

THE IMPORTANCE OF SATISFYING A CONDITION PRECEDENT

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The plaintiff insurer was not entitled to rely on a deed of indemnity to recover \$4.3M in remedial work costs because of its failure to comply with a condition precedent requiring it to notify any proposed settlement of a claim.

IN ISSUE

- Non-compliance with condition precedent in a deed of indemnity.

BACKGROUND

Mr Laurence Kalnin (the second defendant) was the director of Kalnin Corporation Pty Ltd (the first defendant). The second defendant decided that the first defendant should develop the property he owned into a multi-unit residential complex (the development). After obtaining development consent in February 2002, the first defendant engaged Definite Dimensions Pty Ltd (the builder) to construct the development. The builder applied for statutory home warranty insurance with AAI Ltd t/as Vero Insurance (the plaintiff). Before the plaintiff issued the insurance policy to the builder, the plaintiff required the defendants to execute a deed of indemnity (the deed) in its favour. The second defendant executed the deed on behalf of the defendants. The plaintiff issued the builder with a certificate of insurance.

The development was completed in November 2004. Shortly after the strata plan was registered and the relevant owners corporation was created. In November 2008, the owners corporation notified the plaintiff of a potential claim based on alleged defective works. The builder had been placed into liquidation. In March 2009, the owners corporation sought indemnity under the policy (the claim). From May 2009 to February 2013, the plaintiff engaged consultants to evaluate and assess the defects and potential rectification works. The plaintiff paid \$4,232,000 in remedial works. The plaintiff sought enforcement of the deed and subsequent indemnity from the defendants.

The court considered a number of issues, including whether the plaintiff satisfied the condition precedent of the deed. The condition precedent required the plaintiff to promptly notify the defendants of the proposed settlement of the claim. The defendants submitted that they were only notified of the actual settlement of the claim.

DECISION

The court dismissed the plaintiff's claim for indemnity as it did not satisfy the condition precedent of the deed.

The purpose of the condition precedent was for the plaintiff to provide the defendants with “*advance notice of its intention to settle a claim under the policy*”, in order to allow the defendants to consider the amount of the proposed settlement and alternate means of resolving the claim. The court accepted the defendants' submission that “*the entire point of [the condition precedent] was to create an opportunity for [the defendants] to respond in a meaningful way to what [the plaintiff] proposed to do*”.

The plaintiff agreed to settle the claim for \$1.6M and notified the defendants of the settlement. The court found that the plaintiff's “*announcement*” of the settlement did not comply with the condition precedent as the settlement was something the plaintiff actually decided to do, rather than a mere proposal.

IMPLICATIONS FOR YOU

It is important to carefully consider the terms of any indemnity. If a condition precedent is not satisfied, a claim for indemnity may be rejected or suspended, depending on the terms of the deed. The existence of an indemnity in favour of a particular party does not mean that party is automatically indemnified for the loss incurred. Rather, that party must comply with all the terms and satisfy any condition precedent in order to benefit from the indemnity

[AAI Ltd t/as Vero Insurance v Kalnin Corporation Pty Ltd; Kalnin Corporation Pty Ltd v AAI Ltd t/as Vero Insurance \[2017\] NSWSC 548](#)

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