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Insurance law update

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CASE NOTE

Insurers take note: Victorian cases clarify limitations on joinder of insurers, strike-out applications and awards of indemnity costs

Three recent Victorian decisions serve as an important reminder of possible impacts on insurers:

1. *Akron Roads Pty Ltd (in liq) v Crewe Sharp & Ors* [1] (*"**Akron Roads v Crewe Sharp**"*) – the Supreme Court determined that a person who is not a party to an insurance contract has a proper basis for joining an insurer as a defendant to a proceeding in circumstances where the insurer has declined indemnity to an insured;

2. *Shumsky v Visintin (Building and Property)*[2] ("***Shumsky v Visintin***") – two respondents successfully argued before the Victorian Civil and Administrative Tribunal ("**Tribunal**") that the applicants' claims against them should be struck out on the basis that the parties had previously entered into a duly executed release that operated to bar the commencement of the proceeding; and

3. *Macfayden & Ellis v Bank of Queensland Limited (ACN 009 656 740)* [3] ("***Macfayden v Bank of Queensland***") – The Supreme Court utilised the provisions in the Civil Procedure Act 2010 (Vic) ("**CPA**") to award indemnity costs.

[1] [2015] VSC 34.
[2] [2015] VCAT 172.
[3] [2015] VSC 20.

JOINDER OF INSURERS - *AKRON ROADS V CREWE SHARP*

Facts

This case concerned an application by the liquidators of Akron Roads Pty Ltd ("**Akron Roads**") to join CGU Insurance Limited ("**CGU**") as a defendant to the proceeding.

The liquidators had commenced an action against Akron Roads, the directors of Akron Roads, and Crewe Sharp Pty Ltd ("**Crewe Sharp**"), a related corporation of Akron Roads, for losses resulting from insolvent trading by Akron Roads, and breaches of the *Corporations Act 2001* (Cth).

Crewe Sharp, and one of Akron Roads' directors, were insured under a professional indemnity policy underwritten by CGU. CGU had declined indemnity to Crewe Sharp and the relevant director in respect of the claim by the liquidators of Akron Roads.

The liquidators of Akron Roads therefore sought to join CGU as a defendant to the proceeding, with their proposed claim against CGU seeking a declaration that CGU indemnify Crewe Sharp and the relevant director for their liabilities to compensate the liquidators of Akron Roads.

CGU opposed the joinder application, and argued, in short, that:

a) Akron Roads' liquidators were not entitled to declaratory relief against CGU, as they are not an insured under the relevant policy of insurance. Declaratory relief is only available as a remedy if Crewe Sharp or the relevant director make a direct claim against CGU;

b) the liquidators' proposed claim had no proper basis as the terms of the policy clearly exclude liability to Crewe Sharp and the relevant director; and

c) the proposed pleading was deficient, as, amongst other things, it did not particularise that Crewe Sharp was a director of Akron Roads.

Decision

The Victorian Supreme Court held that Akron Roads' liquidators had a proper basis to join CGU as a defendant, and permitted the joinder.

Relying on the principles articulated in *The Owners-Strata Plan 62658 v Mestrez Pty Ltd*,[4] which described situations when it may be appropriate to join an insurer as a defendant to a proceeding, the Court considered that the liquidators had a sufficient interest in the proceeds of insurance to provide them with standing to apply for declaratory relief against CGU. In particular, the Court was reluctant to refuse the joinder application on this basis, noting that "*it would be a rare case where circumstances relevant to the existence of jurisdiction and the exercise of discretion to make a declaration were all before the court on a joinder application*"[5].

Furthermore, despite CGU advancing a number of substantive defences to the liquidators' proposed claim in an effort to establish that the proposed claim had no proper basis, the Court was not persuaded that the proposed claim was baseless and bound to fail. While the Court recognised that the legal and factual merits of a case play a part in the exercise of the Court's discretion when considering a joinder application, the Court was clearly of the view that the issues raised by CGU were a matter for trial.

In addition, the Court did not consider that it was appropriate to refuse the joinder application on the basis that the pleading did not contain a particular that Crewe Sharp was a director of Akron Roads. The Court considered that this issue was something that could be addressed following service of the pleading.

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[4] [2012] NSWSC 1259, [54].

[5] *Akon Roads v Crewe Sharp at* [28].

STRIKE-OUT APPLICATIONS - *SHUMSKY V VISINTIN*

Facts

The applicants alleged that a builder, architect and building surveyor had failed to properly procure insurance which would indemnify the applicants for loss or damage suffered as a consequence of the builder breaching its warranties. In particular, the applicants alleged that the policy of insurance did not name the relevant builder, which meant that the applicants were unable to claim the benefit of the insurance policy.

The applicants had, in an earlier action, sued the architect and building surveyor for loss and damage arising from the design and construction of domestic building work. This claim had been settled, and terms of settlement containing a release had been duly executed by the parties.

