

## **CGU INSURANCE LIMITED v AMP FINANCIAL PLANNING PTY LTD (M127/2006)**

Court appealed from: Full Federal Court of Australia

Date of judgment: 2 September 2005

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Date special leave granted: 29 September 2006

The respondent ("AMP") retained the services of two financial advisers whose recommendations to investors led to large losses. On becoming aware of this, AMP notified its insurer ("CGU") and sought indemnity under the policy.

Discussions took place between them and AMP prepared a protocol for handling the claims which was agreed to in principle by CGU. It was envisaged that when a claim was received AMP would notify CGU, prepare a liability report setting out its views and recommendation, and CGU would make a decision within 14 days. Whilst CGU agreed in principle, it repeatedly stated to AMP that the question of indemnity "was reserved" and that AMP should act as a "prudent uninsured".

Forty seven claims were notified and over \$3 million paid out by AMP, after repeated requests to CGU for determination were unsuccessful and under pressure from the Australian Securities and Investments Commission ("ASIC") to resolve the claims promptly. A subsequent claim for indemnification under the policy was refused and AMP commenced proceedings alleging that CGU was in breach of the policy.

The trial Judge (Heerey J) dismissed the application holding, inter alia,

- that AMP had to establish the occurrence of the insured event, not merely prove the settlements
- AMP had not demonstrated that the settlements were reasonable
- CGU was not liable for settlements made before any breach of the contract of insurance, and AMP could not avoid this result by claiming estoppel, unconscionable, misleading and deceptive conduct, or breach of the obligation to act in utmost good faith.

On appeal, the Full Court (Moore & Emmett JJ, Gyles J dissenting) upheld the appeal and ordered that the matter be remitted to Heerey J. The majority found that Heerey J had incorrectly approached the issues of estoppel and whether the delay in decisions by CGU on the recommendations demonstrated a lack of utmost good faith. They also held that the finding that the settlements were not reasonable due to the fact that AMP was under pressure from ASIC was not, of itself, sufficient and each settlement needed to be individually assessed. The majority also held that AMP's apparent failure to properly take into account the possible defence under Section 819(4) should not have been relied upon as a further reason for concluding the settlements were unreasonable without first having assessed the material available to AMP and its advisers.

Gyles J held that the central issue was the applicability of S819. The trial judge's view was only tentative due to the incomplete evidence and uncertain operation of

the section. In those circumstances AMP had not acted as a prudent uninsured as it should not have agreed to any settlements until this issue had been properly explored.

The grounds of appeal in matter M127/2006 are:

- In the context of a claim for damages by an insured against an insurer for breach of a professional indemnity insurance policy, the Full Court erred in holding that:
  - (a) the reasonableness of settlements entered into by the respondent ("AMPFP") with third party claimants could be assessed by reference to matters unrelated to the merits of those claims including circumstances personal to the insured such as adverse publicity that might arise in the absence of a settlement and pressure to settle from a government regulator, namely ASIC;
  - (b) the position of CGU in relation to its potential liability under the policy was irrelevant in determining the reasonableness of settlements entered into by AMPFP with third party claimants;
  - (c) the settlement of a claim by AMPFP could be found to be reasonable in the absence of any evidence that could satisfy a court that AMPFP could have been liable to the claimant in respect of such claim;
  - (d) the primary judge had erred in holding that the settlements were unreasonable because AMPFP failed to take into account the possible availability of a defence under section 819(4) of the *Corporations Law* to claims that might be brought against it by third party claimants.
  - (e) CGU could be in breach of the obligation of utmost good faith, implied in the policy by the provisions of section 13 of the *Insurance Contracts Act 1984* (Cth) by failing to comply with a procedure imposed by AMPFP for settling claims which was extraneous to the insurer's contractual obligations with respect to indemnity under the policy;
  - (f) in the context of settlement of each of the claims made by the third party claimants, it was relevant to address the question whether the settlement was reasonable; and
  - (g) the primary judge had erred in failing to consider whether CGU was estopped from requiring AMPFP to establish by admissible evidence that it had a liability to each claimant with whom it settled when that case was neither pleaded nor conducted by AMPFP at the trial.

Following the judgment of the Full Court on 2 September 2005, CGU applied for leave to reopen the appeal. There were two bases for the application: (1) the Full Court failed to consider three issues which were argued before the trial judge; and (2) the majority of the Full Court misapprehended the basis on which certain material was tendered by AMP at the trial, and how it might be used on remitter.

The application was dismissed on 8 June 2006. The Full Court noted that CGU had not filed a notice of contention which raised the three issues, and they were not clearly and directly raised in argument by CGU in the appeal. While it was true that the issues were raised in a cross-appeal filed by CGU against the costs order made by the trial judge, that would not raise them in the appeal in the absence of a notice of contention.

As to the second basis of the application to re-open the appeal, the Full Court denied that it was under any misapprehension that the material was admitted on a limited basis, that is, not as proof of the truth of the underlying facts contained in the material, but as evidence of the circumstances in which AMP decided to settle various claims.

The grounds of appeal in matter M128/2006 are:

- The Full Court erred in:
  - (a) dismissing the appellant's cross-appeal without addressing and determining the grounds of the cross-appeal;
  - (b) holding that the appellant's cross-appeal was academic in light of the orders made in the respondent's appeal when a favourable determination of any one of the grounds of cross appeal would, despite the determination of the respondent's appeal, have entitled the appellant to judgment in the application and to a consequential award of costs;
  - (c) refusing to re-open the appellant's cross appeal to address and determine the grounds of the cross appeal despite not having previously made or entered any orders in relation to the cross appeal;
  - (d) refusing to re-open the respondent's appeal in order to address and determine, as alternative grounds upon which the order of the primary judge should be affirmed, the challenge made by the appellant to the determination by the primary judge of issues 7, 8 and 9 in the reasons for judgment of the primary judge;
  - (e) holding that, in the absence of a notice of contention, the appellant had failed to present to the Full Court, as alternative grounds upon which the order of the primary judge should be affirmed, the challenge made by the appellant to the determination by the learned trial judge of issues 7, 8 and 9 in the reasons for judgment of the primary judge.