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Seeking cover under another party's insurance policy

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Introduction

It is often the case in multi-party litigation that one party will seek cover under another party's insurance policy based on an insurance covenant contained in an agreement between the parties. Such claims are often contentious, due in part to the wide variations in drafting from one contract to another, and the consequential difficulty for the courts in setting down guiding principles for interpreting insurance covenants.

It is often argued, in response to such claims for cover, that the insurance covenant must be determined in light of the scope of the indemnity provision in the agreement. This issue was recently considered by the District Court of Western Australia in *Henry v CSBP*.[1]

Facts

This case concerned an injury suffered by a truck driver. The plaintiff was employed by A & N Trucking Pty Ltd and deployed to work for Chemtrans Pty Ltd (**second defendant**), who specialised in the transportation of dangerous goods. The second defendant was engaged by CSBP Ltd (**first defendant**) to transport and distribute Flexi-N fertiliser from its Kwinana works to various country locations.

On 9 December 2009, the plaintiff was loading Flexi-N into the second defendant's tanker at the first defendant's loading facility. He lowered the loading platform on to the top of the water tank (situated on the top of the tanker) and then stepped from the loading platform onto the tanker. As he was doing so, he slipped and fell through the gap between the loading platform and the tanker onto the concrete floor below, suffering injury.

The claims against both defendants were ultimately dismissed. For the purposes of this article, it is not necessary to discuss the reasons for the findings on primary liability.

The contribution claim

A contribution claim was made by the first defendant against the second defendant based in contract.

It was common ground that the relationship between the first and second defendants was subject to a written contract, the terms of which remained in force at the time of the incident. As is typical of such agreements, the contract contained indemnity and insurance covenants. These provisions sat side by side in the contract.

Clause 16 (**insurance covenant**) provided that:

> *'16. Insurance*
>
> *16.1 HBL* [second defendant] *shall at all times keep in force during the continuance of the Agreement:*
>
> *(a) ….*
>
> *(b) A policy of insurance in the joint names of HBL and CSBP* [first defendant] *for their respective rights and interests against all third party risks, including public liability and property damage, with respective rights and interests against all third party risks, including public liability and property damage, with respect to the performance of the Transportation Services. The limit of liability shall be not less than $10 million for any one event.* (emphasis added).
>
> *(c) ….*
>
> *16.2 HBL shall ensure that all sub-contractors are protected by similar insurances as referred to in this clause 16.*
>
> *16.3 …'.*

Clause 17 (**indemnity covenant**) provided that:

> *'17. Indemnities*
>
> *HBL will be liable for, and will indemnify and keep indemnified CSBP and CSBP's directors, employees, agents and contractors against:*
>
> *…*
>
> *(c) claims by any person against CSBP or CSBP's directors, employees, agents or contractors in respect of personal injury, disease, illness or death; and*
>
> *…*
>
> *arising out of, or in connection with, HBL carrying out the Transportation Services, but HBL's liability to indemnify CSBP will be reduced in proportion to the extent that such claims, damages or losses are due to the negligence, breach of duty or breach of statute by CSBP or CSBP's directors, employees, agents or contractors.'* (emphasis added).

The issue for consideration was whether or not the second defendant's obligation to take out insurance extended to covering the negligence of the first defendant.

The first defendant argued that pursuant to clause 16, the second defendant was required to have in place a public liability insurance policy for the benefit of the first defendant that would indemnify it against all third party risks, including in respect of any liability it may have to the plaintiff, as well as defence costs.

The second defendant, on the other hand, argued that the obligation should be read down by the operation of the indemnity in clause 17. In this regard, the indemnity covenant contained a proportionate liability carve out, such that it did not extend to covering the negligence of the first defendant. The second defendant's argument, therefore, was that the insurance covenant should also be so limited.

Decision

The issue for the court was one of contract interpretation. In construing the terms of the contract, the court reiterated what is essentially the fundamental principal for contract interpretation, being the principal of objectivity. That is, the role of the court in construing a written contract is to give effect to the common intention of the parties judged objectively.[2]

In this regard, the court quoted, with approval, the comments of the New South Wales Court of Appeal in *GIO General Insurance v Centennial Newsstand Pty Ltd*,[3] in which it was observed that it is not uncommon in agreements between a principal and head contractor to provide that one of them take out insurance indemnifying all parties who may be involved in the works, including subcontractors, against all liabilities to each other and to third parties.[4] In *GIO*, the subcontractor was found to have owed a contractual obligation to effect insurance covering the head contractor for its own negligence.

In light of this, the court considered that it was not appropriate to read down the insurance covenant to exclude any liability in respect of the first defendant's own negligence.[5] It held that the indemnity and insurance covenants had *'work to do separately and independently of the other'*.[6]

The court considered that the indemnity covenant was a stand-alone provision requiring the second defendant to indemnify the first defendant for claims in respect of personal injury, save to the extent that any loss or damage was due to the first defendant's negligence, and that the insurance covenant essentially *'fill[ed] the void'*.[7]

The court, therefore, concluded that the second defendant owed a contractual obligation to effect insurance covering the first defendant for its own negligence, including in respect of defence costs.

Conclusion

It is often argued, in response to a claim for cover under another party's policy, that the scope of the insurance covenant should be determined by reference to the scope of the indemnity covenant, and read down accordingly, particularly where the provisions stand side by side in the contract. The decision in *Henry* lends further support to the position that it is not, in fact, a principle of contract interpretation that the two provisions should act in lock-step with each other. Each case is fact specific and the scope of the insurance covenant will depend on the specific wording of the contract.

Lesson

When dealing with cases involving contractual relationships between defendants, it is important to always consider the indemnity and insurance provisions contained in the agreements to ascertain whether or not cover might be available under another party's insurance policy. This includes the head contract, which is often overlooked. Head contracts can contain insurance provisions benefiting downstream parties, and may provide access to cover from a party not involved in the litigation.

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[1] [2017] WADC 1.
[2] *Henry v CSBP Ltd* [2017] WADC 1, [226]; citing McLure P in *Hancock Prospecting v Wright Prospecting* (2012) 45 WAR 29 [75].
[3] (2014) NSWCA 1.
[4] Henry v CSBP Ltd [2017] WADC 1, [227].
[5] Ibid [228].
[6] Ibid [229].
[7] Ibid [233], [234].

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