

# OUT OF TIME: INSURERS HAVE A WIN ON LIMITATION ISSUES

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In considering the defence of any claim, one of the first ports of call is whether the claim is time barred. In this recent decision, the New South Wales Court of Appeal considered when the cause of action for breach of an obligation to indemnify under an insurance policy for property damage accrues.

## IN ISSUE

- Whether the claims under the relevant insurance policy were statute barred; and
- The time at which a cause of action for breach of contract under an indemnity policy of property insurance arises.

## BACKGROUND

Globe Church Incorporated (Globe Church) held an industrial special risks insurance policy with Allianz Australia Insurance Ltd (Allianz) (60%) and Ansvar Insurance Ltd (Ansva) (40%) for the 12 month period ending 31 March 2008 (2008 Policy).

Relevantly, in September 2009, Globe Church made a claim under the 2008 Policy for damage to its property, and for loss of income allegedly caused by rainwater and flooding occurring initially between 8 June 2007 and 31 March 2008. In 2011, the claim was denied separately by Ansva and Allianz; and in November 2016, Globe Church commenced proceedings against both insurers seeking a declaration of breach of contract relating to the denials, and damages for breach of the 2008 Policy. Globe Church's claim was met with a limitation defence, with both insurers asserting that Globe Church's claim was time barred. The limitation issues were removed to the Court of Appeal for separate determination.

## THE DECISION

Both insurers submitted that the cause of action for breach of contract accrued on the happening of the insured event (i.e. the property damage occurring in 2007/2008) and not any later point in time, including when the claim was declined. In support of their position, the insurers argued, amongst other things, that absent any policy term to the contrary, it is at this time that the obligation to indemnify (i.e. to hold the insured harmless against loss) arises and all the facts necessary for the insured to maintain its action have occurred.

Globe Church submitted that the cause of action for breach accrued when the claim had been made and a reasonable time had elapsed for the insurers to discharge their obligations under

the policy, in this case, no earlier than the date of the insurers' declinatures. Pointing to a number of terms within the policy, Globe Church argued that the insurers' position conflates the issue of when a party's contractual obligation arises and when a breach occurs as a result of a failure to comply with that obligation. It was also noted that if the insurers' position was accepted, an insurer could be in breach of a policy without the insured having made a claim and before the insurer has any knowledge of the occurrence triggering the policy.

In a lengthy and detailed decision that traversed relevant Australian and overseas decisions on the issue, a 3-2 majority found in favour of the insurers. In this case, the relevant policy provisions setting out the mechanism for making a claim by the insured, and payment by the insurers, were not condition precedents for indemnity and the obligation to indemnify arose when the property damage occurred. In response to the concerns raised by Globe Church about knowledge of the breach, the majority accepted that this created a legal fiction, but noted that it was open for insureds and insurers to negotiate policy terms that addressed the issue, for example, by making a claim a condition precedent to indemnity or providing that indemnity only arises on the occurrence of property damage reasonably ascertainable by the insured.

## Implications for you

Whilst the outcome in this case was a win for the 2 insurers, the majority's endorsement of the notion that a property insurer can be in breach of their obligation to indemnify without having knowledge of the insured event highlights the need for insurers, insureds and their brokers to closely consider what condition precedents are necessary to trigger the obligation to indemnify, noting the examples provided by the majority. The decision is also a timely reminder for insureds in particular to be mindful of limitation issues in protracted indemnity disputes.

*Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27

## AUTHORS



**ANDREW WARD**  
SPECIAL COUNSEL

+61 7 3231 6305  
andrew.ward@bnlaw.com.au