AUSTRALIAN INSURANCE LAW ASSOCIATION
(WESTERN AUSTRALIAN BRANCH)

Cases presented at Annual General Meeting on 15 December 2010

"THE YEAR THAT WAS"

Important High Court Insurance Cases In 2010

High Court – 30 March 2010

Wallaby Grip Limited v QBE Insurance (Australia) Limited
[2010] HCA 9; (2010) 40 CLR 444

Loss

1 In October 2007 Angus Stewart died from the effects of mesothelioma. He had been exposed to asbestos when he was employed by Pilkington Bros (Australia) Ltd ("Pilkington") from about 1964 to 1967. He had worn asbestos gloves for heat protection. In the Dust Diseases Tribunal Pilkington was held to be liable in negligence to pay damages to his estate. The gloves were supplied by Wallaby Grip Limited. Wallaby Grip was also held to be liable.

Insurance indemnity

2 Pilkington was insured against its liability to pay damages to injured employees by Eagle Star Insurance Ltd. Eagle Star's liabilities were ultimately assumed by QBE Insurance (Australia) Limited ("QBE").

3 From 1953 an employer in New South Wales was required to insure not only against liability to pay workers' compensation but also against liability to pay damages for negligence. It was accepted that Eagle Star was liable to indemnify Pilkington for its liability to the estate of Mr Stewart, subject to the issue of the extent of the indemnity.

4 The *Workers' Compensation Act 1926* (NSW) required an employer to have a policy of insurance for an amount of at least $40,000 in respect of liability independently of the Act for any injury to a worker. QBE did not admit that the Eagle Star policy provided cover in excess of the statutory minimum of $40,000. However the policy of insurance was not produced at the trial in the Dust Diseases Tribunal.

Issues for determination

5 The questions for determination were who bore the burden of proving whether there was any limitation on the extent of indemnity under the Eagle Star policy and what that limit was.

Courts below

6 The Dust Diseases Tribunal held that QBE bore the onus of proving the limit of indemnity. This decision was overturned by the New South Wales Court of Appeal.

High Court decision

7 The High Court overturned that decision, in effect restoring the decision at first instance.

8 Under the policy required by the *Workers' Compensation Act* of New South Wales the insurer was liable to pay to an insured worker or his dependants the amount for which the employer was liable in negligence under a judgment or other determination. The insurance cover was against liability to pay damages for negligence.

9 The High Court held that it was necessary for the estate (Stewart's wife) to establish that a contract of insurance under the New South Wales Act was in existence at the relevant time and that Pilkington was liable to her husband for his injuries. She did so. It followed that the claim was within the terms of cover under the Eagle Star policy and the insurer's obligation to indemnify arose.

10 QBE was required to establish what limit, if any, had been placed on its liability to indemnify and it had not done so.

High Court, 4 August 2010

CGU Insurance Ltd (ACN 004 478 371) v One.Tel Ltd (In Liq) (ACN 068 193 153)
[2010] HCA 26; (2010) 84 ALJR 576

Loss

11 In proceedings brought by the Australian Securities and Investments Commission ('ASIC') in the Supreme Court of New South Wales, Mr Greaves, a former director of One.Tel Ltd, was held liable to pay $20 million to One.Tel ('the compensation order').

12 Mr Greaves entered into a Deed of Arrangement pursuant to Part X of the *Bankruptcy Act 1966* (Cth) under which he assigned his rights under the CGU policy to the trustee under the Deed. The Deed provided that he was released from all debts and claims against him upon execution of a certificate by the trustee pursuant to clause 7 of the Deed, except for any liability under the compensation order. The clause 7 certificate was to be issued after Mr Greaves had complied with his obligations under the Deed. The trustee executed the clause 7 certificate.

13 By clause 9 another certificate was to be issued immediately after the trustee completed or settled any claim under the insurance policy or made a decision not to pursue a claim. The Deed provided, by clause 11, that before execution of a certificate under clause 9 neither the trustee nor any creditor would take any steps to enforce the compensation order against Mr Greaves other than to seek recovery pursuant to the arrangement constituted by the Deed.

14 By clause 10 Mr Greaves was to be absolutely released and discharged from all liability in respect of the compensation order upon execution of the clause 9 certificate.

Insurance indemnity

15 Mr Greaves was insured under a directors and officers liability policy issued by CGU Insurance Ltd against "the amount payable in respect of a claim made [against him] for a Wrongful Act [including] damages, judgments, settlements, interest, costs …".

Litigation

16 The trustee began proceedings in the Supreme Court of New South Wales against CGU to be indemnified for the compensation order. Before the proceedings were finalised the Deed of Arrangement terminated by virtue of a clause in the Deed and section 235(d) of the *Bankruptcy Act* because three years had passed since it was executed. A clause 9 certificate was not executed. In the proceedings against CGU the name of the plaintiff was changed to Mr Greaves.

