Legal Update | Insurance

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CGU Insurance Limited v AMP Financial Planning Pty Limited

In the January 2006 edition of the Middletons' Insurance Legal Update, we reported on the Full Federal Court's decision in *AMP Financial Planning Pty Limited v CGU Insurance Limited* [2005] FCFAC 185.

The High Court has now delivered its judgment on the appeal from that decision and has taken the opportunity to comment on the duty of utmost good faith under section 13 of the *Insurance Contracts Act 1984* (Cth) (*CGU Insurance Limited v AMP Financial Planning Pty Limited* [2007] HCA 36).

AMP was subject to claims from a number of investors in relation to the conduct of AMP's financial planners. The insurer neither denied indemnity nor refused its consent to the proposed settlements although it acceded to a protocol proposed by AMP for settlement of the claims. The insurer raised with AMP the possibility that AMP might have a defence to the claims under section 819 of the *Corporations Act 2001* (Cth) and told AMP that it should act as a prudent uninsured.

The evidence disclosed that AMP settled the claims in "circumstances of haste and external pressure" from ASIC, which had admonished AMP not to attempt to "rely on technicalities in its dealings with the investors". Furthermore, at the time it paid the settlements, AMP wanted to preclude the insurer from assuming the defence of the claims. The High Court endorsed the trial judge's conclusion that:

> *"AMP was not prepared to let the contractual process take its normal course but was manoeuvring events to serve its commercial purpose of satisfying ASIC whilst preserving, as best it could, its rights against CGU."*

The High Court found that the insurer was not required to indemnify AMP in the absence of evidence that the settlements were objectively reasonable and quoted the trial judge's comments that "the objective reasonableness of the settlements... could not be divorced from the question whether AMP was... liable to the investors with whom it settled in the full amount claimed."

To some extent, the decision turned on the facts of the case, in particular, that most of the settlements had taken place at a time when "CGU was questioning whether AMP was under any liability to the investors" and had not relinquished the requirement that CGU prove that the settlements were reasonable. In the circumstances, there was no reliance by AMP upon any representation by CGU which would found a successful estoppel claim.

While it was not necessary for the court to attempt any "comprehensive definition" of the duty, the following observations emerge from the judgment:

- the absence of good faith is not limited to cases of dishonesty. The duty may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests
- the duty involves notions of reciprocity similar to the "clean hands" rule in equity. AMP's "manoeuvring" meant that its complaint that the insurer was not acting with the utmost good faith was "somewhat bold" and "a trifle disingenuous". Even if there had been an absence of good faith on the part of the insurer there was not such a degree of reciprocal good faith on the part of AMP to entitle it to relief
- inordinate delay by an insurer in reaching a decision on indemnity can amount to a breach of the duty: "temporising by an insurer can be just as damaging to an insured as outright rejection of a claim. To preserve their businesses, business people often need to act expeditiously"
- section 13 of the *Insurance Contracts Act* does not permit a punitive sanction for not acting in good faith. If there is a breach of the duty, it is still necessary to identify how that breach leads to the conclusion that the insurer is liable to indemnify the insured.

Finally, Justices Callinan and Heydon thought it significant that neither party had invoked the "QC clause" in the subject policy. In their Honours' view, this was significant factor in AMP's lack of "clean hands".

Owners – Strata Plan No. 50530 v Walter Construction Group Limited (in liq.)

The New South Wales Court of Appeal has restricted the application of section 6 of the *Law Reform (Miscellaneous Provisions) Act, 1946* (the Act) in the case of "claims made" policies.

Section 6(1) of the Act provides:

> *"If any person (hereinafter in this Part referred to as the insured) has, whether before or after the commencement of this Act, entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person's liability shall on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability."*

The section provides for a charge over insurance moneys which descends at the time of the event giving rise to the claim. The nature of "claims made" policies means that the subject policy (and conceivably the insurer) may not have been in existence at the time of the event giving rise to the claim. As Justice Giles remarked in the earlier case of *Tzaidas v Child* (2004) 61 NSWLR 18, there is a "conceptual difficulty":

> *"in a charge attaching at the time of the event giving rise to the claim against the insured if that time is before the contract of insurance is made, as may occur with claims made policies".*

