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PRODUCTION OF INSURANCE POLICIES

Production of insurance policies in litigation – an overview

From a practical perspective, the availability and extent of a defendant's insurance coverage are matters clearly relevant to the commencement of litigation by a plaintiff, the conduct of commercial negotiations and the extent of any ultimate compromise. On that basis, the desire of plaintiffs, their lawyers and/or litigation funders to access policies of insurance before and during litigation comes as no surprise.

This is in direct conflict with a defendant's (and their insurer's) desire for privacy and confidentiality over financial documents.

This update seeks to provide a summary of the circumstances in which plaintiffs have been allowed access to policies of insurance, and commentary on what this means for insurers from a practical perspective.[1]

The starting position – privity of contract and relevance

Absent extraordinary circumstances, or a statutory right that modifies the privity of contract that exists between an insurer and its insured, an insurance contract is a private contract that, prima facie, will not be accessible to a third party. Based on the privity doctrine, the insured and its insurer are entitled to keep the terms and conditions of their commercial arrangement confidential.

Historically, for this reason, the Courts have been reluctant to require a defendant to disclose its insurance position. Furthermore, generally speaking, the insurance status of a party is not a matter strictly relevant to any substantive issue in dispute in the litigation. As pointed out by Ryan J in *Kirby v Centro Properties Limited*[2] (***Kirby v Centro***):

> 'the existence of policies of insurance held by a party or the details of such policies will not normally be relevant to the proof of any cause of action pleaded against that party'.

On the basis that a party's insurance status is not relevant to a fact in issue in the proceedings, defendants typically resist any request for a copy of its policy of insurance, advanced as part of the discovery process (including pre-litigation discovery) or under subpoena.[3]

Australian Courts have sanctioned this approach,[4] notwithstanding arguments based on the need to facilitate settlement discussions at an early stage, the benefits of an expeditious disposal of the proceedings, the desire to minimise the use of Court resources and the practical impact that a plaintiff's prospects of recovery are likely to have on the conduct of the litigation.

In 2009, the Federal Court reconsidered these issues in *Kirby v Centro*. Mr Kirby and other investors (together **claimants**) brought a securities class action against Centro Properties

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[1] The 'policy documents' referred to in this update do not extend to claim forms or other notification documents, which may be both relevant and discoverable in circumstances where the policy itself may not.

[2] [2009] FCA 695.

[3] For example, in NSW rule 21.1 of the *Uniform Civil Procedure Rules* provides that an order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue.

[4] *Beneficial Finance Corporation Ltd v Price Waterhouse* (1996) 68 SASR 19 is often cited as the leading case in this regard. In that matter, the plaintiffs sought discovery of the defendant accountants' policy of insurance, with a view to joining the insurer and seeking a declaration that indemnity under the policy was available. The Full Court, overturning the trial judge's decision, determined that the action as framed did not raise any question as to the insurance arrangements and any application for discovery would fail on the basis of relevance.

Limited (**Centro**) in the Federal Court, alleging losses sustained as a result of Centro's failure to adhere to its continuous disclosure obligations. The Court ordered a mediation, following which the claimants filed a notice of motion seeking production of Centro's policies of insurance. It was submitted by the claimants that:

- a mediation conducted without knowledge of Centro's insurance cover (if any) would not produce an outcome which could properly be the subject of an application for approval as required under Pt IVA of the *Federal Court of Australia Act* 1976;
- a mediation conducted without knowledge of Centro's insurance cover would not be consistent with the principles underlying case management (as prescribed by the *Federal Court Rules*); and
- the insurance policies were discoverable, as they relate to a matter in question in the proceedings.

Ryan J noted that the underlying premise of each contention was that:

> 'without more complete information about the existence of relevant policies, the amount insured and the risks covered [the claimants would not have been in a position to] evaluate or agree to any proposal which might be made at mediation'.

In refusing the motion, Ryan J acknowledged the Court's traditional reluctance to 'accord any relevance to the possession of insurance cover in determining the existence or measure of liability against which the policy indemnifies a defendant'.

Further, while accepting that insurance cover, or lack of it, may be significant (including that a party may use that knowledge as a bargaining chip) disclosure of such matters are of 'commercial judgment or strategy' and are not an area into which the Court can intrude.

