

CGU Insurance Ltd v. Porthouse
New South Wales Court of Appeal
11 April 2007

FACTS

The claim arose out of an action commenced by Mr Bahmad against his former solicitors, Cameron Gillingham Boyd (CGB), Mr Porthouse, barrister and another solicitor Mr Kheir for damages in respect of the loss of a cause of action.

Mr Bahmad's original claim arose in 1999, when he sustained an injury to his arm while performing work pursuant to a community service order. In May/June 2000, CGB briefed Porthouse to advise on Bahmad's claim.

From about June or July 2001, amendments by way of tort law reform were widely publicised in New South Wales. These amendments included severe restrictions on common law claims for injuries. The commencement date for the amendments was 27 November 2001.

On 20 November 2001, Porthouse was sent an expert's report and on 26 November 2001, he was asked to draft a Statement of Claim for Bahmad. He drafted a Statement of Claim, which was filed on 11 December 2001.

On 4 November 2002, Mr Bahmad recovered a verdict at an arbitration. The Crown applied for a rehearing and the matter was listed for hearing in the District Court on 15 May 2003. On that day, Counsel for the State of New South Wales informed Mr Porthouse that as Bahmad's claim was not commenced prior to 27 November 2001, the State would argue that the Bahmad's claim could not succeed, as it failed to satisfy a 15% threshold that applied to claims made after the legislative amendments became operative.

In late May and early June 2003, Porthouse researched the point and satisfied himself that, if it was correct, Mr Bahmad would lose the case.

Bahmad's case (surprisingly) succeeded before the District Court.

On 22 September 2003, the Crown lodged its Notice of Appeal. The Appeal was listed for hearing on 19 July 2004.

On 20 May 2004, Mr Porthouse completed a proposal form seeking Professional Indemnity Insurance from CGU for the year commencing 30 June 2004. Question 4 on the proposal form was: *"Are you aware of any circumstances, which could result in any Claim or Disciplinary Proceedings being made against you?"* Mr Porthouse inserted the answer "No".

CGU issued the policy, which did not cover "known claims" or claims arising from "known circumstances". Known circumstances were defined in the policy as follows:

"11.2 Known Circumstances

Any fact, situation or circumstance which:

An Insured knew before this Policy began; or

A reasonable person in the Insured's professional position would have thought before this Policy began,

Might result in someone making an allegation against an Insured in respect of liability, that might be covered by this Policy."

On 19 July 2004, the Crown's Appeal was heard. That day, Mr Bahmad foreshadowed a potential claim against his legal advisors if the Appeal was successful.

On 27 August 2004, the Court of Appeal allowed the Crown's Appeal, and set aside the verdict in favour of Bahmad. Bahmad then commenced proceedings alleging negligence against his former solicitors and Mr Porthouse.

DECISION OF PRIMARY JUDGE

Bahmad's case was heard by Judge Balla in the Supreme Court of New South Wales. CGU denied cover to Porthouse as, in their view, the Bahmad claim arose from known circumstances. Porthouse joined CGU to the proceeding.

Her Honour found negligence established against Mr Porthouse, on the basis that he should have appreciated the amendments proposed to commence on 27 November 2001, could defeat Mr Bahmad's claim. She also found CGU was liable to indemnify Porthouse.

Her Honour found that it did not occur to Porthouse that the late filing of the Statement of Claim could be matters which would give rise to a claim against him.

COURT OF APPEAL

CGU appealed the decision.

The Court of Appeal, in a 2:1 majority, dismissed CGU's Appeal. The majority judgments held that Judge Balla was correct to consider that the combination of the words "thought" and "might" in CGU's exclusion covered a spectrum which ranged from something like "*believed that the circumstances might as a realistic possibility result in an allegation*" down to "*fleetingly thought that the circumstance might as a remote possibility result in an allegation*". Judge Balla correctly found the exclusion was ambiguous and construed it against CGU to mean the former.

The language in the exclusion was different from that of Section 21(1) of the *Insurance Contracts Act*, which referred not to what a person "would" have thought, but rather to what a person "*could reasonably be expected to know*". The majority held that what conclusions a reasonable person would have thought could be approached by considering what

an actual person did think and asking if this was unreasonable.

THE DISSENTING JUDGMENT

Justice Hunt delivered a dissenting judgment. His Honour related to the wider issue of whether a reasonable person in the Insured's professional position would have thought (at the relevant time) that the circumstances known to the Insured "*might*". The word "*thought*" imposed a lower threshold than the word "*knows*".

His Honour considered that a reasonable person would clearly have been far more perceptive of the possible consequences of those circumstances than Porthouse was. Porthouse's fixed belief was that he had not been guilty of negligence – that is, that no claim made against him would succeed. He did not even consider whether there was a real possibility that the Plaintiff would see it differently and might make an allegation against him nonetheless.

CONCLUSION

This is an unusual case. Given that the lay client was alive to the possibility of a claim against his lawyers, it is difficult to accept that a professional lawyer was not aware of that same possibility.

The case does highlight a judicial trend to read down exclusions. Policy exclusions and terms that rely on what an insured thinks or thought are dangerous and may be viewed as ambiguous. The formulation contained in s. 21(1) is perhaps less open to judicial interference. For some reason, CGU did not allege a non disclosure defence against Porthouse.

The interpretation of the known circumstance exclusion renders the exclusion ineffective, as an insured who fails to disclose circumstances he or she "*believed as a realistic possibility might result in an allegation*", may be guilty of fraudulent nondisclosure which is already dealt with under the *Insurance Contracts Act*.



By Vanessa Kemp
Senior Associate
vkemp@mrlaw.com.au