In *Strata Plan No. 50530 v Walter Construction Group Limited*, the Court of Appeal referred to how various trial judges had attempted to deal with the "conceptual difficulty" and the resulting divergent lines of authority. Ultimately, the Court of Appeal extracted four propositions from the High Court authority in *Bailey v New South Wales Medical Defence Union Limited* (1995) 184 CLR 399:

- first, the term "charge" in section 6 is a statutory right which does not neatly fall into existing legal or equitable categories
- secondly, the charge arises on the happening of the "event" referred to in section 6 – that is whatever completes the relevant cause of action
- thirdly, the relevant contract of insurance is that as it stood when the charge descended, and
- fourthly, the phrase in section 6(1) of the Act that "insurance moneys that... may become payable" refers to situations where, while the charge has descended, there is no sum which could be identified as payable by the insurer to the insured.

On the basis of these propositions, the Court of Appeal decided that a charge could not attach to a policy that had not come into existence at the time the charge descended.

While the members of the Court agreed that the meaning of "charge" in the context of the Act did not have its usual legal or equitable meaning, they also considered that the legislature could not have envisaged:

> *"something called a charge in existence at a time when there is no property to which it could attach, and no person against whom any rights could be asserted to have a charge attached to property if and when the property comes into existence".*

While this decision has restricted the beneficial effect of section 6, (and arguably section 206 of the *Civil Law (Wrongs) Act 2002* (ACT) which is similar to section 6), as all insurers will be aware, there are a range of other provisions that provide third parties with rights with respect to insurance policies in certain circumstances. These include section 51 of the *Insurance Contracts Act 1984* (Cth), section 117 of the *Bankruptcy Act 1966* (Cth) and section 562 of the *Corporations Act 2001* (Cth).

Brescia Furniture Pty Ltd v QBE Insurance (Australia) Ltd

This recent decision of Justice Hammerschlag of the New South Wales Supreme Court provides further guidance on when an insurer can be liable for damages beyond the limit of indemnity under the policy. In particular, his Honour considered whether an insurer can be liable for consequential damages when the policy has not been terminated for breach.

In 2005, Brescia's showroom was destroyed by fire. Brescia sought indemnity from its insurer under an industrial special risks policy providing cover against property damage and consequential loss of profits. The insurer refused to indemnify Brescia on bases including that Brescia had failed to take reasonable precautions to prevent fire damage which was a condition precedent to the insurer's liability to indemnify.

Justice Hammerschlag found that the insurer was liable to indemnify Brescia. Brescia sought damages for consequential loss arising from Brescia's failure to indemnify. Brescia argued that the insurer's refusal to indemnify had caused loss beyond the amount of the limit of indemnity under the subject policy.

The insurer relied on the Tasmanian Supreme Court's decision in *Russell Young Abalone Pty Limited v Traders Prudent Insurance Company Limited* (1993) 7 ANZ Ins Case 61-182 to argue that if an insured did not accept the insurer's repudiation of the policy, the contract of insurance remained on foot entitling the insured to recover only in accordance with the terms of the policy.

Justice Hammerschlag reviewed various authorities on this point and concluded that "[t]he breach by an insurer to meet its obligations to indemnify is no different to a breach by any other citizen of a contract." His Honour said:

> *"The general principle remains that when assessing damages for breach of contract the plaintiff should be put in the position that he or she would have been in but for the breach, that is, the position if the contract had been performed."*

Brescia v QBE follows a line of authorities dealing with an insured's entitlement to recover damages for an insurer's breach of contract including for loss of use of the insurance funds. In *CIC Insurance Limited v Bankstown Football Club Limited* (1995) 8 ANZ Ins Cas 61-232, Kirby P (as he then was) said:

> *"A claim for general damages for unreasonably tardy payment arising from or the belated recognition of an entitlement to insurance indemnity is by no means heterodox."*

Insurers should also be aware of the provisions in the *Trade Practices Act 1974* (Cth), the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) which entitle an insured to recover damages if the insurer's behaviour has been unconscionable. This may include cases in which an insurer has validly declined indemnity but nevertheless acted unconscionably in its dealings with the insured.

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