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Professional and Management Liability Gazette

2nd edition

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From the Partner

We are delighted to publish this 2nd edition of the Professional and Management Liability Gazette. As with the 1st edition of the Gazette, which was extremely well received by our firm's insurer, broker, professional and corporate clients, this edition considers recent decisions involving a wide range of professionals, including solicitors, barristers and brokers.

In this edition, we consider recent cases involving fraudulent non-disclosure and fraudulent misrepresentation under a directors' and officers' liability policy, when a director is an '*executive*' or a '*non-executive*' for the purposes of indemnity under a professional indemnity policy, as well as examining the related entities exclusion in a professional indemnity policy.

We also look at privilege issues which may arise from the provision of solicitors' reports to insurers, in addition to revisiting the relevant principles of advocates' immunity and the test for determining whether a party is a vexatious litigant. We have also included a useful analysis of the duty of care owed by a broker to third parties to obtain appropriate insurances.

As a premier legal practice with one of the largest insurance practices in Australia, with teams in both Brisbane and Sydney, we are confident that this edition of the Professional and Management Liability Gazette will be a useful resource for our readers. We would welcome your feedback on this edition and any suggestions for our future editions (feedback@carternewell.com).

Michael Gapes

Partner

Contributing Researchers

Natasha Millington
Solicitor

Marijke Bassani
Solicitor

Hannah Fox
Solicitor

Thomas Pepper
Graduate Lawyer

Contributing Editors

Michael Gapes
Partner
07 3000 8305
mgapes@carternewell.com

Mark Brookes
Partner
07 3000 8301
mbrookes@carternewell.com

Michael Bath
Partner
02 9241 6808
mbath@carternewell.com

Dee Wood
Senior Associate
07 3000 8314
dwood@carternewell.com

Jason Savage
Senior Associate
07 3000 8358
jsavage@carternewell.com

David Fisher
Senior Associate
07 3000 8386
dfisher@carternewell.com

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Case Note

Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2) [2014] FCA 481

When disclosure to an insurer risks waiving privilege.

Facts

Asahi Holdings (Australia) Pty Ltd (**Asahi**) through its nominee, Independent Liquor (NZ) Limited (**ILNZ**), agreed to purchase the shares in a beverage company (**company**). It was a condition of the sale that Asahi obtain insurance in respect of certain warranties given by the sellers. Asahi entered a warranty insurance policy which provided cover for Asahi and ILNZ against breaches of those warranties by the sellers (**policy**).

Pursuant to the policy, the insurer was liable to indemnify Asahi for any loss it would have been entitled to claim against the sellers for breach of the insured warranties.

Asahi and ILNZ (**applicants**) later made a claim under the policy for loss occasioned by alleged breaches of a number of the insured warranties. They also commenced proceedings against the sellers and a number of their directors and employees (**respondents**), claiming they breached certain warranties and misrepresented the financial position of the company.

Relevantly, the applicants' then solicitors had prepared a report for Asahi and ILNZ in anticipation of the litigation with the respondents, containing a number of memos which particularised the conduct alleged to have caused the respondents to misrepresent the financial position of the company, such as inflating or overstating the company's earnings (**report**).

A complete copy of the report was voluntarily provided by the applicants to their insurer to support the applicants' claim under the policy,[1] with many (but not all) of the pages marked '*Privileged and Confidential*'.

A redacted copy of the report was also disclosed to the respondents during the course of the proceeding. The respondents sought disclosure of the unredacted version, however the applicants resisted the request on the basis the redactions attracted legal professional privilege.

The respondents asserted that the protection conferred by the privilege was lost when a copy of the report (in its entirety) was provided to the insurer, a third party.

Issues

Bromberg J was required to consider whether the privilege attaching to the report was waived by the applicants providing an unredacted copy of the report to their insurer.

His Honour referred to the guiding principles of waiver of privilege as outlined in *Mann v Carnell* (1999) 201 CLR 1 and relevantly noted that:

1. The key question was whether the applicants' conduct in providing the unredacted copy of the report to the insurer was inconsistent with maintaining confidentiality in the redactions as against the respondents;
2. The test of inconsistency was an objective test, meaning waiver might be implied despite the applicants' subjective intention to maintain confidentiality in the report; and
3. While the applicants' voluntary disclosure of the report to the insurer did not necessarily waive privilege, the inconsistency described above would usually only be established through a voluntary act of disclosure.

Decision

It was found by the court that the confidentiality in the report was *prima facie* protected by litigation privilege rather than advice privilege, meaning the report was prepared between the applicants and their solicitors for the dominant purpose of securing a fair trial. An essential element of maintaining the confidentiality was not disclosing the contents of the report to the applicants' opponents.

The court accepted the respondents' submission that there was *not* a commonality of interest between the insurer and the insured applicants (unlike many situations involving an insurer and insured, such as when an insurer assumes the conduct of litigation on behalf of an insured). In doing so the court recognised that, in relation to both the claim under the policy and the claim against the respondents in the proceeding, it was in the applicants' interests to establish that the respondents engaged in misleading or deceptive conduct. Conversely, the insurer and the respondents had a common interest in disproving the allegations of misleading or deceptive conduct. As a result there was a divergence of interests between the applicants and the insurer.

The court attached significance to this potential for competing interests because the applicants had voluntarily disclosed privileged information to a potential opponent when they provided the unredacted report to their insurer.

The applicants argued that the privilege attaching to the unredacted version of the report had not been waived by its disclosure to the insurer because the report had been disclosed for a limited and specific purpose and in a confidential context. In support of this, the applicants relied on:

1. Their use of the words '*Privileged and Confidential*' when disclosing the report to the insurer;
2. An implied obligation on the insurer to maintain confidence, consistent with the insurer's '*duty of utmost good faith*'; and
3. An alleged commonality of interest between the applicants and the insurer, based on, *inter alia*, a common interest in assessing the sellers' liability (an interest the court viewed as insignificant).

The court observed that objectively the applicants must have provided the unredacted report to the insurer to enable the insurer to assess the claim under the policy. The applicants must also have (objectively) appreciated that if a dispute arose under the policy and the insurer rejected the applicants' claim, the insurer could use the information in the unredacted report in any relevant proceedings against it which would result in the report passing into the public domain.

The court held:

1. The disclosure of the unredacted version of the report to the insurer for use by the insurer was *inconsistent* with the maintenance of confidentiality which the privilege was intended to protect;
2. An implied and complete waiver of privilege had occurred, because the applicants could not control the insurer's further dissemination of the unredacted report once it had been disclosed; and
3. An agreement of confidentiality as between the applicants and the insurer (as asserted by the applicants) could not be implied in the circumstances.

[1] The applicants were not compelled under the policy to provide the report to the insurer.

Case Note

Markan v Bar Association of Queensland (No 3) [2014] QSC 225

When a party will be considered a vexatious litigant.

Facts

Mr Markan was found guilty of committing grievous bodily harm for breaking the arm of a former colleague while working at a resort on South Stradbroke Island. He was convicted and sentenced to four year's imprisonment.

