

Insurance Law Update

Policy Interpretation

Looking at the document as a whole

Supreme Court of Victoria Court of Appeal

Allstate Exploration NL v QBE Insurance (Australia) Limited (2008) VS CA 148 (21 August 2008)

Background

After a reserved judgment of less than three weeks the Victorian Court of Appeal affirmed the trial judge's conclusion and reasoning that QBE was not required to indemnify Allstate Exploration (Beaconsfield Mine in Tasmania) under its ISR policy following a mine closure notice issued after an underground seismic disturbance on Anzac Day 2006.

The closure caused Allstate considerable financial loss despite there being no physical damage to the property otherwise insured under the policy.

The particular part of the policy which was in contention was a provision which was not part of the standard policy, but, added in at the request of the insured.

That it was added in at the request of the insured removed any traction which Allstate may have sought to obtain if the contra proferentem rule was engaged.

Allstate said that the mine closure was an insured event.

Provision in the policy

The provision in the policy said:

"Civil Authority

Notwithstanding anything contained herein to the contrary, the Property Insured under this Policy is also covered against the risk of loss, destruction or damages arising from the actions of any civil authority during a conflagration or other catastrophe and for the purposes of preventing, minimising or retarding same and shall also include the closure of Premises / Operations by any civil authority due to the operation of a peril insured against.

Reasons for decision

Allstate submitted that the better method of interpreting the operation of the provision was to look at the words themselves.

By contrast the insurer advocated an interpretation based on the whole of the document as a more harmonious method of interpreting the provision even if one accepted that the cover derived from the condition broadened the scope of the policy.

At the trial QBE persuaded the judge that the relevant provision in the policy was not engaged because the mine closure was not due to any loss, destruction or damage to property insured within the meaning of the policy.

QBE had persuaded the trial judge that the better interpretation meant reading the material provision in the context of the policy which provided indemnity for property damage and the consequences of property damage.

The trial judge and the appeal judges all determined that neither the position of the insured or the insurer was free from difficulty or manifestly correct. The construction urged by Allstate was supported by a literal reading of the words but that literal meaning gave rise to anomalies in application.

The construction urged by QBE found support in the structure of the policy but required the clause not to be given its literal application.

The parties encouraged the court to adopt the well known canons of construction namely to interpret the policy in a business like way and to resolve ambiguities in a common sense and non technical way so as to give the agreement a commercially sensible construction.

A prominent reason why the contentious provision, although extending the operation of the policy, should not be treated on a stand alone basis was to do with the absence of a basis for settlement clause covering the provision whereas the other parts of the policy had one.

It was the absence of a basis for settlement clause in the contentious provision which permitted the trial judge and the appeal judges to prefer the marrying of the provision to the policy as a whole as a means of interpreting its proper meaning.

While the rest of the policy was covered by a basis of settlement provision, the Court of Appeal said:

“It is difficult to conclude that the parties intended that the basis of settlement under clause 23 (the contentious clause) should be left either to the common law at large or to some unidentified modification or adaptation of the otherwise specific provisions they had made in respect of claims for property damage (section 1) or business interruption loss (section 2). The absence for a basis for settlement of claims under clause 23 more readily supports an inference that the clause was not intended by the parties to be a third and

independent basis of claim than an inference that they intended to leave the basis of claim either to the common law or to a modified or adapted application of other provisions.”

The Court of Appeal decided that a fair reading of the clause was to identify additional clauses of coverage rather than to enlarge the indemnity beyond the loss, destruction or damages elsewhere provided for in the policy.

The Court of Appeal’s decision sets out in reasonably close form the various arguments favoured by the insured and the reasons why those arguments did not find favour in the Court.

Conclusion

The reasons indicated in the decision reaffirms the overall complexity which can sometimes arise in the interpretation of complex insurance policies, especially where the clauses in contention were not part of the standard contract.

Kevin Gibbons

Title: Principal
T+61 2 9265 3227