

March 2013

*Practice Group(s):
Litigation & Dispute
Resolution*

Claimants Joining Insurers to Proceedings – Recent Developments in NSW and WA

By Greg Couston and Catherine Cooper

In the context of professional indemnity insurance, there have been multiple instances in which claimants have attempted to join – as a party to court proceedings – the insurer of an alleged wrongdoer.

In NSW, the application to join an insurer is usually made under section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

The Court of Appeal's decision in *Walter Construction*¹ concluded that – in respect of "claims made" policies – two events (in substance) needed to have occurred in the same policy year, namely:

- The "happening of the event" that gave rise to a claim for damages or compensation.
- The claim against the insured (alleged wrongdoer) triggering the "claims made" policy.

An insurer (of an alleged wrongdoer) would only be joined to proceedings, pursuant to section 6, if a claimant established both of these elements.

The effect of the *Walter Construction* case was to place significant hurdles in front of a claimant who wished to sue an insurer directly.

In recent times, claimants seeking to join insurers have had mixed success:

- In *Sciacca*², Justice Schmidt permitted a professional indemnity insurer to be joined to proceedings. Her Honour allowed for the possibility that a claimant may have made an oral claim against an insured in the same policy year as the "happening of the event" that gave rise to the claim.
- In *KCRAM*³ a professional indemnity insurer of a valuer was joined to proceedings. The facts were somewhat complicated. The claimant was a mortgage insurer who had issued an insurance policy to lenders. The Court

¹ *The Owners – Strata Plan No. 50530 v Walter Construction Group* [2007] NSWCA 124.

² *Sciacca v ACE Insurance Limited* [2011] NSWSC 798.

³ *Genworth Financial Mortgage Insurance v KCRAM Pty Limited (In Liquidation) (No.2)* [2011] FCA 1124.

CLAIMANTS JOINING INSURERS TO PROCEEDINGS – RECENT DEVELOPMENTS IN NSW AND WA

concluded that the "happening of the event" was when the mortgage insurer had paid out money to the lender pursuant to its policy. It was held that this occurrence was the damage suffered by the mortgage insurer and was regarded as the "happening of the event" giving rise to the mortgage insurer's claim for damages.

- Late last year, Justice Davies in *Malouf*⁴ refused to join an insurer to proceedings. This was a professional indemnity claim against a solicitor. His Honour concluded that the "happening of the event" which gave rise to the underlying claim was when the solicitor breached his contract/retainer. Justice Davies concluded that, on this date, the claimant's breach of contract claim was complete and actionable. It was irrelevant that the claimant's loss (perfecting the negligence cause of action) was occasioned at a later point in time. Justice Davies concluded that "the happening of the event" occurred well prior to the claim against the insured which potentially triggered the policy.

While a body of highly technical law is developing in the context of section 6 applications, the Court of Appeal in Western Australia, late last year, found an alternate basis for permitting a claimant to sue an insurer directly.

In *QBE Insurance v Lois Nominees*,⁵ the Western Australian Appeal Court (by majority) allowed a plaintiff – who was a claimant against an insolvent insured, and who was **not** a party to any insurance policy:

- To seek a declaration that insurers were liable to indemnify the insured.
- For those purposes permitted a claimant to proceed directly against the insurer.

The Western Australian decision is a noteworthy development.

In NSW, insurers on "claims made" policies (particularly professional indemnity insurers) have until this point been entitled to take a measure of comfort from the extent of technical hurdles thrown up by the *Walter Construction* and *Malouf* judgments.

If, however, NSW courts follow this recent Western Australian decision, it will provide an easy avenue for claimants to avoid the technical jurisprudence which has grown up in NSW around section 6.

This is an issue which potentially promises broader insurance coverage opportunities to policyholders, or to those seeking the benefit of insurance issued to policyholders.

⁴ *Perpetual Trustees Victoria Ltd v Malouf* [2012] NSWSC 1119.

⁵ *QBE Insurance (Aus) Ltd v Lois Nominees Pty Limited* [2012] WASCA 186.

CLAIMANTS JOINING INSURERS TO PROCEEDINGS – RECENT DEVELOPMENTS IN NSW AND WA

Authors:

Greg Couston

greg.couston@klgates.com

+61 29513 2480

Catherine Cooper

Catherine.cooper@klgates.com

+61 29513 2501

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris
Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane
Sydney Taipei Tokyo Warsaw Washington, D.C.

K&L Gates practices out of 47 fully integrated offices located in the United States, Asia, Australia, Europe, the Middle East and South America and represents leading global corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2013 K&L Gates LLP. All Rights Reserved. Rights Reserved.