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Forge Wars Episode 2: Rushleigh Strikes Back – a warning for insurers about the *Civil Liability (Third Party Claims Against Insurers) Act* 2017

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In *Rushleigh Services Pty Ltd v Forge Group Limited (In Liquidation) (Receivers and Managers Appointed)* [2018] FCA 26 (***Rushleigh No 2***), the Federal Court of Australia considered and dismissed the insurers' arguments as to why they should not be joined to the proceedings. The *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (**Act**) is surprisingly broad legislation enabling insurers to be joined to proceedings where their insured has a liability to the plaintiff that is covered by the relevant policy.

Background

The Act was introduced in New South Wales in 2017 to replace the infamous and now defunct, section 6 of the *Law Reform Act* (NSW) giving plaintiffs direct access to insurers of defendants where the liability is covered.

Facts

Forge Group Limited (in liquidation) (**Forge**) was a mining services company which was placed into liquidation in 2014 as a result of the mining downturn. A group of shareholders, represented by Rushleigh, commenced proceedings against Forge and two of its directors for losses arising out of the reporting of Forge's financial position. Leave was required to proceed against Forge because it was in liquidation.

In *Rushleigh No 1,*[1] Rushleigh was denied leave to proceed against Forge; so in July 2017, Rushleigh applied for leave to proceed directly against Forge's insurers (**the insurers**), under the Act.

In *Rushleigh No 2,* the court considered whether to grant Rushleigh leave to proceed directly against the insurers pursuant to s 5 of the Act.

Decision

The court granted Rushleigh leave to proceed directly against the insurers, and in doing so, rejected the following arguments of the insurers:

1) *Insurers would suffer irreparable prejudice as they were not as familiar with the factual matrix or relevant documents as Forge, and defence costs for the insurers were estimated at $5.7 million (with $2 million for discovery costs alone).*

   Justice Markovic held that it must always be the case that an insurer will know less about the underlying facts, matters and circumstances giving rise to a claim than the insured. An insurer will always be a *'stranger'* to a proceeding when joined under the Act. On that basis, the insurers' potentially significant legal costs were not relevantly prejudicial to their interests.

2) *There was no utility in joining the insurers because they had already substantially agreed to indemnify Forge.*

   Justice Markovic held that there was utility in granting leave given that Rushleigh could not proceed against Forge in light of Justice Foster's decision in *Rushleigh No 1* which meant that Rushleigh could not sue Forge directly.

3) *The joinder of insurers to overcome the consequences of Rushleigh No 1 was not a proper basis for the exercise of the discretion.*

   In *Rushleigh No 1*, Rushleigh was denied leave under s 500(2) of the *Corporations Act 2001* (Cth) (***Corporations Act***) to proceed against Forge in liquidation. The insurers in *Rushleigh No 2* argued that if leave to proceed were granted under s 5 of the Act then that would, in effect, permit Rushleigh to proceed with its claims against Forge, even though leave had been refused in *Rushleigh No 1*. The insurers contended that those circumstances weighed against the grant of leave to proceed against them.

   In response to those arguments, Justice Markovic said the exhaustion of a party's rights against Forge under s 500(2) of the *Corporations Act* did not preclude an application to join Forge's insurers under the Act.

   Her Honour held there was a proper basis for exercising the discretion to join the insurers.

Next Steps

Forge's insurers will now effectively conduct Forge's defence in the place of Forge. This obviously poses some difficulties for the insurers in terms of full access to information and documentation, as well as to the Forge personnel who were involved in the facts which gave rise to the litigation.

Presumably Forge's obligation to cooperate will assist insurers, but being party to the proceedings adds an unwelcome complication.

Important points for insurers and claimants

The court's decision was directly relevant to provisions of NSW legislation, which does not presently have an equal in other states.

If a liability policy covers the relevant risk, the insurer is vulnerable to being joined as a defendant and the associated costs.

Insurers' liability is limited to that which is covered by the policy, but is notably not discharged or reduced by any settlement or compromise between the insurers and insured unless such payment made its way to the claimant.

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[1] *Rushleigh Services Pty Ltd v Forge Group Ltd (In Liq) (Recs and Mnagrs Apptd); Forge Group Ltd (In Liq) (Recs and Mnagrs Apptd)* [2016] FCA 1471

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