Issues for determination

17 CGU contended:

17.1 The trustee had no power to continue the action once the Deed of Arrangement terminated;

17.2 Mr Greaves had suffered no loss because clause 11 survived the termination of the Deed and prevented the trustee and creditors from enforcing against Mr Greaves the orders made in the ASIC proceedings.

18 CGU conceded that there was an equitable assignment to the trustee of Mr Greaves' right to claim against CGU.

Courts below

19 The primary judge held that once the deed terminated the trustee had no power to continue the proceedings against CGU. The New South Wales Court of Appeal allowed the appeal to that Court and remitted the matter back to the Equity Division of the Supreme Court for further hearing.

High Court's decision

20 An appeal to the High Court was dismissed.

21 The High Court held that there was a valid equitable assignment of Mr Greaves' chose in action against CGU, that Mr Greaves became trustee of that chose in action for the trustee, and the trustee in turn held equitable title to Mr Greaves' rights in trust for the

beneficiaries identified in the Deed. These rights were not unwound by the termination of the Deed of Arrangement. The trustee had the right to continue the proceedings against CGU even after the Deed of Arrangement terminated.

22 The High Court held that upon termination of the Deed of Arrangement the trustee continued to hold the equitable interest in Mr Greaves' chose in action on trust. A person who is a trustee as a result of an equitable assignment of the benefit of a contractual right on trust can maintain the same actions on the right as that person could maintain if the contractual right were held by that person free of trust. Generally it was of no concern to defendants whether the plaintiff suing on a chose in action is suing as assignee or not or suing under an equitable rather than legal assignment or was holding the right sued on in trust for a beneficiary.

23 The High Court rejected the argument that Mr Greaves had not suffered a loss. The policy defined "loss" as being "the amount payable in respect of a claim made". The term included judgments and settlements. The compensation order was an "amount payable" even though on an assumption favourable to CGU that clause 11 survived termination of the Deed, the trustee and the creditors were debarred from taking any steps to enforce the compensation order. A distinction was drawn between Mr Greaves' duty to pay and the capacity of others to enforce that duty.

24 In any event CGU's argument that clause 11 survived termination of the Deed of Arrangement was not correct. The preferable conclusion was that once the Deed terminated acts that were carried out under it remained effective but the whole of its future potential operation ceased.

High Court, 29 September 2010

Miller & Associates Insurance Broking Pty Ltd (ACN 089 245 465) v BMW Australia Finance Ltd (ACN 007 101 715)
[2010] HCA 31

Loss

25 BMW Australia Finance Ltd ("BMW") provided Consolidated Timber Holdings Ltd ("Consolidated Timber") with a loan of $3.975 million to fund payment of the premium under a contract of insurance issued by HIH Casualty & General Insurance Ltd ("HIH") to Plantation Management Corporation Ltd ("Plantation Management") and St George Bank Ltd. The funding was arranged through Consolidated Timber's insurance broker Miller & Associates Insurance Broking Pty Ltd ("Miller").

26 About $1.265 million was repaid by Consolidated Timber and BMW was not able to recover the balance from Consolidated Timber. The total amount remaining unpaid, with interest, approached $5 million.

27 The policy that had in fact been taken out for the benefit of Plantation Management was a costs of production policy that was not "cancellable". The significance of a "cancellable" policy was that if default occurred in repayment of the loan the policy could be cancelled and part of the premium would be refunded by the insurer.

28 Cancellable policies may provide a form of security for a premium loan because the lender can require the borrower to assign its rights, including of right of cancellation, under the policy. In the event of default, the lender may cancel the policy and recover the unused premium.

Insurance indemnity

29 This is not a case about insurance indemnity. It was a claim for damages for misleading conduct and negligence.

Litigation

30 BMW commenced proceedings against Miller and alleged that Miller engaged in misleading or deceptive conduct and was negligent in connection with documentation supplied to BMW to support the loan application. On appeal it was largely treated as a claim for damages for misleading conduct and the negligence claim, including the fact that an adverse decision had been made in the Court of Appeal, was almost overlooked by the appellant.

Issues for determination

31 BMW relied on two allegations:

31.1 The principal allegation was that a certificate of insurance from HIH conveyed a false impression that the policy covered property and was assignable and cancellable;

31.2 An alternative allegation was that Miller did not disclose the important fact that the policy was not assignable and was not cancellable and therefore was of little use as security for the loan.

32 The arguments were founded on evidence that BMW thought the insurance was property insurance and cancellable.

33 There was evidence that the cancellability of insurance was a matter understood by insurance brokers to be of critical importance to premium lenders. It was not in issue that Miller knew that cancellability of insurance was important to a premium lender's determination of a loan application.

Courts below

34 BMW's claim failed at first instance, but was successful in the Victorian Court of Appeal.

High Court's decision

35 The matter came before the Full Court of the High Court when the application for special leave to appeal was referred by two judges of the Court. The High Court rejected both allegations made by BMW.

