

DAMAGES, COMPENSATION OR LEGAL LIABILITY - INTERPRETING AN INSURING CLAUSE

14 MAY 2020 | GENERAL INSURANCE

The SA Metropolitan Fire Service (SAMFS) sought to recover the costs of remediating contaminated land following a fire fighting operation at the premises of the First Defendant (Mulhern). Mulhern's public liability insurer denied coverage in relation to the SAMFS recovery claim. The District Court of South Australia upheld the denial of coverage.

IN ISSUE

- Whether Mulhern's liability to SAMFS under s42(5) of the Fire and Emergency Services Act 2005 (the Act) amounted to a legal liability 'to pay damages or compensation...for Property Damage or other Contingencies' such that it fell within the insuring clause of Mulhern's public and products liability policy.
- Whether s141 of the Act operated to extend the cover available under the insurance policy to cover the costs recoverable by SAMFS under s42(5) of the Act.

THE BACKGROUND

SAMFS responded to a fire at a waste facility operated by Mulhern in March 2012. The water used to contain the fire combined with oil from products on the property, which subsequently contaminated adjacent property. In exercising its powers under the Act, SAMFS engaged contractors to remove the contaminants and sought to recover those costs from Mulhern.

Mulhern held a Public and Products Liability Policy (the Policy) issued by Newline Australia Insurance Pty Limited and/or Newline Syndicate 1218 at Lloyds (the Insurers). Pursuant to the Policy's insuring clause Insurers agreed to indemnify Mulhern *"against all sums that (Mulhern) shall become legally liable to pay for damages or compensation... for ... Property Damage or Other Contingencies ... in connection with the Business."*

The SAMFS contended that the liability it sought to recover from Mulhern was a legal liability to pay 'compensation' and therefore covered by the Policy. Further, or in the alternative, the SAMFS contended that the Policy was 'a policy of insurance against damage or loss of property caused by a specified emergency', so that s141 of the Act extended cover under the Policy.

The Insurers declined indemnity on the basis that the liability was one in debt and so did not fall within the insuring clause. Further, the Insurers contended that the Policy was not 'a policy of insurance against damage or loss of property caused by a specified emergency' and

therefore s141 of the Act did not apply.

THE DECISION AT TRIAL

The Court found in favour of the Insurers in relation to both issues.

The Court confirmed that ‘damages’ included such sums that fall to be paid by an insured because of a breach of duty (whether imposed by the common law, statute or contract). Mulhern’s liability to the SAMFS pursuant to s 42(5) was not a legal liability as it was not contingent upon any breach of duty or obligation of Mulhern. Further, the claim did not arise from damage to any of SAMFS’s property, rather it was for pure economic loss (i.e. a debt) sustained by SAMFS in the performance of its obligations and functions under the Act.

Whilst the costs incurred by SAMFS were incurred in connection with damage to property, the sum payable pursuant to s 42(5) of the Act was not payable ‘for compensation’ for either ‘Property Damage’ or ‘Other Contingencies’ within the meaning of the Policy.

As to s141, the Court reasoned that the section only applied to ‘a policy of insurance against damage or loss of property caused by a specified kind of emergency’ (i.e. first party cover). The intention of the section was not to capture policies that indemnify an insured for damages to third parties. Accordingly, s141 did not operate to extend the cover available under the Policy.

IMPLICATIONS FOR YOU

The case reiterates the well-settled principles governing the interpretation of insurance policies. Specifically, an insurance policy is a commercial contract and is to be given a business-like interpretation. Particular attention ought to be given to the ordinary meaning of the language used by the parties, the commercial circumstances addressed by the policy and its intended purpose.

The decision also highlights the importance of carefully considering the legal basis for any damages claimed against an insured with reference to the relevant insuring clause. Such consideration is particularly important in circumstances where the damages in question (such as in this case) are derived not from the common law but a specific legislative provision.

[*SA Metropolitan Fire Service v ACN 008 275 296 Pty Ltd \(In Lqd\) & Ors* \[2020\] SADC 45](#)

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