After unsuccessfully appealing the conviction, Mr Markan complained to the Legal Services Commission (**LSC**) about the conduct of his solicitors and counsel. The LSC commissioned reports from the Bar Association of Queensland (**BAQ**), however they did not substantiate Mr Markan's complaints.

Mr Markan did not sue his solicitors, but instead commenced a series of claims, appeals and applications against various parties he saw as having a role in his conviction: the BAQ, the Crime and Misconduct Commission, the Queensland Police Service and the LSC.

In his first proceeding, he sued the BAQ for $10,000,000.13, alleging it was an:

> *'… arrogant mafia organisation operating to subvert the Government and community institutions',* and has been involved in a *'… fragrant [sic] contempt of laws in this country',* which involved *'… unlawful act [sic] indicating gross malice and ill will … affecting the whole society, eroding public confidence in the operation of justice system [sic]'.*

This proceeding involved an appeal to the Court of Appeal and applications for special leave to appeal to the High Court.

In his second proceeding, he again sued the BAQ for $10,000,000.13, this time as a debt *'… for the service provided by Peter Markan concerning the redemption of Bar Association of Qld'* which seemed to include a fee for the services of providing *'public ridicule'* and *'public humiliation'*.

The present proceeding (being the third against the BAQ) also relates to an invoice that Mr Markan delivered to the BAQ, again for $10,000,000.13, but this time for *'promotion of [the BAQ] … as the most effective Mafia organisation in the world'*, allegedly under an agreement the BAQ had entered into with him *'… by virtue of their conduct'*. The pleading also sought a finding that the BAQ was *'a criminal organisation and that persons associated with it should be sent to re-education facilities and subjected to hard physical labour'.*

The BAQ of course denied the existence of any agreement on the basis that it lacked the fundamental prerequisites for creation of a contract: offer and acceptance. What makes this case interesting however, is the BAQ's application under the *Vexatious Proceedings Act 2005* (Qld) (**VPA**) seeking that Mr Markan be declared a vexatious litigant. This is a rarity as the register of vexatious litigants maintained under VPA lists only 21 persons against whom a *'vexatious proceeding order'* has been made.[1]

Mr Markan responded by seeking an order that the BAQ be declared a vexatious litigant.

Issues

The two-stage test involved in determining whether a person is a vexatious litigant requires consideration of:

1. Whether the plaintiff has instituted vexatious proceedings; and
2. Whether the vexatious proceedings have been instituted frequently.

Decision

The court found the following factors were indicia that Mr Markan was a vexatious litigant:

1. The claims had no basis in law;
2. The claim for damages were extraordinarily high;
3. The accusations against BAQ were unsubstantiated and very serious;
4. All matters were appealed to the limit of the appeals process which involved the rerunning of arguments previously said to be without merit; and
5. Continued disregard of court procedure and the failure to learn anything from previous inadherence of the court rules.

The agreement alleged to exist between Mr Markan and the BAQ was found to be '*plainly fictitious*'. Further, the calculation of the damages sought was found to be irrational and exorbitant. The accusations made in Mr Markan's claims were found to be very serious against each of the defendants, but baseless. Those accusations were elaborated upon in affidavit material and specifically named various members of the judiciary, again with unsubstantiated accusations.

The repeated and regular appeals involving the rerunning of arguments, particularly in light of the fact that they were deemed to be without merit, was an abuse of process.

Wilson J noted that he was entitled to take into account what had happened in the other proceedings instituted by Mr Markan. Mr Markan's actions were illustrative that he had no desire to adhere to the court procedure despite being given explicit directions to do so. Where he was allowed to amend his applications so as to adhere to the court rules, the amended claims and pleadings were returned *'more extravagantly and less coherent than the documents he initially filed'.*

With respect to the frequency aspect it was considered that *'frequently'* is a relative term to be considered in the context of litigation and may also include applications made within proceedings.[2] Mr Markan commenced a combined number of nine actions and appeals since 2010. The total number of claims, appeals and applications made by Mr Markan was considered to fall *'fairly within the usual meaning of the word* frequently*'.*

Despite Mr Markan's valiant attempt to rely upon *Mabo*[3] and the Constitution,[4] Wilson J held that *'the absence of any legal basis for his actions, combined with his perseverance in the face of these adverse judgments, compels the conclusion that his proceedings are vexatious within the meaning of that term in the VPA.'* The orders of Wilson J prohibit Mr Markan from instituting proceedings in any Queensland court apart from an appeal of the orders.

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[1] The list is retrospective and contains entries dating from 12 October 1983.

[2] *Attorney-General (NSW) v Gargan* [2010] NSWSC 1192 at [7].

[3] *Mabo & Ors v Queensland (No 2)* (1992) 175 CLR 1.

[4] Wilson J's decision does not record whether Mr Markan also relied upon *'the Vibe'*.

Staff profile Insurance and Construction & Engineering

Michael Bath

Partner

Michael Bath is a Partner in Carter Newell's Financial Lines and Construction & Engineering Insurance teams. He leads our Sydney office and has almost 15 years experience in insurance and commercial litigation.

Michael advises both local and international insurers on coverage issues across a wide range of insurance classes including professional indemnity, product liability, contract works/ construction risk, property and industrial special risks. He also provides advice on the suitability of insurance regimes and their interaction with contractual indemnities in property and construction transactions. He has acted in numerous complex commercial litigation across most Australian jurisdictions, as well as private arbitrations, particularly for construction, financial and allied health professionals.

+61 2 9241 6808

+61 433 318 452

+61 7 3000 8478

mbath@carternewell.com

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Case Note

Akron Roads Pty Ltd (in liq) v Crewe Sharp & Ors [2015] VSC 34

Consideration of whether plaintiff liquidators can join a third party insurer to actions involving the insured defendants.

Facts

During the course of litigation brought by the liquidators of Akron Roads Pty Ltd (**company**) against its former directors, in which it sought damages in excess of $14 million for losses resulting from insolvent trading, the liquidators became aware of the existence of a professional indemnity insurance policy issued by insurers to both Trevor Crewe (one of the former directors) and Crewe Sharp Pty Ltd (allegedly a shadow director) (**insureds**).

Under the insurance policy, insurers agreed to:

> *'indemnify the Insured up to the policy limit for any Civil Liability to any third party which is incurred by the Insured in the conduct of the Professional Services …'*

Insurers had declined cover on the basis that the company's claim against the insureds did not relate to *'Professional Services'*, namely the provision of *'Management Consultancy'* services.

The liquidators sought a declaration that insurers must indemnify the insureds for their liability to compensate the company for its claimed loss. The liquidators contended that despite it not being an insured under the policy, s 562 of the *Corporations Act 2001* (Cth) (**Act**) provided sufficient basis for the joinder.