Of course, a request for production of policy material advanced in the ordinary course of discovery cannot be resisted outright, absent an assessment of the particular facts of a given case. There may well be situations where the existence of insurance is an issue in dispute in the substantive proceedings, as was seen in *Bennett v WMC (Olympic Dam Corporation) Pty Ltd*[5]. In that matter, the defendant to a personal injury proceeding claimed an indemnity from the plaintiff's employer and the plaintiff's employer's insurer. A term of the relevant policy under which the indemnity was sought required the defendant to disclose details of other insurances held by it. On that basis, the existence of other insurance was determined to be a fact in issue in the proceedings, and the policies were discoverable.

Joinder of an insurer - policies will be relevant and discoverable

Historically, Courts have permitted insurers to be joined to proceedings by third parties in only limited circumstances[6]. There are, however, a number of *statutory* bases upon which a plaintiff can join an insurer to proceedings directly.

Where a plaintiff has a cause of action founded in statute, the insurance policies in question will become directly relevant to the proceedings (or impending proceedings) and will be discoverable, and/or the subject of a proper request for particulars.

Examples of statutory rights providing for the joinder of an insurer to proceedings include:

- in New South Wales, s.6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (***LRMP Act***). That section operates to create a charge over insurance monies that would ordinarily have been paid out on behalf of an insured to a third party and, as such, creates a right to join an insurer to proceedings in circumstances where the insured is insolvent and/or may not be able to meet a judgment;
- s.601AG of the *Corporations Act*, which provides that a person may recover from an insurer of a deregistered company the amount that was payable to the company under

[5] [2008] SADC 42.

[6] That said, in two recent decisions (*Lois Nominees Pty Ltd v Hill* [2011] WASC 53 and *CGU Insurance Ltd v Bazem Pty Ltd* [2011] NSWCA 81 there appears to be an indication that, provided that the joinder of the insurer as a third party is permissible from a procedural perspective, there is no reason why a third party should be prevented from joining an insurer to proceedings, with the aim of obtaining a declaration that the insurer is required to indemnify its insured.

an insurance contract, subject to the company having a liability to the person and the liability being covered by the insurance immediately before de-registration; and

- finally, s.51 of the *Insurance Contracts Act* 1984 which provides that where the insured is liable in damages to a third party, the insured has died or cannot be found, and the contract provides insurance cover in respect of the liability, the third party may recover from the insured an amount equal to the insurer's liability under contract.

Other statutory provisions – the *Corporations Act* 2001

A number of statutory provisions contained within the *Corporations Act* 2001 have also afforded an avenue by which plaintiffs have obtained orders from the Court compelling production of insurance policies, contrary to the general rule.

Leave to proceed – Section 440D and Section 471B

The existence of insurance has been determined to be relevant to the question of whether a party should be granted leave to proceed against a company in administration (s.440D) or liquidation (471B), see for example *Lopez v Star World Enterprises Pty Ltd*[7].

Applications pursuant to Section 247A – inspection of books

A number of claimants have successfully gained access to insurance documents by way of an application under s.247A of the *Corporations Act*.

That section provides *inter alia* that on application by a member of a company or registered managed investment scheme, the Court may make an order authorising the applicant to inspect the books of the company or scheme, if satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

An application pursuant to s.247A was considered by the Western Australia Supreme Court in *Snelgrove v Great Southern Managers Australia Ltd (in Liq)*[8]. In allowing the applicants access to the company's policies, the Court considered that the 'books of the scheme' should be constructed broadly and, as such, the insurance policies fell within that ambit of the section. The applicants purpose in seeking access to the documents, namely to inform their consideration of whether litigation was commercially viable, was considered sufficient to satisfy the 'proper purpose' threshold. The Court also consider relevant the fact that allowing the applicants access to the policies would prevent the resources of the applicants and the public being wasted (it is worth noting that these factors alone, absent the specific statutory provision, were considered insufficient to justify the access order in *Kirby v Centro*).

A similar approach was adopted in the recent Federal Court decision *London City Equities Limited v Penrice Soda Holdings Limited,*[9] where the Court allowed London City Equities Limited, a shareholder of Penrice, access to policy documents (albeit on a more limited basis than claimed) as to do so would allow an assessment of the insurance position before a decision to commence proceedings was made.

The examination provisions

Lastly, the 'examination provisions' contained within s.596B of the *Corporations Act* authorise the Court to summon a person, on the application of an eligible applicant (including among others ASIC, a liquidator or administrator) for examination about a corporation's 'examinable affairs'.

In *Gerah Imports Pty Ltd v Duke Group Ltd (in liq)*[10] the Full Court permitted a liquidator access to policy documents as part of a s.596B order.

Other avenues – abuse of process?

