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Scope of Services:

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Contractual + commercial litigation
Directors' + officers' cover
Discrimination law
Employment contracts
Employment law
Equal opportunity
Financial services
General insurance
Life insurance
Medical defence
OH+S
Policy drafting + interpretation
Professional indemnity
Public + products liability
Self insurance
Superannuation
Trade + transport + aviation

CGU INSURANCE LTD v. PORTHOUSE
NSW Court of Appeal
11 April 2007

THE FACTS

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

Mr Bahmad's compensation 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 Mr Porthouse to advise on Bahmad's claim.

From about June 2001, tort law reform amendments 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, Mr 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, Bahmad recovered a verdict at an arbitration. The Crown applied for a rehearing and the matter was heard on 15 May 2003 in the District Court. 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, it could not succeed, as it failed to satisfy the 15% threshold that was introduced by the tort law reform.

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

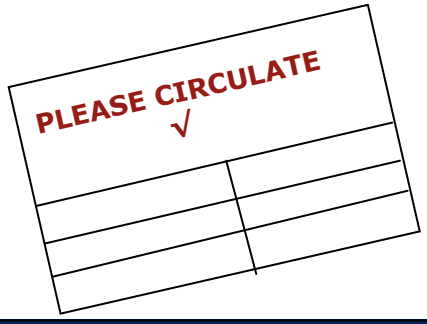
Bahmad's case (surprisingly) succeeded before the District Court.

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's policy 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 22 September 2003, the Crown lodged its Notice of Appeal. On 19 July 2004, the Crown's Appeal was heard. On that day, 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 against his former solicitors and Mr Porthouse.

DECISION OF PRIMARY JUDGE

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

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

Her Honour found that it did not occur to Mr Porthouse that the late filing of the Statement of Claim could 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 *"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 refers 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 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 was concerned with 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"* give rise to our allegations. The word *"thought"* imposed a lower threshold than the word *"knows"*.

"... His Honour (Hunt J) considered that a reasonable person would clearly have been more perceptive of the possible consequences ..."

His Honour considered that a reasonable person would clearly have been far more perceptive of the possible consequences. Mr 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.

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 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 Mr 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 non-disclosure which is already dealt with under the *Insurance Contracts Act*.

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WOODS v. DeGABRIELE & ORS
VICTORIAN SUPREME COURT
15 JUNE 2007

Recently, Her Honour Justice Hollingworth of the Supreme Court of Victoria, has shed some light on the proportionate liability provisions in Federal and State legislation.

The proceeding arose from the collapse of the Westpoint Group of Companies. The Plaintiff alleged that the Defendants had provided him with negligent investment advice. This decision arose from an Application by the Plaintiff to amend his Statement of Claim to avoid the proportionate liability provisions in the *Corporations Act*, *ASIC Act*, *Fair Trading Act* and *Wrongs Act*.

The proportionate liability provisions in each Act are similar. Each Act provides that a claim made for breach of a specified section of the Act gives rise to an apportionable claim. For example, s. 12GP of the *ASIC Act* provides that a claim for damages for economic loss or property damage caused by contravention of s. 12DA (misleading and deceptive conduct) gives rise to an apportionable claim.

In its Application, the Plaintiff sought to avoid this provision in the *ASIC Act* by substituting a claim under s. 12DB (false representation). The Plaintiff sought to make similar amendments to avoid the proportionate liability provisions in the other legislation referred to above.

"... the proportionate liability provisions would apply if the facts on which the claim was based constituted a failure to take reasonable care whether or not the Plaintiff gave it that name ..."

The question arose whether the Plaintiff could escape the proportionate liability provisions by simply framing his claim under s. 12DB instead of s. 12DA. Her Honour thought not.

She was of the view that the Plaintiff's amendments sought to defeat the objects of the legislation. The claims under s. 12DB of the *ASIC Act* did not avoid the proportionate liability provisions, if the loss was caused by conduct which was, in fact, in contravention of s. 12DA.

Her Honour had similar views about the Plaintiff's attempt to avoid the proportionate liability provisions under the *Fair Trading Act* and Part IVAA of the *Wrongs Act*.

Section 24AF of the *Wrongs Act* provides that a claim for damages in contravention of s. 9 of the *Fair Trading Act* is an apportionable claim. Similarly, it provides that a claim for economic loss or property damage arising from a failure to take reasonable care, is also an apportionable claim.

By his amendments the Plaintiff sought to avoid a claim under s. 9 of the Act (misleading and deceptive conduct) and in its place, substitute claims under s. 12 (false representations).

Her Honour expressed the view that the proportionate liability provisions would still apply if the relevant conduct that contravened s. 12 also, in fact, contravened s. 9 of the *Fair Trading Act*, whether that section was pleaded or not.

Similarly, the Plaintiff sought to frame its breach of contract claim to delete all references to "*reasonable care*". Her Honour said that it was conceptually difficult to distinguish between "*due skill and diligence*" and "*reasonable care and skill*". The proportionate liability provisions would apply if the facts on which the claim was based constituted a failure to take reasonable care whether or not the Plaintiff gave it that name.

CONCLUSION

Her Honour was primarily concerned with the Plaintiff's Application and did not make any final determinations on the proportionate liability provisions in the various legislation. However, her comments are instructive and indicate that the Courts will adopt a purposive approach to the various proportionate liability provisions at Federal and State level. The Courts will be more concerned with the substance of a Plaintiff's allegations, rather than the form in which they are described. Even if the Plaintiff makes statutory claims that do not appear to be apportionable, the Courts will look at the facts and conduct giving rise to the loss in determining whether the proportionate liability provisions apply to any final judgment.

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Interesting Fact!

Sometimes the simplest of technologies are the most important. One of these is soap, which has had a major impact on human health and civilisation. Soap, in the form that we use it today, was invented in the late 1700's. It is made of long molecules that stick to dirt at one end and water at the other end, allowing us to easily remove dirt and harmful bacteria from our bodies!

"***How Cool Stuff Works - 2005 Dorling Kindersley Ltd***"

M+R NEWS UPDATE

Congratulations to the following M+R staff members who have been appointed **Senior Associates**, effective 1 July 2007.

Carolyn Bridges

Louise Edmonds

Kirstin Follows

Gessica Giordano

Steven Notarianni

Nadia Spiller

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