

8 August 2008

Insurance Law E-alert

Quintano –v– B W Rose Pty Ltd & ors

On 5 August 2008 Justice Brereton of the Supreme Court handed down judgment in the matter of *Quintano –v– B W Rose Pty Ltd & Ors [2008] NSWSC 793*.

This case arose out of a professional indemnity insurer declining indemnity on the grounds of certain exclusions in the policy.

Justice Brereton ruled that:

1. If a claim has foundation in a matter, then the claim arose from that matter, irrespective of the formulation of the pleadings; and
2. Where a policy excludes cover for claims arising from a specified matter, it is the insurer's intention to decline indemnity where its existence is asserted, with no need for the matter to objectively exist.

Justice Brereton found in favour of the Insurer in both instances, finding that the exclusion clause did apply.

The Facts

On 15 December 2002 Luke Quintano suffered traumatic brain damage when he was shot in the head at a nightclub operated by B W Rose Pty Limited ("**BWR**"). Quintano subsequently brought a claim for damages against BWR for failure to have adequate security.

Prior to the incident BWR had retained a broker (Prestige) to procure their public liability insurance. Prestige placed this insurance, through a second broker that specialised in "hard to place" risks, with an unregistered overseas insurer.

The insurer was subsequently wound up by the Federal Court of Australia, and the second broker ceased to operate.

BWR brought a cross-claim against Prestige, alleging that they had negligently placed insurance with an unregistered overseas insurer and failed to advise them of the associated risks. (This cross-claim was ultimately dropped prior to hearing).

Prestige, by way of third cross-claim, claimed indemnity from its professional indemnity insurers, who declined indemnity on the grounds of the following exclusion clause:

"The underwriter shall not provide indemnity in respect of any Claim ...

arising from:

- a) the insolvency of any insurer or reinsurer; or
- b) any breach of the Assured's duty to advise on the suitability (which expression shall, without prejudice to the generality of such term, including financial standing) of any insurer or reinsurer utilised; ..."

The use of the term "arising from"

Prestige's argument was two-fold: firstly, that the relevant exclusions operate only if the subject matter is the proximate cause of the claim; and secondly, that since BWR's cross-claim against Prestige did not allege or refer to the insolvency of the public liability insurer, the claim could not be said to arise from the insolvency, and therefore the exclusion clause was not invoked.

In respect of Prestige's "proximate cause" submissions, Justice Brereton concluded that *"A claim can be said to arise from a matter – at least – if it has a foundation in that matter, so that the matter is one of the underlying facts that, if they exist, together justify the claim."*

Secondly, in accordance with the case law, he held that the formulation of the claimant's case against Prestige cannot be determinative of the claim for professional indemnity.

Justice Brereton held that the gist of the claim brought by BWR was that it was left without indemnity, which was attributable to the insolvency of the insurance company, meaning that the claim against Prestige arose from the insurer's insolvency despite this not being explicitly pleaded, thereby invoking the exclusion clause.

Can a claim arise from a matter if the matter does not objectively exist?

The professional indemnity policy excluded cover for claims arising from a breach of duty to advise on the suitability of an insurer or reinsurer.

Prestige submitted that the exclusion clause could operate only where it was proved, as a matter of objective fact, that there was a breach of the stipulated duty.

Justice Brereton identified that, were this to be the case, it would give rise to the curious situation where indemnity arises in matters where the insured is ultimately found not to have breached a duty, but indemnity is declined where the insured is found to have breached their duty.

Justice Brereton considered the structure and purpose of the policy, in determining that the exclusion clause is invoked where a breach of the insured's duty is alleged, and is not dependant upon the existence of the breach as an objective fact.

Conclusion

This decision confirms that the words "arising from" are inclusive words of causation. His Honour was quite pithy when saying :-

"...but the craftiness or clumsiness of the claimants pleading is not determinative of the characterisation of the claim."

And the real message is:-

"a cause of action arises from a set of material facts proof of which found the cause of action...a claim arises from the underlying facts, that, if established, justify the claim. In my view, a claim can be said to 'arise from' a matter – at least – if it has a foundation in that matter".

It is unnecessary that a claim must solely or totally arise from that matter. All that is required is that the matter is one of the underlying facts that if they exist together, justify the claim.

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