In *Lehman Bros v Wingecarribee Shire Council*[11] the Wingecarribee Shire Council (**Council**) sought access to the insurance policies of Lehman Brothers Australia Limited (**Lehman**

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[7] [1997] FCA 454.

[8] [2010] WASC 51. See also Re Style Ltd *Merim Pty Limited v Style Limited* [2009] FCA 314.

[9] [2011] FCA 674.

[10] (1993) 61 SASR 557.

Brothers), following the commencement of proceedings in 2007 in which it was alleged that Lehman Brothers had breached its duty, and engaged in misleading and deceptive conduct, in relation to a number of investment transactions.

Lehman Brothers went into voluntary administration. In an ensuing report to creditors, reference was made to various insurance policies issued by insurers in Australia and overseas. Requests made by the solicitors for the Council to the administrators for copies of the policy documents were refused.

A Deed of Company Arrangement (**DOCA**) was ultimately proposed, providing a discrete pool of funds for the creditors. The DOCA also contained a number of releases to be provided by creditors in favour of Lehman Brothers and its directors, the effect of which would be to extinguish the Council's rights against Lehman Brothers.

The Council submitted that it had insufficient information upon which to decide whether or not the DOCA should be accepted, including in relation to the nature and limits of the insurance cover available. The Council filed a notice of motion seeking access to the policies under section 23 of the *Federal Court of Australia Act* 1976, pursuant to which the Court was entitled to make orders to prevent the abuse and frustration of its processes. The Council submitted that the inadequate provision of information to permit the Council to make a decision constituted an abuse, in circumstances where the adoption of the DOCA would extinguish the Council's rights.

Ultimately, while acknowledging that the Court had power to compel disclosure of insurance policies and asset positions under s.23, the Court did not accept the Council's submission. The DOCA, notwithstanding that its effect would be to extinguish the Council's rights, was a legitimate part of the administration process. The Court also commented that the appropriate remedy for the Council was to impede the adoption of the DOCA, or to apply to have the DOCA set aside if it operated unfairly or prejudicially to one or more creditors.

Subrogated recovery – can a defendant access policy documents?

Thus far, this update has focused on the ability of a plaintiff, or prospective plaintiff, to obtain access to a policy of insurance, with a view to investigating the utility of litigation, and commercial matters impacting on the prospects of a recovery and settlement.

Occasionally, however, a request for a copy of a policy of insurance will be issued to the plaintiff in a subrogated recovery action. These requests are founded on a purported right to explore whether the insured was entitled to be indemnified under the policy, absent which the subrogated recovery cannot be pursued.

In keeping with the general rule articulated above, a defendant to recovery proceedings will only be entitled to a copy of the policy under which payment by an insurer has been made if that policy is relevant to an issue in the proceedings.

The Privy Council in *King v Victoria Insurance Co Limited* [1896] AC 250 considered whether Victoria Insurance Co Limited was entitled to be subrogated to the rights of its insured, irrespective of whether the payment it made to its insured was voluntary, because the claim was not within the ambit of the policy's cover.

In rejecting that proposition the Privy Council held that even if coverage had been unavailable, and liability had been disclaimed, payment made honestly, in satisfaction of a claim, entitles the insurer to be subrogated to the rights of the insured. This position has subsequently been adopted by Australian Courts.[12]

On that basis, there appears a reasonable basis upon which a request for policy documents extended in these circumstances can be refused.

Commentary

This update seeks to encapsulate the circumstances in which the Courts have entertained a plaintiff's request for production of policies of insurance, and the basis upon which production can be resisted.

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[11] [2009] FCAFC 63.

[12] *Sydney Turf Club v Crowley* [1971] 1 NSWLR 724 and *Wabbits Pty Limited v Godfrey* [2009] NSWSC 1299.

Privacy over commercially sensitive material is a significant issue for defendants and their insurers. In addition, it is undesirable that a judge determining the liability issues has in mind the defendant's insurance status (particularly in circumstances where there is coverage for the claim before the Court). While, in theory, insurance follows liability, as has been articulated[13], in practice it paves the way to liability and acts as a hidden persuader.

Defendants and their insurers can take comfort from the fact that, absent a specific statutory provision, or a unique set of facts, Courts have been reluctant to mandate the production of insurance policies.

That said, while there may be circumstances in which production of policy material can be resisted, strategic and commercial advantage may be gained by disclosing coverage issues and may ultimately be desirable from a tactical perspective.

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[13] G Fleming *The Law of Torts* (9th ed, Sydney, LBC Information Services, 1998) 126 and 12 and 13.