CONTRACTUAL DAMAGE—ARE YOU COVERED?

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Standard form contracts commonly provide that one party will extend contractual warranties or indemnities in favour of the other. This has historically provided fertile ground for dispute between insurers and insureds as to whether the cover afforded by the first party's policy of insurance extends to that contractual liability. Many of these disputes have focused on the construction of the words 'for' or 'in respect of' within the insuring clause of the insurance policy. However, it has been generally accepted that other than when dealing with statutory schemes the words 'in respect of' have had far wider import than the word 'for'. As demonstrated below, this issue is far from certain.

The recent decisions of the Supreme Court of Queensland in Royston v McCallum & Ors [2006] QSC 193 and the New South Wales Court of Appeal in Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd [2006] NSWCA 328 appear on their face to be in direct conflict as to the interpretation of the above words. However, they serve as a reminder that while case law regarding the interpretation of a clause may be instructive, it must always be treated with care and that the task of interpretation is to be determined by its context, which at times may be finely balanced.[1]

BACKGROUND

While contractual breaches frequently arise in the context of personal injury or property damage, and are quantified by reference to the extent of the personal injury or damage, damages for contractual breach are at law damages for economic loss, (being the economic loss sustained by the contractual party flowing from the breach).

Strictly speaking, such damages are not considered compensatory damages for personal injury or property damage. The following decisions provide some support for that proposition, but also identify the difficulties encountered when construing the meaning of the words 'for' or 'in respect of':

- Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd[2]— where the Western Australian Court of Appeal found that a claim enforcing a contractual indemnity was not damages 'in respect of' personal injury.
- Unsworth v Commissioner for Railways[3]—where the High Court accepted that a claim for contribution was not an action to recover damages 'in respect of' personal injury within the meaning of the legislation under discussion. In those circumstances the natural meaning of the words 'in respect of' was to be read as being in respect of personal injury to the plaintiff themselves.
- Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd[4]—where the New South Wales Court of Appeal held that a contractual contribution claim was held not to be one 'for damages for personal injury' under the Limitation of Actions Act.
- Allianz Australia Finance Ltd v Wentworthville Real Estate Pty Ltd t/as Starr Partners (Wentworthville) & Ors[5]—where the New South Wales Court of Appeal refused to allow an insurer to decline indemnity under a professional liability policy on the basis of 'for bodily injury' exclusion. The Court of Appeal determined that the contribution claim was in the nature of economic loss, not bodily injury.

The issue was further considered by the New South Wales Court of Appeal in the National Vulcan Engineering Insurance Group v Pentax Pty Ltd.[6] That matter

involved a defendant who was held liable to indemnify another under a contractual indemnity after injury to a worker. The Court of Appeal held that the defendant was entitled to indemnity under its insurance policy which insured 'all sums … for or in respect of … personal injury'.

The trial judge was of the view that the indemnity claim was not one 'for' personal injury, but was one 'in respect of' personal injury, notwithstanding it was ultimately for economic loss. While the Court of Appeal did not specifically address whether the claim was 'for' personal injury, it was of the view that in the context of the particular policy which was of a construction nature where contractual claims were common, the term 'in respect of' was sufficiently broad to include a contractual claim. Further, the Court of Appeal said that the reference to 'all sums' indicated intent to include contribution claims.

The decision of the Court of Appeal was thought to have provided further clarification as to the breath of the construction of the words 'in respect of'. These issues were further considered in depth in the matters of Royston v McCallum & Or and Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd.[7]

ROYSTON V MCCALLUM & ORS [2006] QSC 193

Chesterman J in construing the indemnity provisions of a motor vehicle statutory policy of insurance held that the word 'for' in the phrase 'liability for personal injury' attracted the broader interpretation of 'in respect of'.

In coming to this decision, Chesterman J considered the High Court case of State Government Insurance Office (Qld) v Crittenden.[8] In determining the effect of the word 'for', Taylor J in Crittenden considered the operation of the Motor Vehicles Insurance Act 1936 (Qld) (the Act) which expressed a requirement for owners of motor vehicles to insure against their liability to pay compensation on account of injuries. Taylor J, with whom Menzies and Windeyer JJ agreed, was of the view that it was impossible to give to the word 'for' any narrower meaning than would be indicated by the expression 'in respect of'.

