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## Insurance Law e-alert

### *Vero Insurance Limited v QBE Insurance (Australia) Limited* [2011] NSWSC 593

#### Background

Mr Selia Im was an employee of Priceright Construction Pty Ltd (**Priceright**), a contractor engaged to undertake work for the Liverpool Hospital Project for Barclay Mowlem Construction (**BMC**). Im was injured at the Liverpool Hospital site in the course of his duties and sued BMC and Priceright for the injuries he suffered.

District Court Proceedings were settled on the basis that BMC was to pay Im \$500,000 inclusive of costs and workers' compensation payback.

Vero indemnified BMC and paid out a total sum of \$523,950.14 inclusive of defence legal costs. Vero then claimed contribution from QBE alleging dual insurance of BMC for the same risk under the two insurance policies. QBE denied that it was liable to contribute and the two parties were referred to a Referee for the purposes of determining the issues. Ultimately the Referee found for QBE and Vero challenged the findings of the Referee by commencing an action in the Supreme Court.

#### Issues

In support of its denial of contribution, QBE sought to rely on exclusion clause 5.21 of its policy which stated:

*"The Liability of the Insurer to indemnify the Insured pursuant to clause 1.1 and to pay other costs pursuant to clause 1.2 shall not extend to any of the following:*

##### **5.21 More Specific Insurance**

*Liability for which separate insurance protection has been effected by the Named Insured or an insured in paragraph (b) of the Definition of 'Insured' except as provided for by Memorandum 6.1 hereunder."*

##### **6.1 Difference in Conditions and Excess (Deductible)**

*Notwithstanding anything contained in this Policy to the contrary, Insurers hereby agree that this Policy shall, in respect of Construction Operations where the principal, owner, head contractor or another (including the Named Insured) has effected more specific Contractor's Liability/Public Liability insurance (hereafter referred to as Primary Insurance'(sic), provide the following indemnity:*

- (a) Pay all losses not otherwise recoverable under those policy(ies)*
- (b) Pay all amounts in excess of that recoverable under those policy(ies);*
- (c) Pay the difference (if any) between the Excess (Deductible) under the Primary Insurance and the Excess (Deductible) that would have been applicable under this Policy if the contract has been insured hereunder;*

*provided that such losses and/or amounts would but for the existence of the specified policy(ies) be recoverable under this Policy and subject to the Limit of Liability stated in the schedule and provided that such cover is for the sole benefit of Insureds designated in paragraph (a), (b), (c) and (d) of the Definition of 'Insured' and is not for the benefit of sub-contractors or other contractors, principals or owners."*

Basically, QBE's exclusion clause stipulated that it would not indemnify an insured if the insured already had a more specific insurance cover which it had already effected. The exception was that it would indemnify any excess cover not recoverable by that more specific insurance cover, ie: that of Vero's policy (clause 6.1).

The Referee's finding was that QBE's exclusion clause could only operate to limit its liability as permitted by section 45 of the Insurance Contracts Act.

However, the wording of section 45 is that the insurer was unable to rely on an exclusion clause limiting or excluding its liability by reason that the insured had **entered into** some other contract of insurance.

The crux of the issue was whether QBE's exclusion clause, in limiting its liability in relation to insureds that had **effected** separate insurance protection, would trigger the operation of section 45 which relates to insureds that had **entered into** some other insurance contract.

## The decision

The Referee found that BMC had effected insurance cover, but it did not enter into a contract of insurance with Vero in the sense contemplated by section 45. Under the terms of its contract with NSW Department of Commerce (**the Department**) for the construction of the Liverpool Hospital project, BCM covenanted to effect and maintain insurance. The Department took steps, through Marsh Pty Limited, to facilitate performance by BMC of that obligation by negotiating an endorsement to an earlier Vero policy so that it extended cover for contract works and public liability in relation to the Liverpool Hospital project.

In agreeing with the Referee's decision, Justice Einstein held that it was plainly possible to effect insurance without becoming a party to a policy of insurance. In dismissing the claim, Justice Einstein adopted the decision of the Referee and found that there was no error of principle or approach.

## Implications

This case confirms that where a subcontractor has covenanted to effect and maintain insurance with a particular insurer, this does not equate to the subcontractor entering into a contract with that insurer.

With this in mind, a carefully drafted exclusion clause in one insurer's policy may be effective to avoid contribution to any dual insurance claims by another insurer.

## Contacts

Linda Hamilton, Sydney	+61 2 9391 3112	<a href="mailto:lhamilton@hunthunt.com.au">lhamilton@hunthunt.com.au</a>
Peter Ewin, Melbourne	+61 3 8602 9226	<a href="mailto:pewin@hunthunt.com.au">pewin@hunthunt.com.au</a>
Peter Jones, Adelaide	+61 8 8414 3330	<a href="mailto:pjones@hunthunt.com.au">pjones@hunthunt.com.au</a>
Peter Forbes-Smith, Hobart	+61 3 6231 0131	<a href="mailto:pforbessmith@hunttas.com.au">pforbessmith@hunttas.com.au</a>
Tony Mylne, Brisbane	+61 7 3292 9715	<a href="mailto:amylne@macrossans.com.au">amylne@macrossans.com.au</a>
Darren Miller, Perth	+61 8 9488 1300	<a href="mailto:darren.miller@marksandsands.com.au">darren.miller@marksandsands.com.au</a>
Peggy Cheong, Darwin	+61 8 8924 2600	<a href="mailto:pcheong@huntnt.com.au">pcheong@huntnt.com.au</a>