Barry.Nilsson. LAWYERS

DOUBLE (TROUBLE) INSURANCE - FEDERAL COURT RULES ON CLAIM FOR EQUITABLE CONTRIBUTION FROM HEAD CONTRACTOR'S INSURER AFTER SETTLEMENT

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In the recent decision of *QBE Insurance Australia Limited v Allianz Australia Insurance Limited* [2020] FCA 589, the Federal Court found that an insurer was entitled to dual insurance contribution for the liability of a subcontractor that it had covered under a liability policy, including in respect of defence costs.

THE BACKGROUND

In 2010, a developer QIG Property Development Pty Limited (QIG) retained a head contractor Southern Cross Constructions (ACT) Pty Limited (SX) to undertake building works at Double Bay in Sydney. The works required excavation and SX retained Pile & Bucket Pty Limited (P&B) as a subcontractor to do the excavation work.

The owners of the adjacent property brought proceedings in the Supreme Court of NSW against QIG, SX, P&B and others for damage to their building caused by the building works (Neighbour's Claim). P&B's liability insurer, QBE settled the Neighbour's Claim in the sum of $826,854.14 (including $150,000 for costs). QBE also indemnified P&B's defence costs in relation to the Neighbour's Claim in the sum of $700,000. Allianz, as the liability insurer for SX (which was now in liquidation), defended the Neighbour's Claim and had it dismissed.

A dispute arose as to whether Allianz also insured P&B, and if it did, whether QBE was entitled to contribution from Allianz for the damages, costs and defence costs it had incurred in relation to the Neighbour's Claim. QBE commenced proceedings in the Federal Court.

IN ISSUE

- whether P&B was an 'Insured' within the meaning of a policy issued by Allianz, so as to entitle QBE to claim equitable contribution as a matter of principle; and
- whether any entitlement to contribution would extend to the costs incurred by QBE in the defence of the proceedings against P&B.

DECISION

On 6 May 2020, Allsop CJ delivered his reasons after a preliminary hearing and answered the

two questions in dispute in the affirmative.

The building works contract between QIG and SX (the Head Contract) and the contract between SX and P&B (the Subcontract) both contained similar provisions with respect to maintaining insurance during the building works. Each contract provided "Two Alternatives" with respect to who would effect insurance. In both contracts SX was required to effect public liability insurance as "Contractor" and "Main Contractor" on the Head Contract and the Subcontract respectively.

The insuring clause of the Allianz policy provided that indemnity is triggered [subject to the terms and conditions under the policy] for both the "Named Insured" and "the Insured". While SX was the Named Insured, P&B was not. Relevantly, the phrase "the insured" was defined to include *"all subcontractors to…[SX] including their subcontractors of any tier, but only whilst acting in the scope of their duties as subcontractors in relation to the Insured Contract and only to the extent this insurance…is required for such interest under the Insured Contract*".

The live issue concerned whether the Allianz policy was required to extend to cover P&B, which turned on the operation of the words "*the extent to which [the Allianz policy] is required for such interest under the Insured Contract*". This in effect posed a further question – did the term "Insured Contract" refer to the Head Contract or the Subcontract? "Insured Contract" was defined as "*the contract…entered into by [SX] which gives rise to Contract Works and includes any subcontract…in connection with the contract…*"

Allianz accepted that either contract fell within the definition of "Insured Contract". However, it submitted that the phrase "Insured Contract" in the definition of "Insured" meant the Subcontract did not create a responsibility on SX to take out cover for the interests of P&B. Allianz also argued that there was no relevant obligation on SX to insure P&B for the purposes of the Allianz policy as P&B was required to effect liability insurance itself (which it did) and that it would be uncommercial to have two parties taking out insurance.

His Honour found that the natural meaning of "Insured Contract" when read alongside the definition of "Insured" meant that a subcontractor to SX, if its interest is required to be covered under the Head Contract, is an Insured. This position was supported by the fact that the definition of "Insured Contract" included a subcontract in relation to a contract otherwise falling within that definition. In addition, the Allianz policy included a requirement that subcontractors have their own policy, which gave Allianz the comfort of co-insurance which would respond directly to claims by those subcontractors. The inference being that the co-insurance situation was contemplated by Allianz at policy inception.

Allsop CJ then considered whether such entitlement to contribution would extend to the costs incurred by QBE in defence of the Neighbour's Claim. Allianz argued that as QBE had conducted the defence and appointed its own lawyers, P&B did not incur this liability and there was no right of contribution (i.e. Allianz was only required to contribute to the liability incurred by P&B). Allianz's argument contradicted settled principles in relation to contribution between insurers and was (unsurprisingly) rejected. His Honour concluded that the appropriate proportion of those costs should be shared between the insurers, at least in respect of the costs required to defend the claim for which both insurers were liable to indemnify P&B.

IMPLICATIONS FOR YOU

This decision serves as a useful example of the Courts' application of the principles of

contribution between insurers. It upholds the established principle that an insurer has an equitable right of contribution against another insurer who is also on risk for an insured in respect of the same liability, including in respect of reasonable defence costs.

QBE Insurance Australia Limited v Allianz Australia Insurance Limited [2020] FCA 589

GET IN TOUCH

DEAN CUPAC
ASSOCIATE

+61 2 8651 0229
dean.cupac@bnlaw.com.au