Insurers made the following submissions resisting the joinder:

1. The declaration should not be granted because courts can only make a binding adjudication with respect to justiciable controversies when private rights are involved. A court will only grant a declaration at the suit of a person entitled to assert that their right was infringed, and as no claim was made by an insured against insurers under a policy, there was no justiciable controversy;
2. The right of a liquidator pursuant to s 562 of the Act grants them the right to any insurance proceeds from an insured successfully enforcing its rights, not a right of action against the insurer to enforce the insurance policies; and
3. In any event, the terms of the policy of insurance exclude liability to each insured.

Issues

1. Whether the liquidators had sufficient interest in the proceeds of insurance to provide them with standing to apply for the joinder of insurers;
2. Whether there was a justiciable dispute consequent upon insurers' denial of indemnity to the insureds; and
3. Whether it was appropriate to join the insurers to the action as a defendant.

Decision

Justice Judd adopted the summary of the principles set out by Lindsay J in *The Owners – Strata Plan 62658 v Mestrez Pty Ltd*[1] as to whether there was a '*justiciable controversy*'. The view is that a true legal controversy will exist between a plaintiff and an insurer where there is a realistic prospect of s 562 of the Act having scope for operation, which should be assessed on a case-by-case basis.

His Honour found that in the scenario before him there was a proper basis to join insurers as defendants, irrespective of their arguments that:

1. The party applying for joinder was not an insured; and
2. Indemnity would not be available in any event.

In coming to his decision, His Honour thought the following considerations were relevant to his exercise of discretion:

1. That the claim had been made by the insured under the policy and liability denied;
2. The insured consented to the joinder;
3. Insurers accepted they would not be open to re-litigate the question of liability under the policy in different proceedings;
4. The trial was expected to last days and not weeks. Were it otherwise, it may have been appropriate to consider an earlier determination of insurers' liability to indemnify;
5. It is unlikely that the joinder of insurers would be prejudicial to the efficient and cost-effective management of the trial, or extend the duration of the proceeding by any disproportionate amount of time;
6. The liquidators had a sufficient interest in the proceeds of insurance to provide them with standing to apply for declaratory relief; and
7. It was convenient, and in line with the overarching purpose of the *Civil Procedure Act 2010* (VIC) to resolve the dispute between the liquidators and insurers in the same proceeding as the dispute between the liquidators and the insured.

In this instance, whether the policy actually responded, was a live issue. His Honour relevantly observed that *'[t]he proposed case to be advanced by the [liquidators] is not hopeless, or bound to fail. Nor is it fanciful, without any reasonable prospect of success.'* If it had been beyond doubt that indemnity was not available under the policy, that would have weighed more heavily as a factor against the discretion to join insurers to the proceeding.

It was also material that a claim had been made by the insureds under the policy. If this had not occurred, it is unlikely that s 562 of the Act would have any application as it refers only to amounts received under an insurance policy, not the right to lodge claims.

[1] [2012] NSWSC 1259 [54].

Case Note

Hamcor Pty Ltd & Anor v The State of Queensland & Ors [2014] QSC 224

Consideration of the existence of a duty of care between an insurance broker and third parties to obtain appropriate policies of insurance.

The facts

Hamcor owned industrial property in Queensland. Binary, the leasee, operated a chemical factory from the property. Binary and Hamcor were related entities, sharing the same controlling minds.

In August 2005 the factory was destroyed by fire. Large amounts of water applied to fight the fire became mixed with chemicals emanating from the factory, contaminating Hamcor's land and that surrounding it. Hamcor was required by the *Environmental Protection Act 1994* (Qld) to remediate the contaminated land, at a cost of $9 million.

Hamcor received $3 million in proceeds from a property insurance policy taken out in its name covering the circumstances of the fire, however an uninsured exposure of $6 million remained.

Hamcor commenced proceedings against two insurance broking firms (**brokers**), who had arranged liability insurance for Binary. Hamcor alleged that:

1. The brokers knew, or ought to have made sufficient enquiries to discover that Hamcor owned the land from which Binary operated the factory, and should have had it named as an insured (or interested party) on Binary's liability policy; and
2. Alternatively, the brokers should have obtained an Industrial Special Risks policy for Hamcor.

Issues

The proceeding against the brokers raised three key issues for determination:

1. Whether the brokers, whose retainer was limited to one on behalf of Binary, owed Hamcor (a third party) a duty of care;
2. Whether Hamcor would have purchased any additional insurance had it been recommended; and
3. Whether such insurance would have covered Hamcor's uninsured losses.

Decision

In finding for the brokers, Justice Dalton determined all three issues against Hamcor.

Regarding the existence of a duty of care, the evidence before the court was that up until around 2003 Hamcor and Binary used the same insurance broker to provide their respective insurance needs for the property, as owner and leasee respectively. The existing broker was known to, but not affiliated with, the brokers.

That position changed from 2003, when Binary's then insurer refused to renew its public liability cover. Following a series of exchanges between Binary and the brokers throughout 2003, they were able to place Binary's public liability insurance with an alternative insurer. As part of that process Binary and the brokers entered a Services Agreement for the provision of those services. Binary's remaining insurance needs, as well as those of Hamcor, remained with the existing broker.

Hamcor cast its case in particularly wide terms, alleging the brokers owed it a duty to:

1. Investigate the relationship between Binary and Hamcor;
2. Investigate the existing insurances that had been arranged on behalf of both entities;
3. Realise those existing insurances were inadequate to respond to a situation in which Hamcor became subject to an obligation to remediate its land if contaminated.

Dalton J acknowledged that the brokers were aware of Hamcor's existence, and that the prevailing circumstances could reasonably have indicated to the brokers that there was some relatively close relationship between Binary and Hamcor, however this alone was not enough.

Hamcor's claim against the brokers was one for *pure economic loss*, her Honour referring to the seminal case of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.[1] Her Honour was not satisfied that the special circumstances espoused in *Woolcock* for the imposition of a duty of care – reliance, assumption of responsibility and vulnerability – could be established, noting the following:

1. The brokers had a defined retainer, which was limited to placing Binary's public liability cover;
2. The brokers were not engaged to ensure that all of Binary's (let alone Hamcor's) insurance needs were met, and knew that another broker retained this responsibility;
3. Binary rejected the brokers' attempts to assume a wider role in offering other forms of insurance.

Justice Dalton therefore found the brokers did not owe Hamcor the duty of care alleged, and the claim failed on this basis. In a further blow to Hamcor however, her Honour went on to consider the remaining two issues in *obiter*, making the following remarks:

1. Having regard to the available objective evidence, including Binary's dilatory attitude towards matters of insurance, and the fact Hamcor did not take out additional insurance in respect of a similar property it owed in Western Australia after the fire even though existing insurance proved to be inadequate, it could not be established Hamcor would have taken out any additional insurance had it been recommended;
2. Hamcor failed to prove that it could have been named as either an insured or an interested party on Binary's liability policy, or that an insurer would have provided Hamcor with separate ISR cover had it been inclined to buy it. The evidence before the court was that the prevailing insurance market for the petrochemical industry at the time was a difficult one (which perhaps explained why Binary's renewal was refused in the first place, and the time taken to obtain appropriate alternative insurance);
3. The policies which Hamcor say ought to have been obtained, an interest in Binary's liability policy or its own ISR policy, would not have provided cover for Hamcor's costs of remediating its own land in any event. Those costs could not be said to be a *'liability to pay compensation'* as a result of claim against Hamcor so as to bring it within Binary's liability policy, and were not costs associated with the remediation of physical property as contemplated by the ISR policy but the land itself (which was excluded from cover).