The High Court in Crittenden had determined that the phrase 'for personal injuries' in a policy of compulsory third party insurance meant 'in respect of personal injury'. Taylor J was of the view that there was every reason to think that when the phrase, interpreted as it had been without criticism for 30 years, was employed as the Parliament intended it to have its established meaning,[9] 'unless the context makes it clear that the word must have a different construction'.[10]

In considering the long line of authorities, Chesterman J said that the above considerations were a powerful indication that the statutory policy should not be given a restrictive operation. In doing so, his Honour noted that the remedial and beneficial effect of the Act (and that of its predecessor) had frequently been recognised 'to meet a well recognised social and economic problem'[11] and 'to afford protection to users of motor vehicles who became subject to liability because of bodily injury caused to others by the use of their motor vehicle'.[12]

Chesterman J accepted that the authorities mentioned above illustrated the difficulties in construing insurance policies and the textural considerations which, in a particular policy will determine the meaning of a particular clause. However, these authorities did not affect his Honour's conclusion as to the meaning of the statutory policy which had been settled for 40 years and which was arrived at in consequence of a particular social and economic problem which the policy was intended to address.

Interestingly Chesterman J in considering the decision of the New South Wales Supreme Court in Regal Pearl Pty Ltd v Zurich Australian Insurance Ltd[13] commented that the trial judge's analysis in that decision 'was wrong'.[14] In Regal Pearl a businessman sought damages against a supplier for breach of warranty implied by the Sale of Goods Act 1923 (NSW). The wholesaler claimed indemnity from its insurer under a products liability policy by which its insurer had agreed to pay amounts which the insured might become 'legally liable to pay compensation for … personal injury'. Chesterman J observed that the claim against the wholesaler was 'obviously' not, one for personal injury, but a claim for damages for breach of contract In his Honour's views the trial judge's analysis confused the circumstances of the event giving rise to a claim for indemnity with the nature of the claim which is the subject of the indemnity. His Honour referring to the decisions of Allianz Australia Ltd v Wentworth Real Estate Pty Ltd[15] and National Vulcan Engineering Insurance Group v Pentax Pty Ltd, said that the cases show, 'as one would expect that 'for' does not ordinarily mean 'in respect of'. The latter phrase is of wider import and extends the ambit of liabilities an insurer may suffer for which the insurer must give indemnity. Unless there are particular circumstances attendance upon the policy of insurance compelling the construction 'for' will not mean 'in respect of'.[16]

ZURICH AUSTRALIAN INSURANCE LTD V REGAL PEARL PTY LTD [2006] NSWCA 328

Following Chesterman J's judgment, the New South Wales Court of Appeal in Zurich Australia Insurance Ltd v Regal Pearl Pty Ltd delivered its decision on 27 November 2006 upholding the decision at first instance.

An issue on appeal concerned whether a policy of insurance which provided cover for 'legal liability to pay compensation for personal injury' extended to a claim under implied contractual warranty of quality and fitness contained in the Sale of Goods Act 1923 (NSW).

Spigelman CJ, with whom Beazley and Hodgson JJA agreed, that while upholding the decision at first instance the trial judge erred in his application of an insuring clause which he had expressed in the following terms:

When a limit of liability for an event which causes personal injury or property damage that is neither expected nor intended by an insured person, that is caused by or arises out of any of the insured's products, we will pay for all amounts up to the limit of liability that an insured person becomes legally liable to pay in compensation for personal injury or property damage ….[17]

His Honour confirmed that the italicised words were materially incorrect. Those words were found in the definition of Products Liability and it was on this basis that the trial judge distinguished other cases which considered words equivalent to 'for personal injury'.

Spigelman CJ identified that there were a number of authorities which suggest that, in the context of liability insurance, the use of the word 'for' linking a reference to damages or compensation with a reference to personal injury has, at least prima facie, a narrow meaning so that the policy only responds when proceedings are taken by the person injured.[18] In contrast the authorities also suggest that the formulation of 'in respect of' is wider than 'for' and extends to claims made other than by the person injured.[19] However, His Honour noted that the word 'for' was capable of meaning 'in respect of', but whether it will attract that meaning will be determined by the context.

To demonstrate the significance of context, reference was made of the decision of Unsworth v Commissioner for Railways,[20] where the High Court concluded that notwithstanding the use of the formulation 'in respect of' the broader words were read down in the context so as not apply to a claim for contribution under the Lord Campbells Act.

Similarly, the approach of the High Court in Crittenden, in considering the scope and purpose of the legislative scheme for third party vehicle insurance, leads one to the conclusion that a narrow view should not be taken in the context, such that the word 'for' extended to proceedings for loss of consortium.

