24 February 2016

SHOULD INSURANCE POLICIES BE CONSTRUED IN FAVOUR OF INSURERS WHEN IN DOUBT?

TODD V ALTERRA AT LLOYDS LTD (ON BEHALF OF THE UNDERWRITING MEMBERS OF SYNDICATE 1400) [2016] FCAFC 15 (19.2.16)

Anthony Lo Surdo SC

The substantive issue in this appeal determined by the Full Court of the Federal Court of Australia (Allsop CJ, Gleeson & Beach JJ) on 19 February 2016 was the proper interpretation and construction of the financial services errors and omissions insurance policy in respect of which Alterra at Lloyd's Limited (**Alterra**) was the lead underwriter.

The primary judge found that the policy did not respond to cover agreed losses suffered by clients of Mr Todd (an authorised representative of The Salisbury Group Pty Ltd which held an Australian Financial Services Licence from 2003) and who lost money as a result of purchasing investment products on Mr Todd's advice. The Full Court disagreed.

The relevant insuring clause was in the following terms:

AUSTRALIAN FI PROFESSIONAL INDEMNITY POLICY WORDING

In consideration of payment of the Premium by the Insured and subject to all the terms, conditions and exclusions, including all definitions of the Policy, Underwriters agrees [sic] as follows:

1. Insuring Clauses

1.1 ***Professional Liability***

Underwriters will pay on behalf of the Insured the Loss which the Insured is legally liable to pay in respect of a Claim alleging an act, error or omission of the Insured in the performance of Professional Services.

1.2 ***Advancement of Defence Costs***

Underwriters will pay for Defence Costs in respect of a Claim covered under Insuring Clause 1.1 or under any applicable extension. Underwriters will pay for these Defence Costs as and when they are incurred prior to the final resolution of the Claim. However, each Insured shall repay to Underwriters all payments of Defence Costs incurred on that Insured's behalf if and to the extent it is established that such Defence Costs are not insured under the Policy.

Defence Costs are subject to the Excess and shall form part of the Limit of Liability."

The only contentious issue relevant to the construction of the policy was the submission advanced by the insurers that any doubt as to the proper construction of an insuring clause of a policy of indemnity insurance should be

resolved in favour of the insurers. This proposition was advanced in reliance upon the High Court of Australia authorities of *Ankar Proprietary Limited v National Westminster Finance (Australia) Limited* [1987] HCA 15; 162 CLR 549 at 561; *Chan v Cresdon Proprietary Limited* [1989] HCA 63; 168 CLR 242 at 256; *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28; 217 CLR 424 at 433-437 [17]-[23] and 452-453 [68]-[71]; and *Bofinger v Kingsway Group Limited* [2009] HCA 44; 239 CLR 269 at 292 [53].

As Allsop CJ noted, the proposition rested "*…on a syllogism: (1) the settled principle in Australia governing the interpretation of contracts of guarantee and indemnity is that a doubt as to the construction of a provision in such a contract should be resolved in favour of the surety or indemnifier; (2) insurance (at least this insurance) is a contract of indemnity; therefore, (3) the principle in (1) applies to this contract. The proposition was accepted by Rothman J in Miskovic v Stryke Corporation Pty Ltd t/as KSS Security (No 2) [2010] NSWSC 1495; (2011) 16 ANZ Ins Cas 61-873 at [12]-[13].*"

The Full Court said that the approach by Rothman J in *Miskovic* was wrong. In doing so, the Court noted that:

(a) the notion of indemnity is present in many contracts of insurance (though not all: see, for example, sickness and accident, life insurance, and agreed value policies) but that does not without more make contracts of insurance arrangements of a kind to which the principle expressed by the High Court in *Ankar* is applicable;

(a)

(b) the kinds or classes of contract to which the principle in *Ankar* is concerned are of a different character to insurance, including indemnity insurance. They concern making good a creditor by way of secondary or primary financial accommodation. In *Ankar* at 561, Mason ACJ, Wilson, Brennan and Dawson JJ said:

> *"At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety. The doctrine of strictissimi juris provides a counterpoise to the law's preference for a construction that reads a provision otherwise than as a condition. A doubt as to the status of a provision in a guarantee should therefore be resolved in favour of the surety."*

(b)

(c) no consideration was given in either *Ankar* or *Andar* to the proper interpretation of an insurance contract.

(c) "*…the categorisation or characterisation of contracts of guarantee, of indemnity and of insurance, requires, above all, an understanding of their purpose and nature. All, at one level, contain an element of indemnity; all can be said at one level of abstraction to be contracts of indemnity (subject to the qualification expressed earlier as to different types of insurance). But each has a relevant difference from the other; and contracts of guarantee and indemnity, for the operation of the principle in Ankar, are to be categorised and characterised as quite different from contracts of insurance. Each of a guarantee and an indemnity has the object or purpose of making good the financial position of a creditor of someone other than the guarantor or indemnifier. The two categories do this by different means: the guarantor as surety assumes a secondary obligation to the primary obligation of the principal debtor. In a contract of indemnity the indemnifier is primarily liable to the creditor, not collaterally. This difference in*

character, ascertained by construction, is important in the identification of the parties' mutual rights and obligations. But both are a species of financial accommodation to support the credit risk of the principal debtor and to hold the creditor harmless."

(d) (d) A contract of insurance has the object or purpose of sharing the risk of, or spreading loss from, a contingency; and

(e) *"Ultimately, of course, such tasks of categorisation or characterisation depend on the context, in particular, the purpose of the enquiry. From the nature, character and purpose of insurance there is no reason, and no precedent, for according an insurer the tenderness accorded to guarantors and indemnifiers as reflected in the general principle recently restated in Bofinger 239 CLR at 292 [53]."*

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