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Insurance Brokers win strategic ruling in $10 million negligence claim

Chemical fire remediation costs found not capable of being covered under liability insurance policies

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After a chemical fire, a company and director found they held no insurance policy which would respond to their claim to recover their outlays of well over $10 million in remediation outlays. They commenced proceedings against insurance brokers, alleging negligence in the handling of their insurance affairs. However, a Queensland Supreme Court ruling has found that the insurance policies which it is alleged the brokers had negligently failed to place were not capable of covering the claim.

Key Points

- ☐ The issuing of a notice to remediate contaminated land by a statutory authority was insufficient to allow the costs incurred to comply with that notice to be properly categorised as a liability to pay compensation in respect of a claim made against the insured.
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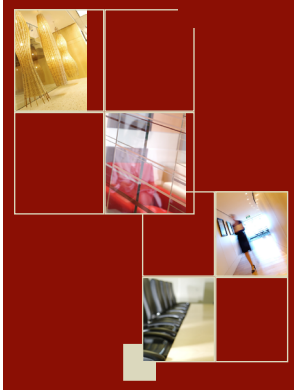
- ☐ Liability insurance policies which provided indemnity for an insured's liability to pay compensation in respect of claims made against the insured could not respond to the remediation costs incurred by the insured in respect of their own property.



Background

The plaintiffs, a company and a director of a chemical manufacturing company Binary Industries Pty Ltd, owned land in Narangba, Queensland on which stood a chemical factory operated by Binary Industries Pty Ltd. On 25 August 2005, the factory and its contents were substantially destroyed by fire. Queensland Fire and Rescue Services attended to fight the fire, dousing the property with a large quantity of water which became contaminated with chemicals. The water overflowed the bunds and dams on the land and escaped to surrounding State-owned properties and a creek, severely contaminating them.

The Environmental Protection Agency prosecuted the plaintiffs as owners of the land, issuing a formal notice and obtaining Court orders under the Environmental Protection Act 1994 for the remediation of the contamination. Over the following years, the plaintiffs paid well over $10 million in remediation costs.

In 2011, the plaintiffs commenced proceedings against the State of Queensland and separate insurance brokers to recover the remediation costs and their legal costs of the EPA prosecution. They allege the Queensland Fire and Rescue Service fought the fire negligently, in particular by application of an excess of water which contaminated the land and led to the remediation orders. As against the insurance brokers, it is alleged the plaintiffs were owed a duty of care to obtain appropriate policies of insurance, that duty was breached, and but for this breach the plaintiffs would have been able to secure for their benefit appropriate insurance cover for pollution

and environmental risks associated with the land in an amount of not less than $10 million by either becoming insured or interested parties on specified policies. Those policies were specified as the primary and excess policies which the insurance brokers had placed for Binary Industries Pty Ltd (with a total sum insured of $10 million), and an Industrial Special Risks policy identified by the plaintiffs as allegedly capable of providing them with indemnity for costs and expenses incurred in respect of the damage to the land.

Case

The insurance brokers, Marsh Pty Ltd and its authorised representative Otago Pty Ltd, applied to the Court to rule on the following preliminary question: whether the costs incurred by the plaintiffs were, as alleged, capable of being indemnified under the specified policies.

By the application, the insurance brokers argued that the primary and excess policies, which provided indemnity for public liability, pollution liability and products liability, would not respond, because no Insured Event had occurred. It was argued that those policies only responded to claims where there was a liability at law to pay damages, which could only arise in the context of a third party claimant having a cause of action at law against the insured (namely the plaintiffs) for the payment of damages as compensation, which was not the case here. As against the ISR policy, the insurance brokers argued that indemnity for the remediation was excluded.

The insurance brokers relied on two recent English decisions to argue that the payment for remediation was not an Insured Event. In Yorkshire Water Services Limited v Sun Alliance & London Insurance plc and Ors , the Court of Appeal affirmed the earlier decision that costs to remediate an insured's own property was not indemnified under a liability policy. The plaintiff/appellant owned sewage disposal works and a waste tip on the banks of a river. The embankment failed and a large quantity of sewage sludge was deposited into the river and into the plaintiff's own sewage works. It was directed by a statutory authority to carry out significant remediation on its own property at a cost £4.6 million, the works also being required to reduce or prevent the possibility of claims by adjoining land owners. The Court of Appeal held that before an indemnity could be obtained under the policy, there had to be sums which the insured became legally liable to pay as damages or compensation in respect of loss or damage to property. Under the policy, this meant sums paid or payable to third parties and in respect of property of a third party claimant. Based on this reasoning, the Court of Appeal held that no obligation to carry out works on the insured's own land, even if pursuant to a lawful direction of a statutory authority, was capable of falling within the indemnity provisions.

In Bartoline v Royal and Sun Alliance Insurance plc , the Court considered a similar claim. Bartoline manufactured adhesives and other products at its business premises. A fire occurred at the premises with the consequence that polluting matter entered two public watercourses. As a result the Environment Agency, acting pursuant to statutory powers, carried out emergency work including remediation of contaminated land. In addition to the emergency works, the Agency served statutory notices requiring Bartoline to carry out remedial works to remove contamination from part of its own land and adjoining land. The cost to Bartoline of compliance was approximately £148,000. The Court rejected Bartoline's claim that the insurers had wrongly declined indemnity for the remediation costs. The Court considered that payment by the insured of a statutory debt to the Agency was not capable of being damages or compensation, as ""damages" were the pecuniary recompense given by process of law to a person for the actionable wrong done to him", but the policy indemnity extended only to "legal liability for damages to some third party which had suffered loss and damage in consequence of a tortious act".

In his judgment on the present application , Justice Boddice of the Queensland Supreme Court at Brisbane declined to follow these English decisions on the basis that the policies were materially different from those specified by the plaintiffs in the principal proceeding. Nevertheless, Justice Boddice agreed that, for indemnity to apply under the primary and excess policies, there must arise against the insured a liability to pay compensation as distinct from damages and that that liability must be in respect of "claims...made against the insured". The judge considered that this requirement could only be consistent with claims for compensation made against the insured by third parties. Justice Boddice also noted the policy exclusion against claims arising out of damage to property owned by the insured. He characterised the costs incurred by the plaintiffs in

complying with the EPA notices and the subsequent Court orders as costs met by them in respect of their own property. As such, those costs did not constitute a liability to pay compensation in respect of a claim made against the insured and so it was held they were not capable of being the subject of indemnity under the primary or excess policies.

His Honour also agreed with the insurance brokers' contention that the remediation costs were excluded from indemnity under the ISR policy as specified by the plaintiffs, pursuant to a policy provision that the insurance did not extend to any liability the insured may incur as a consequence of pollution of any kind.

The judgment of the Court on the preliminary question was therefore decided in favour of the insurance brokers.

Implications

The judgment is positive for the insurance industry as there was no expansion of cover under the policy terms by applying a broad or inclusive interpretation of the plain words used. It also provides an Australian context for the management of pollution and contamination risks presented by hazardous industries.

For the proceeding itself, the decision effectively negates the claim pleaded against the insurance brokers. For the plaintiffs to progress a claim against them, in the absence of a successful appeal against the judgment, a fresh pleading on an alternative basis must be formulated.

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