

Insurance Newsletter

July 2010

The Production of Insurance Policies in Litigation - Where are we now?

The disclosure of details of a party's insurance cover in litigation can be a vexed issue.

In Australia, insurers can be compelled to disclose a policy of insurance in very limited circumstances. Those circumstances include the examination provisions of the *Corporations Act 2001 (Cth)* and the joinder of insurers to proceedings where a declaration is sought that the insurer is obliged to indemnify the insured. A policy of insurance may also be discoverable in proceedings where it relates to a matter directly arising on the pleading.

We have been following this contentious issue closely since our caseflash on this area examining the Federal Court's decision of *Merim Pty Limited v Style Limited* [1]. That decision highlighted another avenue that a company can be compelled to produce documents relevant to its insurance cover namely an application by a shareholder under section 247A of the *Corporations Act 2001 (Cth)*. Section 247A provides that, on application by a member of a company or registered managed investment scheme, a Court may make an order authorising the applicant or another person to inspect the books of the company once the Court is satisfied that the applicant is acting in good faith and the inspection is for a proper purpose.

This article considers three recent cases since *Merim* - one where access to policies of insurance was granted and two cases where access was denied.

Access granted – the case of *Snelgrove v Great Southern Managers Australia Ltd (In Liq)* [2010] WASC 51 (*Snelgrove*)

Following *Merim*, *Snelgrove* is another case where the applicant successfully relied on section 247A to gain access to policies of insurance.

The plaintiffs were members of a managed investment scheme (the Scheme) which was in administration. In considering whether or not to bring an action against the responsible entity of the Scheme, the plaintiffs sought access to the Scheme's policies of insurance under s247A of the *Corporations Act 2001 (Cth)*.

Justice Le Miere held that as members of the Scheme which had not yet been wound up, the plaintiffs had standing to bring the application as members of the responsible entity under section 247A. His Honour also adopted a broad interpretation of 'books of the scheme' to include insurance policies and found that investigating whether to bring an action was indeed a proper purpose because without knowledge of the insurance in place, the plaintiffs were unlikely to proceed.

Snelgrove indicates that the economic viability of an action is relevant where access to the policies of insurance would help the plaintiffs to decide whether or not to pursue a cause of action. His Honour exercised his discretion to prevent the plaintiffs' resources as well as public resources being wasted.

Access denied – the cases of *Lehman and Kirby*

Lehman Brothers Australia Limited v Wingecarribee Shire Council [2009] FCAFC 63

This is the decision of the Full Court of the Federal Court ('the Full Court') from a decision of a single judge of the Federal Court who ordered Lehman Brothers Australia Limited ('Lehman') to produce insurance documents to Wingecarribee Shire Council ('the Council').

During the proceedings commenced by the Council against Lehman, Lehman resolved to appoint voluntary administrators. The Council made requests to Lehman's administrators for copies of Lehman's professional indemnity policies and directors and officers policies, all of which were refused.

Subsequently, the administrators circulated a report to creditors that recommended they enter into a deed of company arrangement ('DOCA'). That report advised that Lehman may have the benefit of various insurance policies issued by insurers but did not provide any specific details. The DOCA also extinguished the Council's rights to sue directors and officers of the company for breaches of their obligations and was to be voted



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on at the next meeting of creditors.

The Council filed a Notice of Motion seeking production of the insurance policies and related documents under section 23 of the *Federal Court of Australia Act 1976 (Cth)* ('FCA'), Section 23 permits the Court to make orders to prevent the abuse and frustration of its processes.

At first instance, his Honour exercised his discretion under section 23 of the FCA to prevent the abuse of the Court's processes and protect possible actions the Council may have by ordering that the insurance documents be produced.

On appeal, the Full Court accepted that his Honour had the power under section 23 of the FCA to prevent litigants from frustrating the Court's processes such as by requiring a defendant to disclose details as to its assets. However, The Full Court held that the administrators were legitimately carrying out their functions under the *Corporations Act 2001 (Cth)* in recommending the adoption of a DOCA at the next meeting of creditors. The administrator's failure to provide adequate details

of insurance agreements was not an abuse of process because there was no evidence to suggest that the failure to provide such information would result in the DOCA being adopted by the majority of creditors at the next meeting. Therefore, there was no connection between the production of insurance documents and the prevention of the termination of the Council's proceedings should the DOCA be adopted.

Although Lehman was not required to produce insurance documents in these proceedings, the fact that the Full Court overturned the decision on review of his Honour's exercise of his discretion rather than the powers under section 23 of the FCA suggests that there is scope for the Court to order production of insurance documents in particular circumstances. However, the Court will not exercise its discretion lightly when a party is seeking access to insurance documents which are considered to be highly confidential.

Kirby v Centro Properties Ltd (ACN 078 590 682) [2009] FCA 695

Mr Kirby and other investors (*'the Claimants'*) brought a securities class action against Centro Properties Ltd (Centro) under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (*'FCA'*) for various losses. The Claimants attributed their losses (estimated to be in excess of a billion dollars) to Centro's failure to meet the ASX continuous disclosure obligations. The Claimants were also concerned as to whether, in the absence of insurance, Centro Properties had the ability to meet such a claim.

The Court ordered that the parties attend mediation. Prior to mediation, the Claimants brought an application seeking production of Centro's policies of insurance on the following grounds:

- No agreement made at mediation could properly be the subject of an application for approval of a settlement agreement under either ss 33V or 33ZF of the FCA without knowledge of Centro's insurance cover;
- Mediation conducted without knowledge of Centro's insurance cover would be inconsistent with the principles underlying case management (see O 72 r 7 Federal Court Rules (*'FCR'*)); and
- The insurance policies are discoverable because they relate to a matter in question in the proceedings and are in the possession, custody and power of Centro (see O 15 r 11 FCR).

Ryan J rejected the Claimants' argument that mediation would be futile and inconsistent with case management principles. His Honour also rejected the argument that Centro's insurance policies fell within the category of discoverable documents in O 15 r 11 of the FCR. In doing so, his Honour adhered to the traditional judicial reluctance to require the production of insurance documents and reasoned that the potential for the policy to be used as a commercial bargaining chip outweighed any potential use in assisting mediation.

Conclusion

In the current economic climate, applications for access to insurance documents may become more common with the rise of shareholder class actions and litigation against directors. A divergence in judicial opinion is not uncommon yet the question remains, why and under what circumstances will an order for production be made?

The recent decisions of *Merim* and *Snelgrove* suggest that the production of insurance documents is likely to be granted to shareholders and members of investment schemes where the application is made in good faith and for a proper purpose under s247A of the *Corporations Act 2001 (Cth)*.

The decision of Lehman suggests that there is still some scope for the court to exercise discretion under its powers to order production of insurance documents. However, *Kirby* demonstrates a judicial unwillingness to compel disclosure and that only in some circumstances, in relation to some causes of action, is an insurance policy relevant.

Insurers and companies alike should be wary of how they respond to such applications and the terms on which access is granted. It is likely that many more applications for disclosure of policies of insurance will follow these recent decisions as parties continue to test the courts' exercise of their discretion under the various rules concerning discovery and abuse of process.



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[1] Insurance Update: Style Limited, In The Matter Of; Merim Pty Ltd V Style Limited [2009] FCA 314 Caseflash - 18 May 2009

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**'Insurance Contracts Act'
Series 2010 - Seminar Three!**

Date: SYD - Tuesday 27 July 2010
MEL - Thursday 29 July 2010
Topic: *Duty of disclosures, consequences of breaches of duty of disclosure or misrepresentation of prior known claims exclusions.*

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