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LAWYERS

THE UTILITY OF JOINING INSURERS TO PROCEEDINGS; WHAT TO DO, WHAT TO DO

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The plaintiffs sought leave to join the defendants' insurers to proceedings pursuant to s6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) [LR(MP) Act]. The Court declined to exercise its discretion to grant leave as it was not persuaded that there was any utility, nor was it reasonable, to join the insurers to the proceedings.

IN ISSUE

- The Supreme Court of NSW has reiterated the reasonableness and utility in joining an insurer to proceedings remains a crucial factor in deciding whether to grant leave pursuant to s6(4) of the *LR(MP) Act.*

BACKGROUND

As a result of the collapse of the Dick Smith retail chain (DSHE), proceedings have been instituted against various directors and executives (the defendants) of DSHE. The various insurers for the defendants have granted indemnity to the defendants, however, on a reservation of rights basis.

The plaintiffs, pursuant to s6(4) of the *LR(MP) Act* sought leave to join the defendants' insurers to the proceedings in order to obtain a charge over any insurance money that may be payable in the event that they were successful.

THE DECISION

All parties agreed that the "usual criteria" for the joinder of an insurer existed, that is (1) there was an arguable case against the defendants; (2) there was an arguable case that the policies covered the claim; and (3) there was a real possibility that if the plaintiffs were successful, the defendants would not be able to meet any judgment debt.

Notwithstanding the existence of this "trifecta" for joinder, the court reaffirmed that leave does not automatically follow and, for the purposes of exercising its discretion, focussed on the utility and reasonableness of joining the insurers to the proceedings.

The court refused to exercise its discretion to join the insurers, as despite having issued reservations of rights letters, it was only speculative that the insurers might disclaim liability under the policies. Further, despite the threat of further class actions against the defendants, granting leave would not create a priority charge over any insurance proceeds (this would

occur at the time of judgment, award or settlement). Finally, the upcoming likely passing of the *Civil Liability (Third Party Claims Against Insurers) Bill 2017* into law had no bearing on the matter.

IMPLICATIONS FOR YOU

The judgment follows the recent decision of *Wayland v Bird* [2017] NSWCA 26 in focusing on discretionary matters outside of the usual "trifecta" for joinder.

The decision provides some comfort to insurers that a reservation of rights letter will not, without anything more, provide grounds for joinder to proceedings pursuant to s6(4) of the *LR(MP) Act*. However, with the likely passing of the *Civil Liability (Third Party Claims Against Insurers) Bill 2017* into law, it remains to be seen whether the same criteria for leave will be relied upon by the courts. More concerning for insurers will be the fact that the new law will not require leave to be sought prior to joinder occurring, meaning that it will become a case management issue when any question of "leave" will be determined.

DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Abboud; National Australia Bank Limited v Abboud [2017] NSWSC 579

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