

Directors Come To The Party

Key message

It is not only the Corporation but also the Directors who are [parties] to the contract of insurance.

A recent decision of the Supreme Court of New South Wales (*Martin John Green v CGU Insurance Limited & Ors* [2005] NSWSC 254) confirms the circumstances in which the directors and officers of a corporation are parties to the company's directors' and officers' insurance policy.

The liquidator of a company commenced proceedings to recover compensation from former directors ('the Directors') for alleged insolvent trading. The liquidator also sought leave under section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) ('the Act') to recover from CGU Insurance Limited as the directors' and officers' insurer.

Under section 6 of the Act, a plaintiff may, subject to certain restrictions, bring an action against an insurer in the same way as if the action were to recover damages from the insured. There are similar provisions in the ACT, the Northern Territory and New Zealand and a similar but more restrictive provision in the Commonwealth *Insurance Contracts Act*. Importantly, section 6 of the Act requires that for an insurer to be joined, the insured against whom a claim lies must be a person who 'has entered into' the relevant contract.

In this case, CGU argued that the Directors had not 'entered into' the policy. CGU relied on evidence that the proposal for the contract was not signed by all of the Directors and that the company's parent was described as the insured entity in respect of the policy. On this basis, CGU argued that the Directors were beneficiaries of the policy, rather than parties to it.

The Court adopted the criteria outlined in *CE Heath v Grey* (1993) 32 NSWLR 25 to conclude that the Directors were parties to the contract. These were:

- » the extent of the Directors' knowledge that insurance was being effected for them
- » the extent of the Directors' involvement in applying for insurance
- » the commercial context of the insurance package
- » the obligations under the policy.

Justice Bergin considered it relevant that the Directors knew that insurance was being effected on their behalf and that enquiries had been made of them in completing the proposal.

Her Honour also looked at the commercial context of the policy and was influenced by the evidence that the policy consisted of two contracts: one relating to directors' and officers' liability and the other providing for company reimbursement:

"It is not only the Corporation but also the Directors who are specifically, and it seems to me, intentionally, the subject of separate agreements... The use of two separate agreements favours the construction that it is not merely the Corporation that is the party to the contract of insurance."

Christopher Palmer | Solicitor

Misrepresentation: Mere Conduits Not Liable

Key message

Real estate agents may not be liable for misrepresentations contained in advertising material where the agent is a 'mere conduit' of the information.

A recent decision of the Federal Court has provided welcome relief for real estate agents and other professionals who pass on information from their clients. In *Dalton v Lawson Hill Estate Pty Ltd* [2005] FCAFC 169 the full bench held that misrepresentations in a brochure distributed by a real estate agent were the responsibility of the vendor.

The vendors of a vineyard in New South Wales retained the real estate agent to assist them to sell the property. A number of brochures were prepared and distributed to potential purchasers. The trial judge held that the brochures contained material misrepresentations as to the area of the vineyard under cultivation and the capacity of an irrigation bore on the property.

Some of the brochures were prepared by the vendors themselves although one was prepared in conjunction with the agent. Prior to its distribution, the agent had confirmed with the vendors the accuracy of the material contained in the brochure. That brochure also contained a disclaimer by the agent as to the accuracy of the information contained in it.

During the course of negotiations with a prospective purchaser, the information contained in the brochures was orally confirmed by the vendors on several

occasions. The vineyard and the associated business were sold in 2001.

The purchaser sued the vendors and the agent in relation to the misrepresentations. On appeal, the Full Court considered that the agent's local knowledge of the area did not mean that he had specific knowledge of particular properties. The Full Court went on to say that the mere distribution of a document containing misleading information does not necessarily constitute misleading conduct:

"Where a person purports to do no more than pass on information supplied by another, in circumstances that make it apparent that the person is not the source of the information and that the person expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on... does not involve conduct that is misleading or deceptive."

The decision provides welcome relief for real estate agents who may not be liable for misrepresentations contained in advertising material where the agent is a 'mere conduit' of the information. This decision also has wider implications for professionals facing claims for misleading and deceptive conduct or negligent misrepresentation.

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Further info

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