The existence of a duty of care aside, Hamcor therefore also failed to establish the alleged breaches were causative of its loss, on the basis it neither *would* nor *could* have obtained appropriative cover against its uninsured losses.

[1] *Woolcock* has since been applied by the High Court in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, delivered eight days after Dalton J's decision.

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Case Note

Bakovski v Lenehan [2014] NSWSC 671

Solicitor's duty to exercise reasonable care, causation, contributory negligence and proportionate liability.

Facts

In August 2004, Mr and Mrs Bakovski entered into a loan agreement for $386,250 with Accom Finance Pty Ltd (**Accom**) in the mistaken belief they were merely the guarantors to the purported borrower, Mr Mitrevski.

The terms of the loan were highly unfavourable to the Bakovskis in that:

- It was a two-month loan on terms that included compound interest of 60 per cent per annum with penalty interest of 96 per cent; and
- They did not receive any direct benefit of the loan because the funds were advanced to a company of which Mr Mitrevski was the director.

Mr Mitrevski had procured loan documentation which clearly showed that the Bakovskis were to be the ones taking the loan secured by one of their properties. Mr Mitrevski drove the Bakovskis to the offices of Lenehan & Co and signed the paperwork with Mr Arkoudis, a solicitor at Lenehan & Co.

Ultimately, the Bakovskis refinanced the loan in December 2004 by obtaining a loan (presumably on more favourable terms) for $526,133.94.

They commenced a claim against Lenehan & Co and Mr Arkoudis to recover these losses. Mr Mitrevski was not a party to the proceeding.

The Bakovskis alleged that at the time of signing the loan documents, Mr Arkoudis placed each document on the desk before them in turn, pointed to the document and said '*sign there, sign there*'. They alleged that the meeting with Mr Arkoudis was very brief and that they did not keep a photocopy of the documents for their records.

Conversely, Mr Arkoudis contends that he did provide advice to the Bakovskis on the terms of the loan using layman's terms and explaining each document he had them sign.

There were no file notes taken by Mr Arkoudis on the meeting which took place with the Bakovskis.

Issues

The court was required to consider:

1. Whether the Bakovski's understood that they had executed the documents in the capacity as borrowers, rather than mere guarantors;

2. Whether the defendants were subject to duties:
    a. to consider whether the underlying transaction was in the interests of the Bakovskis, and if not, to advise them accordingly; and
    b. to insist, as a precondition to providing services to the Mr Bakovski, that a Macedonian interpreter be present.
3. Absent any detailed file notes by the solicitors, whose version of the events in relation to the circumstances surrounding execution of the loan documentation to prefer.
4. Subject to the above:
    a. the amount of loss and damage suffered by the Bakovskis;
    b. whether the Bakovskis were guilty of contributory negligence;
    c. whether the claim was an '*apportionable claim'* under the proportionate liability regime established by the *Civil Liability Act 2002* (NSW) (**CLA**), and if so:
        (i) whether Mr Mitrevski was a '*concurrent wrongdoer'*;
        (ii) who bears the burden of proof; and
        (iii) the extent of the '*culpability and causal potency*' of the defendants and Mr Mitrevski respectively.

Decision

The '*ultimate factual issue*' to be determined in the case was what was said and understood in the meeting between the Bakovskis and Mr Arkoudis in August 2004.

There was no file note and nothing in evidence to corroborate Mr Arkoudis' version of events that he advised the Bakovskis of the great risks associated with the loan they were taking out or that Mr Arkoudis advised them against taking out the loan. Mr Arkoudis' evidence was purely from his memory of events that occurred six years earlier, which were proven to be flawed in a number of respects.

'The solicitor's duty of care was critical and 'a primary and potent cause of the plaintiffs' loss and represented… a serious departure from the standard of reasonable care, skill and diligence required.'

Conversely, the Bakovskis' version of events was corroborated by their past conduct and dealings with solicitors, financial advisors and property investors generally. Additionally, a file note taken by the Bakovskis' financial advisor, two weeks after the Arkoudis meeting, corroborated the Bakovskis' version of events.

Correlating this evidence, the court was satisfied Mr Arkoudis breached his duty to the Bakovskis to exercise reasonable skill, care and diligence in the provision of legal advice. Justice Hall considered the Bakovskis ought to have been advised that the loan was harsh and oppressive, and of the risks associated with taking out such a loan.

As to causation, the court found that if appropriate advice had been given to the Bakovskis, they would likely have heeded that advice. They were able to demonstrate risk averse behaviour in their investments generally, and their prior conduct in seeking legal advice from their usual solicitor.

The defendants argued that any award of damages should be reduced to account for the Bakovskis' contributory negligence. Hall J followed *Astley v Austrust Ltd*[1] and found that the nature of the duty owed by the defendants exculpated the Bakovskis because they were clearly unsophisticated and required clear and strong legal advice. Consequently, the defence of contributory negligence failed.

Next, Hall J considered whether this was an apportionable claim under the CLA. Subject to making a determination about whether Mr Mitrevski was a '*concurrent wrongdoer*', Hall J determined that this was an apportionable claim because the subject matter of the claim was clearly '*damages arising from a failure to exercise reasonable care, being those claims that consist of claims 'for economic loss or damage to property' which do not arise out of personal injury*'.

As to whether Mr Mitrevski was a '*concurrent wrongdoer*', Hall J found that there was '*sufficient evidence for the conclusion that Mr Mitrevski was a concurrent wrongdoer having made material misrepresentations to the plaintiffs which induced them to agree to assist him to obtain short term finance from Accom'.*