Accordingly, the architect and building surveyor brought an application to strike-out the applicants' claim pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("**VCAT Act**") on the basis that the release in the terms of settlement executed in the earlier proceeding operated to bar the commencement of the current proceeding. In support of their contention that the release barred the current proceeding, the architect and building surveyor made the following submissions:

- Although the particulars of breach against the architect and building surveyor differed in each proceeding, the alleged breach concerned the same retainers.
- The loss and damage claimed by the applicants in the subsequent proceeding was the same loss and damage that was the subject of the earlier proceeding.
- The applicants should have reasonably been aware, prior to executing the terms of settlement, that the policy of insurance named the wrong builder. Therefore, the applicants' causes of action against the architect and building surveyor were caught by the release in the terms of settlement.

The applicants argued that the cause of action in the subsequent proceeding was different from the cause of action in the earlier proceeding.

Decision

The Tribunal agreed with the submissions made on behalf of the architect and building surveyor, and held that the release precluded the applicants from bringing the subsequent action. The Tribunal therefore struck-out the proceedings against the architect and building surveyor pursuant to section 75 of the VCAT Act.

The Tribunal also declared that the applicants were estopped from raising the issue of the failure to ensure that adequate warranty insurance was in place, notwithstanding that the earlier proceeding had been compromised through negotiated settlement.

At a subsequent directions hearing, the applicants were ordered to pay the architect's and building surveyor's indemnity costs of the proceeding.

INDEMNITY COSTS - *MACFAYDEN V BANK OF QUEENSLAND*

Facts

The Bank of Queensland Limited ("**Bank of Queensland**") made an application for costs on an indemnity basis following a decision of the Victorian Supreme Court to dismiss the plaintiffs' proceeding for want of prosecution.

The Bank of Queensland argued that an award of indemnity costs was appropriate in this instance as the plaintiffs had:

a) persistently failed to plead a proper statement of claim;
b) continued to make baseless allegations against the Bank of Queensland;
c) commenced and continued with a claim that had no real chance of success; and
d) caused a loss of time to the Bank of Queensland, and the Court.

The plaintiffs submitted that they had acted in accordance with the obligations imposed on them by the CPA, and they had attempted to address all of the concerns of the Bank of Queensland throughout the course of the proceeding. Therefore, an order for indemnity costs was not appropriate, particularly given that the (relatively) new standard costs order enables a party to recover more costs than the previous party and party costs regime.

Decision

Although the Court recognised that the plaintiffs' proposed causes of action were difficult to properly plead, it held that an award of indemnity costs was appropriate in this instance for the following reasons:

- The plaintiffs were on notice from the date upon which the Court refused to grant them leave to file and serve a second further amended statement of claim that if they did not produce a properly pleaded and particularised claim, it was probable that their claim would be struck out for want of prosecution, and an indemnity costs order would be made against them.
- The plaintiffs continued to pursue their claim subsequent to receiving notification from the Bank of Queensland's legal representatives that they considered its pleadings were deficient, which has been recognised by the judiciary as providing a basis for awarding indemnity costs.[6]
- The plaintiffs' conduct was a breach of the obligations imposed by the CPA, namely the obligations to "*facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute*", "*further the administration of justice*", "*act honestly*", "*minimise delay*" and to "*have a proper basis for making a claim*".[7] Accordingly, noting that:
  a) section 29(f) of the CPA allows the Court to make "*any other order that the Court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations*"; and
  b) section 29(3) of the CPA provides that the Court's power to make costs orders is not limited by section 29 of the CPA;

Justice Sifris held that the CPA provides a further separate and independent basis for awarding indemnity costs.

IMPACTS

The above cases are a reminder to insurers that:

- A person who is not a party to an insurance contract is likely to have a proper basis for joining an insurer as a defendant to the proceeding if the insurer has declined indemnity to another party involved in the proceeding.
- The commencement of proceedings against an insured should be carefully scrutinised to ensure that there is actually a question to be tried. If not, consideration should be given to bringing an application to strike out the claim.
- Breaches of the CPA may result in an award of indemnity costs being made against the contravening party.

Authors:
Hubert Wajszel, Partner
Sasha Jeffrey-Bailey, Associate
Daniella Christodoulou, Lawyer

CONTACTS

Shona Wilde, Sydney
Peter Ewin, Melbourne
Hubert Wajszel, Melbourne
Peter Harvey, Newcastle
Peter Jones, Adelaide
Peter Forbes-Smith, Hobart
Darren Miller, Perth
Chris Osborne, Darwin

[6] See *Liberty Financial Pty Ltd v Scott* [2005] VSC 472; *Russo Stores Pty Ltd v Safeway Stores Pty Ltd* [1998] ATPR 41-641; and *Davids Holdings Pty Ltd v Coles Myer Ltd* (1995) ATPR 41-383.
[7] Sections 1(c), 16 – 18 and 25 of the CPA.