His Honour went on to consider the decision of Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd[21] where the court considered the customary common law insurance clause in the Workers Compensation Act 1987 (NSW) in the form 'in respect of [the employer's] liability independently of the Act for injury to any person'. Informed by the purpose and history of the legislative scheme the court confined the word 'for' so as not to extend to a contractual claim. Spigelman CJ confirmed that Nigel Watts Fashion establishes that in that context, even the formulation 'in consequence of' or 'consequent upon' did not extend the word 'for' to a contractual relationship.

Similarly the New South Wales Court of Appeal in Allianz Australian Ltd v Wentworthville Real Estate Pty Ltd[22] gave a narrow interpretation to the words 'for personal injury' such that it was not equivalent to 'in respect of'. However, Spigelman CJ noted that this was in the context of an exclusion clause in a contract of insurance, which is construed more strictly.

The Chief Justice agreed with the observations of Mahoney JA in Nigel Watts Fashion:[23]

The term 'for' is, of course, one which has a wide operation … The extent of it in each case is to be determined by the context in which it is used.

Finally, Spigelman CJ concluded, with whom the court agreed, that the word 'for' should in the present context be given a broad meaning and should in the subject policy be understood to mean 'in respect of' with sufficient breadth to encompass the claim made under the implied contractual terms.

While his Honour identified that the textual indications were finally balanced and that he found the matter difficult to determine, the factors which tipped the balance in favour of providing the broader meaning to the word 'for' were:

1. The definition of 'products liability' did not play an operative role in the insuring clause, it nevertheless reflected the object attained by the policy. That is, the definition of the words 'caused by or arises out of' is a textual indication of the breach of the commercial arrangement and recognition that the parties must be understood to recognise that Australian product liability law

has a much broader basis in practice than the law of tort.[24]

2. The words 'that happens in connection with your products' qualifies the event or occurrence rather than the injury, these words suggest that the policy was intended to have a broader, rather than a narrower, scope.[25]

3. The policy was expressly extended to 'a principal' of the insured, on the condition that there be in existence a contract for the performance of work. On that basis it cannot be said that the policy is concerned only with liability in tort.[26]

4. The insuring clause of the policy operated in the same way with respect to property damage and personal injury. In addition, the exclusion operated to exclude claims for loss of use of property arising from a failure to meet the level of performance, quality or fitness. His Honour saw no reason why, absent the exclusion, the policy would not respond to indemnify the insured with respect to implied contractual warranties.[27]

IMPLICATIONS

The above recent decisions serve as a strong reminder that the issue of interpreting commonly found words in an insuring clause is not without uncertainty and at times any determination is finely balanced. Further, caution should be exercised with respect to applying decisions which involve interpretation of statute, which by necessity must be of a strict nature and are influenced by the purpose or intention behind the statute.

What can be taken away from the above is that the court may look beyond the actual wording of an insuring clause to extend the scope of cover. Informed by the above, insurers and insureds alike should ensure that words and phrases within the policy are consistent with the scope of the intended insuring clause. Inconsistencies may result in an unintended expansion of cover. As demonstrated by Regal Pearl Pty Ltd.

Finally an exclusion clause can not extend an insuring clause, it can assist in determining the meaning of the insuring clause.[28]

REFERENCES

1. Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd [2006] NSWCA 328 per Spigelman CJ

2. [2000] WASCA 408

3. 1958) 101 CLR 73

4. [2001] NSWCA 461

5. (2004)13 ANZ Ins Case 61–598

6. [2004] NSWCA 218

7. [2006] QSC 193

8. (1966) 117 CLR 412

9. Note 7 at [72]

10. Beaman v ARTS Ltd I [1949] 1 KB 550 at 567 per Somervell LJ

11. Note 8 Crittenden per Menzies J at 421

12. Ibid Menzies J at 420

13. Ibid Menzies J at 420

14. Note 7 at [91]

15. [2004] NSWCA 100

16. Chesterman J at [98]

17. Cooper AJ at [53]

18. Note 1 Spigelman CJ at [43]; State Government Insurance Office v Crittenden (1966) 117 CLR 412 at 415–416 per Taylor, contra at 422 per Windeyer J

19. Note 1 Spigelman CJ at [44]; National Vulcan at [4] per Hodgson JA

20. (1958) 101 CLR 73

21. (1995) 8 ANZ Ins Cas 61–235

22. [2004] NSWCA 100

23. Note 1 at 75

24. Ibid at 77

25. Ibid at 78

26. Ibid at 79

27. Ibid at 80

28. Ibid at 82

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