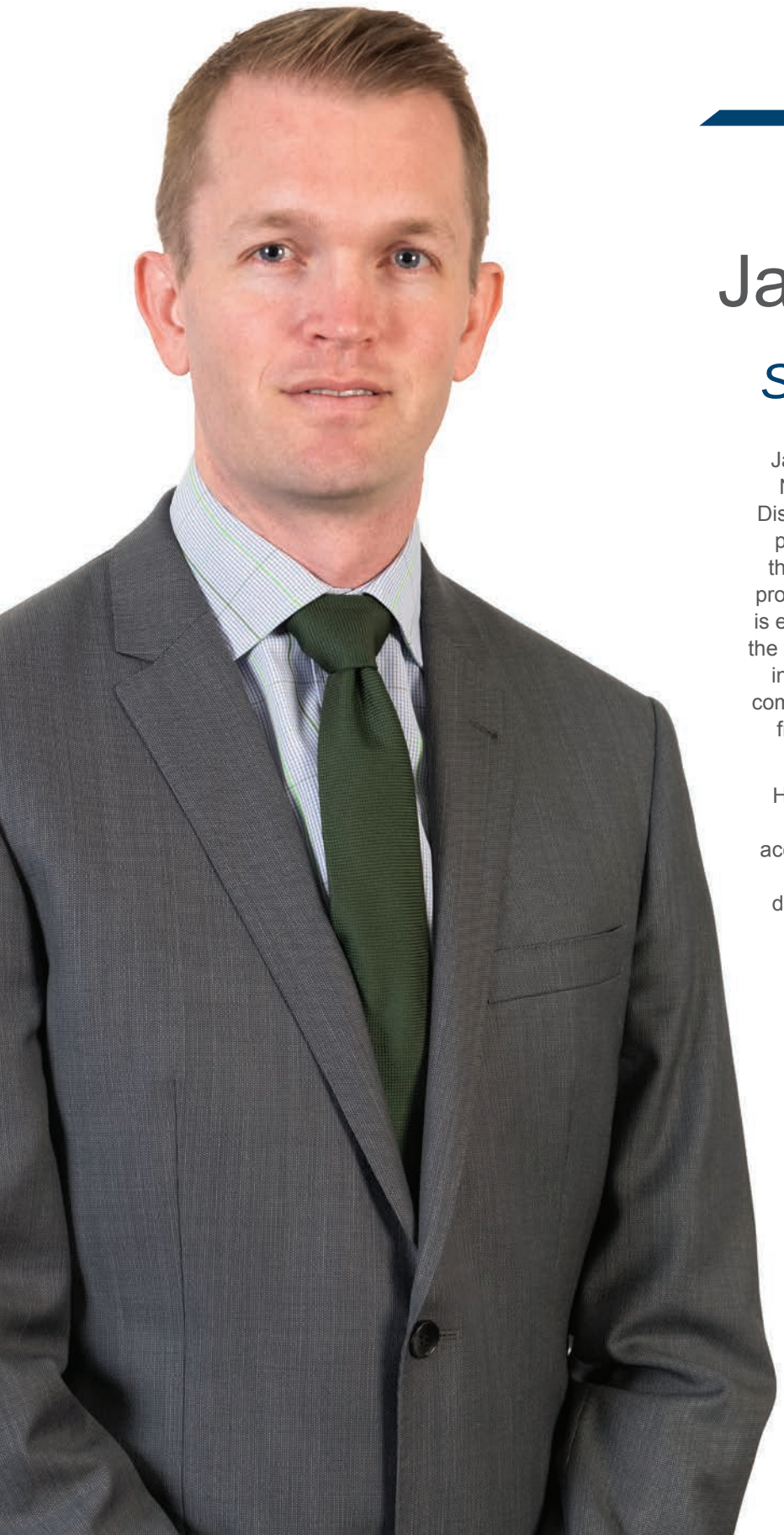
That said, Hall J found that there was insufficient evidence to make a finding that Mr Mitrevski had intended to defraud the Bakovskis, which evidential burden fell upon the defendants and later became an important factor in determining the appropriate apportionment of the loss.

Hall J observed that the breach of duty in this case reached well beyond the omission/failure to draft a mortgage with necessary terms in *Hunt & Hunt Lawyers v Mitchell Morgan.*[2] In the present case, the solicitor's duty of care was critical and *'a primary and potent cause of the plaintiffs' loss and represented… a serious departure from the standard of reasonable care, skill and diligence required'.*

On that basis, Hall J determined that Mr Mitrevski should be found 60% liable and the defendants 40% liable, reducing the damages award accordingly (as Mr Mitrevski was not a party to the proceeding).

[1] (1999) 197 CLR 1.

[2] (2013) 247 CLR 613.



Staff profile Insurance

Jason Savage

Senior Associate

Jason is a Senior Associate in Carter Newell's Insurance and Litigation & Dispute Resolution teams. He has been practising for more than ten years in the areas of commercial litigation and professional indemnity insurance. Jason is experienced in commercial litigation in the Queensland and Federal jurisdictions, including professional liability claims, complex multi-party contractual disputes, franchising disputes and intellectual property disputes.

He has specific expertise in disputes involving financial planners and accountants stemming from his finance background and a also a focus on defending defamation claims against office bearers.

+61 7 3000 8358

+61 414 523 876

+61 7 3000 8478

jsavage@carternewell.com

Carter Newell LAWYERS

Case Note

Bird v Ford [2014] NSWCA 242

Consideration of a solicitors' obligations to advise a client on the prospects of success in underlying litigation.

Facts

Mr and Mrs Bird (**clients**) retained the defendants (**solicitors**) to act for them and their son (**student**) in connection with proceedings to be brought against Broughton Anglican College (**school**) in relation to the student's expulsion from the school.

The clients and the student commenced proceedings in the Supreme Court of New South Wales seeking:

- Judicial review of the school's decision to expel the student; and
- A declaration that the expulsion was invalid because it constituted a breach of an implied term of contract between the school and the client that procedural fairness would be afforded before any expulsion.

Einstein J dismissed the proceedings on the basis that the school was not bound by the common law rules of procedural fairness and there was no basis to imply such a contractual term.

The clients then commenced proceedings against the solicitors, claiming damages for breach of retainer and negligence in the provision of advice about the earlier proceedings against the school.

Schmidt J dismissed the proceedings brought against the solicitors on the basis that:

1. There had been two retainers:
    a. the first retainer concerned the pursuit of a settlement with the school; and
    b. the second retainer concerned litigation against the school.
2. As to the first retainer, the advice given by the solicitors was neither negligent nor clearly wrong, In fact, it had procured an offer to take the student back (which was not accepted).
3. As to the second retainer:
    a. the principle of advocate's immunity applied; and
    b. the solicitors were not negligent in any event.

The clients appealed Schmidt J's decision to the Court of Appeal.

Issues

The clients conceded that in order to succeed on appeal, they needed to demonstrate that Schmidt J ought to have made a finding that the proceedings against the school were, objectively, *'entirely misconceived and manifestly hopeless'*.

The questions of advocate's immunity and causation were not challenged on appeal.

Decision

The Court of Appeal, constituted by Bathurst CJ, Barrett JA and Emmett JA, unanimously dismissed the clients' appeal based on findings that:

1. General law principles are to the effect that:
    a. a client has a right to have his or her case conducted in court irrespective of the view a lawyer has formed about the case and its prospects of success; and
    b. notwithstanding the apparent hopelessness of a proceeding, a lawyer may act with impunity provided that the lawyer is not aware that the proceedings might amount to an abuse of process.
2. There was no abuse of process because:
    a. despite the implied retainer ground's ultimate failure, it had '*some measure of substance, based on the unsettled state of Australian law and a willingness of courts in some other countries to approve an implied term basis for the assertion of a private school's duty to observe procedural fairness in the making of expulsion decisions'.*
    b. although the judicial review grounds were more problematic, '*a reasonable argument might have been gleaned from current New Zealand views about the amenability of administrative action to judicial review which place much less emphasis on the source of the decision making power and, in particular, whether or not it is statutory'.*
3. There was no negligence on the solicitors' part because:
    a. they had correctly advised the clients that the claim against the school would be a novel and difficult case to run, and that there was *'an arguable view of the law in support of the claim but that the case could be lost because of jurisdictional questions, or on the facts, or on discretionary factors'.*
    b. Mrs Bird had on multiple occasions informed the solicitors that she would pursue the matter without them, if necessary.

