

LIGHTS, CAMERA, BUILDING ACTION

MARCH 21, 2018 | BUILDING PROFESSIONALS NEGLIGENCE

Claim for breach of contract to indemnify not a 'building action' for the purposes of section 109ZK(1) of the *Environmental Planning and Assessment Act 1979 (NSW)*.

The New South Wales Court of Appeal has provided guidance on how the courts will interpret the scope of section 109ZK of the *Environmental Planning and Assessment Act 1979 (NSW)* to claims for indemnity, particularly where the parties did not perform building work or are not claiming damages for defective building work.

IN ISSUE

- Whether a claim for indemnity came within the definition of 'building action' under *Environmental Planning and Assessment Act 1979 (NSW)*

BACKGROUND

In 2002 Great Wall Constructions Pty Ltd (Builder) sought builders' home warranty insurance from Allianz Australia Insurance Limited (Allianz) in relation to the construction of a residential strata title development in Lilyfield NSW (Building). Allianz issued the policy on condition that the directors of the Builder (Indemnifiers) agreed to indemnify Allianz against any liability under the policy (Policy). Allianz and the Indemnifiers entered into a deed of indemnity (Deed). The Building was completed and a final occupation certificate issued in late 2003.

In 2009, the Owners Corporation of the Building made a claim against Allianz under the Policy in respect of defects in the Building pursuant to the statutory warranties implied into the *Home Building Act 1989*. The Builder was deregistered in November 2010. Allianz accepted liability in 2011 and settled with the Owners Corporation in February 2013.

THE DECISION AT TRIAL

In 2015, Allianz issued proceedings in the New South Wales District Court against the Indemnifiers for failing to indemnify Allianz pursuant to the Deed.

The Indemnifiers argued that Allianz was outside the 10 year limitation period because its claim was a 'building action' pursuant to section 109ZK(1) of the EPA Act. Allianz argued the contrary. The trial judge agreed with Allianz and found that Allianz's claim was not a 'building action'.

The Indemnifiers appealed the decision, arguing the trial judge had erred in his interpretation of the meaning of 'building action'.

THE DECISION ON APPEAL

To determine whether Allianz's claim constituted a 'building action', the Court of Appeal considered the following issues to be relevant:

1. distinguishing between the trigger of the action and factual conditions giving rise to the action i.e. defective building work did not trigger the action
2. interpreting the EPA Act in context, having regard to the existing state of the law and the purpose or "mischief" that the statute was intended to cure
3. considering the purpose of Part 4C of the EPA Act, which is to protect participants in the building industry from claims without limitation as to time and amount.

The Court of Appeal noted that the obvious intentions of ss109ZJ and 109ZK of the EPA Act were to protect, through the mechanisms of proportionate liability and limitation, those involved in the building industry. It also considered that the purpose of the legislation was to rectify the "mischiefs" perceived to have arisen from the decision of *Bryan v Maloney* (1995) 182 CLR 609, which raised the possibility of "indeterminate time liability" for builders and building professionals to successors in title.

The Court of Appeal considered that the relevant question to be answered was whether an action for damages involving parties, none of whom contracted to perform, or had contractual or statutory liability for the performance of, residential building work, should be characterised as "building work" for the purposes of the EPA Act.

The Court of Appeal ultimately concluded that Allianz's claim was a claim for loss or damage i.e. breach of contract to indemnify, rather than a claim to enforce a liability for loss or damage "arising out of" or concerning defective building work. On that basis, the appeal was dismissed.

IMPLICATIONS FOR YOU

The case is a useful reminder that courts will interpret statutory provisions in context, including considering the existing state of the law and the "mischief" that the legislation was supposed to remedy. Further, simply because a claim may arise as a result of residential building work, does not necessarily mean that it will amount to a 'building action' under the EPA Act.

[Dino Dinov v Allianz Australia Insurance Limited \[2017\] NSWCA 270](#)

Hayden Gregory, a graduate in our Insurance & Health team, assisted in writing this case note.

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