



## Insurance Law Update

### Professional Insurance Liability

### Known circumstances exclusion

### CGU v Porthouse HCA 30 July 2008

#### Introduction

A barrister was, along with his instructing solicitor, sued by a client in respect of personal injuries litigation. The client was successful and liability was apportioned 50/50.

However, CGU refused to indemnify the barrister on a few bases, including the known circumstance exclusion in the policy.

At trial and on an appeal to the NSW CA CGU was found liable to indemnify.

In a unanimous decision the High Court decided that CGU was not required to indemnify because of that exclusion.

#### The exclusion

CGU was not required to indemnify if the insured's liability was excluded by the known circumstance exclusion.

The policy defined a known circumstance as:

*Any fact, situation or circumstance which ...*

(b) *A reasonable person in the insured's professional opinion would have thought ...*

*might result in someone making an allegation ... in respect of a liability that might be covered by this policy.*

The particular litigation which gave rise to the claim occurred well in advance of the proposal for the policy.

The claim under the policy was made shortly after inception, although the litigation which found its way to the High Court was not commenced until much later in the same policy period.

In the proposal form the insured had answered negatively the question as to whether he was aware of any circumstances which could result in any claim being made against him.

In the proposal form there was a statement which in effect notified the

proponent that the policy which would issue would contain a known circumstances exclusion.

The statement in the proposal said that the policy would not provide cover in relation to:

*Facts or circumstances of which you first became aware prior to the period of cover and which you knew or ought reasonably to have known had the potential to give rise to a claim under this policy.*

#### General

At the trial there was no evidence by any person except the insured relevant to interpreting the exclusion on which the case finally turned.

While he was aware of the circumstances which gave rise to the claim he was of the belief that there were no prospects of those circumstances giving rise to a successful claim.

As the High Court decision explains while the insured provided some evidence relevant to that point his evidence about his opinion as to prospects was not relevant to assessing the matter from the perspective of the reasonable person to whom the relevant exclusion is directed.

Further the relevant exclusion was to be determined objectively, not subjectively.

The High Court said, in the context of the question in the proposal, that whether a circumstance has had the potential to give rise to a claim meant no more than the possibility of a claim being made without any judgment or conclusion of the prospects of success of that possible claim.

In considering how the exclusion needed to be considered the High Court said that the opinion of the reasonable person had to be based

on the particular facts which the insured actually knew.

One of the particular facts which the insured was aware of at the time the proposal was completed was that the client was considering a negligence action against the solicitor who had briefed the barrister in the litigation which became the subject matter of the claim.

The High Court considered that the particular error at trial which was not corrected by the Court of Appeal was the judge's failure to properly apply the relevant facts to the exclusion.

The High Court was therefore confronted with whether it should decide the relevant issues for itself even though there was no direct evidence from comparable professionals relevant to the interpretation of the exclusion.

The alternative was remitting the matter for the Court of Appeal to decide the matter afresh having regard to the decision of the High Court.

Perhaps because the issue related to a legal practitioner or perhaps in the interests of costs savings it considered it could do so. It was of the view that it could do so because the inferences to be drawn from the constellation of undisputed facts, were obvious, at least to it.

The High Court concluded that a reasonable person in those circumstances would have thought that a claim alleging liability might result and accordingly the claim which did result was excluded from cover.

In arriving at its conclusion the High Court took into account that the insured's policy was in the nature of a statutory policy a purpose of which was to protect members of the public in the event that they sued a legal professional. However, the High Court did not consider that that public policy object overrode the Court's obligation to interpret the policy according to its words and ordinary meanings.

The High Court recognised that the exclusion was an important practical protection for insurers. It protected them from a genuine but unreasonable or unrealistic estimate or understanding of the insured. The insurer's rights to be protected, in the opinion of the High Court had to be given proper application.

## Conclusion

The case reinforces the benefits for insurers who carefully draft the terms and conditions of policies and the questions in proposals.

The case also suggests that insureds should consider seeking special assistance when making proposals for professional indemnity insurance.

The case also suggests that the responsibility of the broker in assisting insureds to complete proposals should be prominent.

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