Case Note

Gillies v Brewer [2014] NSWSC 1198

Consideration of advocate's immunity to both solicitors and barristers in respect of failed underlying proceedings.

Facts

Mr Gillies was charged with several incidences of sexual assault occurring in July 2004. He retained Ms Randle (**solicitor**) and Mr Brewer (**barrister**) to assist his defence.

The solicitor represented Mr Gillies at a number of directions hearings and then at the trial. The barrister represented Mr Gillies at the trial, however his instructions were withdrawn part way through the trial, before delivery of closing submissions.

On 24 August 2006, Mr Gillies was convicted of one count of sexual intercourse without consent and was sentenced to a term of imprisonment.

On 9 December 2013, Mr Gillies commenced civil proceedings against the solicitor and the barrister seeking relief due to an alleged *'unlawful failure to follow the instructions provided by the plaintiff in order to gain personal financial benefit'*.

The solicitor and barrister applied for orders that the claim be struck out or dismissed on a summary basis.

Issues

The court was required to consider whether;

1. The claim disclosed a reasonable cause of action;
2. The claim amounted to an abuse of process;
3. The proceedings were statute barred;
4. The solicitor and the barrister were immune from suit; and
5. This was a case in which the court could exercise its jurisdiction to summarily dismiss the claim.

Decision

In short, Rotham J found that:

1. The claim disclosed no reasonable cause of action and was an abuse of process;
2. The proceeding was statute barred, having been brought outside the six year limitation period for claims in negligence and tort;
3. The solicitor and barrister were each immune from suit under the advocate's immunity; and

4. It was therefore appropriate to summarily dismiss the claim.

The case law and policy considerations on the principle of advocate's immunity were cited and discussed in detail.

The central basis for the principle is that once a matter is resolved, it should not be re-opened. In allowing barristers and solicitors to be exposed to law suits each time a client's litigated matter fails, the flood gates would potentially be open for the client to sue their legal representatives for negligence. This in itself would then require a re-opening of the initial matter to determine whether or not the legal representatives were in fact negligent or if the initial matter was determined incorrectly.

Rothman J referred to the decision of *Lanphier v Phipos*,[1] in which Tindal CJ expressed the view that *"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill".* Tindal CJ continued: *'On the other hand, the common law has for a very long time recognised that the barrister is not subject to such general duty of care'.*[2]

The principle of advocate's immunity, as explained more recently by the High Court in *Giannarelli v Wraith*,[3] is now well established in Australian law.[4] The law confirms that *'....an advocate cannot be sued by his or her client for negligence in the conduct of a case, or in work out of court which is intimately connected with the conduct of a case in court...'.*[5]

Through the well established common law, the barrister in this case was immune from suit by Mr Gillies given the barrister's involvement was limited to representation of Mr Gillies for (part of) the trial. With respect to the solicitor, a separate body of common law confirms that a solicitor, acting in a litigated matter, can enjoy wide protection under advocate's immunity, even in circumstances where counsel had been briefed.[6]

.....

1 (1838) 8 Car. & P. 475 [479].

2 Ibid [555].

3 (1988) 165 CLR 543.

4 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA. 12; (2005) 223 CLR 1.

5 Ibid [25].

6 *Bird v Ford* [2013] NSWSC 264.

Case Note

Maxwell-Smith v S & E Hall Pty Ltd [2014] NSWCA 146

Consideration of a solicitor's duties owed to former clients.

Facts

Mr and Mrs Maxwell-Smith (**Maxwell-Smiths**) purchased land in 1995 and retained Mr Hugo White (a solicitor) to act for them in the conveyance. The Maxwell-Smiths subsequently retained S & E Hall Pty Ltd (a builder) (**S & E Hall**) to construct a house on the land.

A litigated dispute arose between the Maxwell-Smiths and S & E Hall in relation to the building work. S & E Hall then retained Mr White to act for it in the litigation.

The Maxwell-Smiths' litigation against S & E Hall was unsuccessful and a number of costs orders were made against them. As a judgment creditor, S & E Hall served two bankruptcy notices on the Maxwell-Smiths. Ultimately, one of the bankruptcy notices was annulled and the other was set aside.

The Maxwell-Smiths brought proceedings against Mr White and S & E Hall alleging:

1. In respect of Mr White, that by acting for S & E Hall in the building dispute litigation, Mr White breached:
    a. a retainer he had with the Maxwell-Smiths;
    b. a common law duty of care; and
    c. an equitable duty owed by him to them.
2. In respect of S & E Hall and Mr White, that they had committed the tort of '*collateral abuse of process*' by serving the two bankruptcy notices on the Maxwell-Smiths with a view to recovering the judgment debts.

The Trial Judge dismissed both claims, finding there had been no breach of duty or retainer by Mr White and that no tortious abuse of process had been committed in relation to the two bankruptcy notices.

The Maxwell-Smiths appealed that decision.

Issues

On appeal, the following issues arose for determination:

1. Whether there was an ongoing retainer between Mr White and the Maxwell-Smiths;
2. If not, what ongoing duties Mr White owed the Maxwell-Smiths; and
3. The elements of the tort of *'collateral abuse of process'*.

Decision

The Court of Appeal dismissed the appeal.

In respect of the claim against Mr White for breach of solicitor's duty, the Court of Appeal found at the time he started acting for S & E Hall in the litigation, there was no ongoing retainer. The Court of Appeal therefore considered the nature of Mr White's duties to the Maxwell-Smiths as former clients and found that:

1. A solicitor does not owe to a former client a continuing equitable or contractual duty of loyalty after a solicitor/client retainer ceases;
2. The court's jurisdiction to restrain a solicitor from acting against a former client arises in order to protect the confidences of the former client, or to protect the integrity of the judicial process and the due administration of justice. The court's jurisdiction is not based on any conflict of duty or interest; and
3. There was no basis to suggest Mr White would breach the Maxwell-Smiths' confidentiality or that the due administration of justice would be prejudiced by Mr White acting for S & E Hall in the building dispute litigation.

The Court of Appeal also rejected the Maxwell-Smiths' claim that Mr White and S & E Hall had committed the tort of collateral abuse of process by S & E Hall obtaining and serving the two bankruptcy notices on the Maxwell-Smiths with a view to recovering the judgment debts.

