Barry.Nilsson. LAWYERS

NSWCA REJECTS INSURER'S NON DISCLOSURE ARGUMENT

23 APRIL 2018 | INSURANCE ISSUES

Disclosure of the relationship between an insured employer and an occupier to the insurer's agent was sufficient and the insurer was not entitled to avoid indemnity for non disclosure under section 21 of the *Insurance Contracts Act 1984* (Cth) (ICA).

IN ISSUE

- The proper construction of an exclusion clause for "assumed liabilities" in a combined public and products liability policy.
- Whether the insured breached its duty of disclosure under section 21 of the ICA.

THE BACKGROUND

Mr Newman claimed damages for personal injury from the respondent (SCM) as his employer, and against Endeavour who was the occupier of the site where he was injured. Relations between SCM and Endeavour were governed by a special services agreement (SSA) under which SCM promised to provide supplementary labour for five mines in the area (including Endeavour), and would be liable for, and would indemnify, Endeavour, not only for any breach of the agreement, but for "*any liability and/or loss or damage of any kind whatsoever, arising directly or indirectly from…the illness, injury or death of any of [SCM's] employees…*". In accordance with the terms of the SSA, SCM effected policies of insurance with a Lloyd's syndicate represented by QBE Underwriting Ltd (QBE) and with Coal Mines Insurance Pty Ltd (CMI).

By Statement of Claim filed in the NSW District Court, Mr Newman claimed damages from SCM and Endeavour. SCM claimed on both of its policies. QBE and CMI adopted quite different stances. CMI accepted that it was required to indemnify SCM for its liability to Mr Newman, but not for its contractual liability to Endeavour. QBE declined cover, basing its decision on the exclusion in clause 7.6 of its policy excluding liability arising from the terms of a contract and for non disclosure of the SSA .

SCM brought cross-claims against CMI and QBE seeking coverage. A mediation was held, following which all claims and cross-claims were settled, save SCM's cross claim against QBE.

THE DECISION AT TRIAL

After an eight day trial, the primary judge entered judgment on the cross-claim in favour of SCM for the sum of $265,000 plus interest. The Court of Appeal noted that the costs of the eight day trial, involving senior and junior counsel and hundreds of pages of submissions, likely

exceeded the amount in dispute.

The Issues on Appeal

QBE's notice of appeal contained eleven grounds including whether an exclusion clause (clause 7.6) in the QBE policy for "assumed liabilities" was engaged and whether SCM had failed to disclose to QBE the existence of a contractual indemnity granted by SCM in the SSA in breach of section 21 of the ICA.

The Decision on Appeal

QBE relied upon clause 7.6 which excluded liability: "*Assumed - 7.6.1 Under the terms of a contract, agreement or warranty unless the Insured would have been liable in the absence of such terms or warranty*." The Court of Appeal held that the purpose of clause 7.6 was to exclude liability which is voluntarily assumed under a contract, agreement or warranty if the only reason the insured is liable is that assumption of liability. It was clear that the liability claimed by SCM against QBE was a liability which was not assumed by it, but rather was a liability which SCM would have had in any event and, as a consequence, the exclusion did not apply.

Although QBE claimed that the agreement was never disclosed to it, SCM in fact provided QBE (through its agent) with an "*access warning letter*" which concerned a claim by another employee that arose in much the same way as Mr Newman's. To address this evidence, the Court of Appeal emphasised the distinction in ICA section 21 between disclosure on the one hand, and knowledge on the other- "*one connotes an act of communication between insured and insurer; the other connotes a state of mind*." And while "*knowledge*" requires a level of certainty, the performance of disclosure merely requires that the insured communicate the matter to the insurer which, the Court of Appeal held, is perfectly possible to occur by communication to the insurer's agent. The access warning letter was written by SCM's solicitor, in the context of a claim being made by an employee, and recommended disclosure to QBE. For this reason, the Court of Appeal held that QBE did not prove non-disclosure.

SCM was therefore entitled to be covered by QBE.

Implications for you

This case illustrates that the courts will interpret an '*assumed liability*' clause against an insurer only where the insured would not otherwise have been liable. This case also shows that section 21 ICA disclosure can be made effectively to an agent of the insurer.

QBE Underwriting Ltd as Managing Agent for Lloyds Syndicate 386 v Southern Colliery Maintenance Pty Ltd [2018] NSWCA 55

AUTHORS

BELINDA RANDALL
SPECIAL COUNSEL

+61 8 6424 0400
belinda.randall@bnlaw.com.au