In upholding the Primary Judge's decision, the Court of Appeal found:

1. As against S & E Hall, the Maxwell-Smiths failed to make out the elements of the tort, namely that S & E Hall:
    a. used a court process for an improper purpose; and
    b. engaged in some overt act or threat, distinct from initiating the proceeding itself, in furtherance of an allegedly improper purpose.
2. As against Mr White, the tort of collateral abuse of process can only be committed by a party to the proceedings said to have constituted the abuse of process. Because Mr White neither obtained the bankruptcy notices nor served them on the Maxwell-Smiths, no action could lie against him.

Case Note

Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832

Consideration of indemnity under a directors and officers policy in light of allegations of fraudulent non-disclosure and fraudulent misrepresentation.

Facts

Mr Poole sought indemnity under directors' and officers' liability policies issued by insurers to two companies, Doyles Creek Mining Pty Ltd (**DCM**) and NuCoal Resources NL (**NuCoal**), of which he was a former director.

The indemnity sought was for reimbursement of legal costs of in excess of $650,000 incurred by him in the course of an inquiry by the Independent Commission Against Corruption (**ICAC**), in relation to the granting of an Exploration Licence to DCM by the New South Wales Government without competitive tendering.

Insurers denied they were liable to indemnify Mr Poole by reason of alleged fraudulent non-disclosure and fraudulent misrepresentation, pursuant to s 28(2) of the *Insurance Contracts Act 1984* (Cth) (**ICA**).

The proposal forms completed prior to inception of the policies raised the usual enquiry whether any persons proposed for coverage under the policy (such as Mr Poole as director) were aware of any facts or circumstances which they had reason to believe may afford grounds for future claims. The answer given by both insured companies to this question was *'no'*.

Insurers alleged Mr Poole acted in breach of his duty of disclosure pursuant to s 21 of the ICA, founded on his alleged knowledge that:

1. Certain submissions made to the Government Department for mining prior to the grant of DCM's Exploration Licence, were false or misleading; and
2. There was an *emerging public controversy* in 2009 surrounding the grant of the licence, and that there was a possibility of an ICAC investigation.

Insurers maintained Mr Poole was aware these matters were relevant to their decision whether or not to accept the risk. Insurers contended that had the duty of disclosure been complied with – that is, had the relevant questions in the proposal forms been answered *'yes'* – it would not have entered into either policy.

In response, Mr Poole maintained that:

1. He believed every statement made to the Government Department was true (and consequently that, any statement that was false or

misleading information was not a matter '*known to*' him and accordingly no duty of disclosure arose under s 21 of the ICA;

2. Although he knew of the public controversy, he did not believe there was any prospect of it giving rise to a public inquiry.

Decision

Stevenson J held that insurers had failed to establish Mr Poole had engaged in either fraudulent non-disclosure or fraudulent misrepresentation. It followed that Mr Poole was entitled to indemnity for his costs of the ICAC investigation.

His Honour gave a detailed account of the legal principles applicable to establishing fraudulent misrepresentation or non-disclosure for the purpose of s 28(2) of the ICA. The key issues that emerged are that:

1. A non-disclosure or misrepresentation will be fraudulent if it is made with an absence of actual and honest belief in its truth, or recklessly, not caring whether it is true or false;[1]

2. An insurer must show either a deliberate decision by an insured to mislead or conceal something from the insurer, or recklessness amounting to indifference about whether this occurred; and

3. Fraudulent misrepresentation will be made out where it can be established that the representor was *consciously indifferent* or reckless as to the truth of the representation as *'someone who is indifferent to whether a representation is true or false can have no honest belief as to its truth'*.[2]

His Honour also acknowledged that insurers bore the onus of establishing Mr Poole acted fraudulently, which given the serious nature of the charge required *'clear and cognisant'* proof.

While His Honour accepted that the submission to the Government Department was in some of the alleged respects misleading, he was not persuaded Mr Poole appreciated that was the case. Mr Poole generally came across as an honest and reliable witness (despite being subject to six days of intensive cross-examination), all the while maintaining he believed the submission to be true, which absent sufficient evidence to the contrary (which Insurers failed to adduce) His Honour was not minded to reject.

With regard to the public controversy, Mr Poole's evidence was that he was adamant that he did not think the controversy gave rise in his mind to the slightest possibility there would be a public inquiry. That evidence too was accepted. Stevenson J concluded that a reasonable person in Mr Poole's position would not have suspected that such public controversy would give rise to a sensible prospect of there being a public inquiry as, critically, there was no suggestion nor evidence that the Government Minister had acted improperly in granting the Exploration Licence.

His Honour therefore concluded that insurers failed to establish that Mr Poole acted in breach of his duty of disclosure and failed to establish that Mr Poole was '*cognisant*' of any facts or circumstances which he had reason to suppose might afford a valid claim for a future claim by him under either policy.

……..

[1] *Derry v Peek* (1889) 14 App Cas 337; *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676.

[2] *Prepaid Services Pty Ltd v Atradius Credit Insurance NV*[2013] NSWCA 252.

Case Note

Liberty International Underwriters v The Salisbury Group Pty Ltd (in Liq) & Ors [2014] QSC 240

Consideration of a 'related entities' exclusion in a professional indemnity policy.

Facts

The Salisbury Group Pty Ltd (**Salisbury**) provided investment advice. Ian Weaver, in his capacity as an authorised representative of Salisbury, provided advice to Treadstone Developments Pty Ltd (**Treadstone**). The directors and shareholders of Treadstone were Ian Weaver's wife and children. Treadstone was also the trustee of the Weaver Family Trust and the beneficiaries of the trust were Ian Weaver, his wife and children.

Treadstone, in its capacity as trustee for the Weaver Family Trust brought a claim against Salisbury, alleged that:

1. In reliance on negligent or misleading and deceptive advice (and representations) from Salisbury, by its authorised representative Mr Weaver, it made investments in capital investment funds and obtained margin loans resulting in substantial losses; and
2. The provision of the advice by Salisbury, through its authorised representative Mr Weaver, constituted a breach of contract, negligence or misleading and deceptive conduct in contravention of the *Corporations Act 2001* (Cth), the *Australian Securities & Investments Commission Act 2001* (Cth) or the *Trade Practices Act 1974* (Cth).

Insurers had issued Salisbury with a Financial Institutions Professional Indemnity Policy (**policy**). Salisbury and Mr Weaver notified insurers of the claims against them and indemnity was declined by reason of the '*related entities*' exclusion clause in the policy.

The '*related entities*' exclusion excluded, amongst other things, claims made by or on behalf of:

i. 'One insured against another;

ii. Any current or former spouse or partner, parent, child or sibling of any insured against another insured; or

iii. Any entity the insured has a financial interest in.'

The policy did not define of '*on behalf of*' or '*financial interest*'.

Decision

Insurers made an application to the Supreme Court for a declaration that by operation of the exclusion, the policy did not respond to the claim. Although the exclusion clause was drafted with an intention to preclude claims such as the one by Mr Weaver, on the court's interpretation of the policy wording, the declarations were refused for the following reasons.

On behalf of

The insurer argued Treadstone's claim fell within the first two limbs of the exclusion because it was a claim on behalf of Mr Weaver (an insured) and his wife and his sons (a spouse and children of an insured), because they were each beneficiaries of the Weaver Family Trust.

To determine the meaning of the term *'on behalf of'*, the court considered the High Court decision of *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374 which emphasised that context will always determine which of the many possible relationships the phrase '*on behalf of*' is to be applied to.

In this case, Flanagan J considered that the term *'on behalf of'* contemplated some representative capacity or agency. Treadstone's claim was not, as a matter of fact or law, made in any representative capacity or as agent of the beneficiaries of the Weaver Family Trust. Rather, having regard to the terms of the trust deed, the power and discretion to institute the claim was solely that of Treadstone.

On an ordinary and natural reading of the words of the exclusion in the context of the claim, it could not be said that Treadstone, as trustee of the Weaver Family Trust, made the claims *on behalf of* Mr Weaver, his wife and his sons as beneficiaries of the trust.

Accordingly, the first and second limbs of the exclusion did not preclude Salisbury from claiming indemnity under the policy.

Financial interest

On the insurer's case the third limb of the exclusion was said to apply because Treadstone made the claim on behalf of the Weaver Family Trust, in which Mr Weaver, as a beneficiary, had a financial interest.

In determining whether Mr Weaver had a financial interest in the trust (and in turn, Treadstone) the court again considered the terms of the trust deed, noting that the trust could be characterised as a discretionary trust and that the discretion to distribute any trust income to any one or more of the beneficiaries was absolute.

The terms of the trust deed allowed for the exercise of discretion by the trustee prior to 29 June each year and in the absence of the exercise of that discretion, the default position was that trust income would be held on trust for Mr Weaver's wife and children. At no time was the income to be held absolutely for Mr Weaver, who had no definite right to any financial interest.

On that basis, Flanagan J held that the third limb of the exclusion was also not engaged to preclude Salisbruy's entitlement to indemnity under the policy.

Case Note

AIG Australia Ltd v Jaques [2014] VSCA 332

Categorising a director as an executive or non-executive for the purposes of extending indemnity under an insurance policy.

Facts

Mr Jaques was a director of Australian Property Custodian Holdings Limited (**APCH**) which was concerned with the management (as Responsible Entity) of a property trust dedicated to retirement and aged care facilities. Mr Jaques was also employed as the general manager of Australian Property Custodians Pty Ltd (**Custodians**), a company related to APCH and which undertook the day-to-day management of the retirement facility assets.

Insurers issued APCH with an Investment Management Insurance Policy, which provided cover to executive directors for losses of up to $5 million, and to non-executive directors a special excess limit of an additional $1 million.

Mr Jaques was the subject of certain proceedings in his directorial capacity, which he notified to insurers and in respect of which indemnity was extended. Upon the $5 million cover available to executive directors being exhausted, Mr Jaques sought to invoke the extended cover available to non-executive directors. Insurers refused to provide the extended cover on the ground Mr Jaques was an executive director at the time of the relevant wrongful acts.

Mr Jaques asserted that he was a non-executive director and therefore entitled to the extended cover, and was successful in proceedings against insurers in the Supreme Court at first instance. Insurers appealed that decision.

Decision

It was common ground that Mr Jaques was a non-executive director prior to 6 April 2004, and an executive director from 26 June 2007. The issue at trial and on appeal was whether Mr Jaques was a non-executive director in the interim period.

Insurers maintained the Primary Judge erred in its decision by failing to take into consideration or give due weight to certain factors indicative of Mr Jaques' position as an executive director. Its grounds of appeal were concerned with the Primary Judge's policy interpretation in respect of the definition of '*non-executive director*'.

The relevant policy defined *Director* as *'any person who was, now is, or during the policy period becomes, an executive or non-executive director'* of APCH. A *Non-Executive Director* was defined as '*any natural person who serves as a non-executive director'* of

APCH. The policy did not further define the relevant terms, nor did it provide any criteria by reference to which it might be determined into which category a director fell.

Insurers submitted that:

1. Mr Jaques' acts, representations to investors, representations to the board, independence from the managing director and other written documentary evidence necessarily indicated that he was an executive director in the relevant interim period, and that these factors were not appropriately considered in the judgment at first instance;
2. The payments made to Mr Jaques were indicative of his position as an executive director. In 2001, Mr Jaques was appointed as a non-executive director of APCH and received a director's fee. On 6 April 2004, Mr Jaques commenced employment with Custodians in the position of general manager. At this time, Mr Jaques stopped receiving the director's fee and commenced receiving a salary from Custodians. However, even after Mr Jaques was formally appointed as an executive director, he continued to receive his Custodians salary and his management remained exactly as prior to the appointment, indicative of Mr Jaques' pre-existing executive director role; and
3. Mr Jaques' acts of reporting on his work to APCH rather than Custodians and other concerned parties were demonstrative of the fact that he was an executive of APCH.

Mr Jaques maintained, despite insurers' contentions, that he was a non-executive director of APCH until his formal appointment as an executive director on 26 June 2007.

The appeal ultimately affirmed the Primary Judge's determination of Mr Jaques' status as of non-executive director.

The Court of Appeal said the essential element of the distinction for the purposes of construing the term non-executive in the policy was *'whether the director is performing executive functions in the management and administration of the company.'* This was in preference to other factors given little weight by the court, such as how a director was represented to the investing public, how he or she was regarded by the board or perceived oneself, and whether a director was independent of key management personnel.

'The essential element of the distinction for the purposes of construing the term non-executive in the policy was 'whether the director is performing executive functions in the management and administration of the company.'

The Court of Appeal noted the Trial Judge gave careful consideration to the involvement of Mr Jaques in APCH's business and the work he performed in connection with it, finding that:

1. Mr Jaques' duties were allocated by the board of Custodians (not APCH), and he was employed and paid by it;
2. Mr Jaques was involved in running of the retirement villages not on behalf of APCH but on behalf of Custodians; and
3. While Mr Jaques was involved in investigating and reporting on the feasibility of possible acquisitions by APCH (which ultimately went to the board) in doing so he drew upon his experience managing facilities through his employment with Custodians.

These findings led the Primary Judge to conclude (and with whom the Court of Appeal agreed) that in doing the work he did, Mr Jaques was primarily discharging his duties to Custodian under his employment agreement. Although the contrary factors raised by insurers did not go completely overlooked, the court was not persuaded that as general manager of Custodians, Mr Jaques was charged with or was performing executive functions on behalf of APCH.

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www.carternewell.com

Carter Newell LAWYERS

Carter Newell
LAWYERS

Brisbane
Level 13, 215 Adelaide Street
Brisbane QLD Australia 4000

GPO Box 2232
Brisbane 4001

Phone +61 7 3000 8300
Email cn@carternewell.com

Sydney
Level 6, 60 Pitt Street
Sydney NSW Australia 2000

Phone +61 2 9241 6808

Melbourne
280 Queen Street
Melbourne VIC Australia 3000
(Via Agency)