BMW's first argument

36 The inference was open that "standard" policies of property insurance were cancellable. The HIH certificate that was provided by Miller to BMW did not clearly state that it was for property insurance although it identified four "properties insured". Four properties were identified in a printed box headed "Endorsement Details". One printed box was headed "Profession" and particulars in that box were given as "miscellaneous". The limit of indemnity was $12 million. The certificate was signed by HIH (Professional Indemnity) Pty Ltd.

37 Subsequently Miller provided a policy wording which differed in a number of respects from the HIH certificate. The two documents had different policy numbers. The policy named St George as a co-insured. There was an apparently different date of commencement of the period of insurance. However the four "locations" identified in the certificate to the policy corresponded to the four properties identified in the HIH certificate.

38 Despite the differences between the two documents it was an agreed fact that the cost of production policy was the policy underlying the HIH certificate.

39 The trial judge made findings of fact that were not capable of being overturned on appeal and they removed much of the foundation of BMW's case. He held that the BMW employees read the HIH certificate but did not subject it to careful analysis. They read the word "properties" on the certificate and leapt to the conclusion that the policy concerned property and that it was cancellable. The trial judge found that neither conclusion was conveyed by the HIH certificate but that these conclusions were driven

by the BMW employees' keenness to put the loan in place and by their generally careless attitude.

40 The High Court rejected the argument that the HIH certificate conveyed a representation that the cost of production policy was cancellable. The certificate said nothing about the nature of the risks insured. It was apparent from the policy document that it did not insure against loss or damage to property and it did not contain a cancellation clause. The trial judge found that the BMW employees understood that the policy wording provided to BMW was the policy underlying the HIH certificate.

41 The High Court held that the HIH certificate did not convey a representation that the underlying insurance was a cancellable property policy.

BMW's second argument

42 The High Court also rejected BMW's second argument that Miller engaged in misleading conduct by providing the HIH certificate without stating that the underlying insurance was not property insurance and was not cancellable. There was no foundation in the factual circumstances of the case for the conclusion that the known importance of cancellability gave rise to a reasonable expectation that Miller would not supply the HIH certificate in response to BMW's request without disclosing that the policy was not cancellable.

Factual problems with BMW's case

43 Policies insuring against loss or damage to property are commonly cancellable. Each of BMW's employees claimed he did not understand that the policy wording that was provided had anything to do with the proposed loan and that he would not have authorised the loan had he known that the insurance was not property insurance that was capable of providing BMW with security for its loan.

44 Cancellability was not however shown to have been critical to BMW's determination of the loan application on the facts of the case. A significant administrative error was made

and not corrected. The events leading up to the provision of loan funds by BMW were described by French CJ and Kiefel J as "a convoluted process characterised by error and mismanagement".

45 On 2 October 2000 an employee of BMW sent to Consolidated Timber a standard form letter, described as a "welcome letter" by facsimile that advised in effect that the premium funding loan had been approved. BMW had not at that stage requested any evidence from Miller about the nature of the insurance for which the premium funding was required. Two days later a copy of the welcome letter was sent to Miller. The following day an employee of BMW requested details of insurance and that request was passed on to Miller. This led to the provision of the HIH certificate on 9 October 2000. In November 2000 following a further request from BMW, Miller sent a bundle of documents without a covering letter. Those documents included a copy of the cost of production policy.

High Court, 3 November 2010

Selected Seeds Pty Ltd v QBE MM Pty Limited
[2010] HCA 37

Loss

46 Selected Seeds Pty Ltd was a grain and seed merchant in Queensland. It purchased seed from a Northern Territory merchant of Jarra grass seed which in turn Selected Seeds sold to another party as Jarra grass seed. Through a chain of transactions the seed was sold to R&J Shrimp but when they planted it on their land it produced only Summer grass. Jarra grass produced high quality stock feed. Summer grass was fit only as low quality stock feed. It was regarded as a weed when present in commercial hay and seed crops.

Insurance indemnity

47 Selected Seeds was insured by QBE MM against all sums which it became legally liable to pay by way of compensation in respect of property damage happening during the period of insurance and caused by an occurrence.

Litigation

48 The Shrimps commenced proceedings against the supplier to them of the seed and claimed damages for the costs of eradicating Summer grass from their land and for loss of use of the land during that period. Selected Seeds was given leave to defend the claim and eventually contributed $150,000 to a settlement. It then sought indemnity from its liability insurer.

Issue for determination

49 It was not in issue, for the purposes of the appeal to the High Court, that the liability under the settlement fell within the insuring clause. The relevant issue was whether an exclusion clause, described as an Efficacy Clause, applied. To the extent material the exclusion provided that the policy did not cover any liability arising directly or indirectly from the failure of any product to correctly fulfil its intended use or function.

Courts below

50 The trial judge accepted that the production of Jarra grass and seed could qualify as intended use or function of the seeds that were planted. He held that the seed that was sold did not fulfil the use or function of producing Jarra grass. It failed to produce Jarra grass and seed and also produced a weed crop – namely, Summer grass. The property damage of which complaint was made was the effect worked on the Shrimps' land by the introduction of the weed. The effect on the land was not a "failure of [the] Product to correctly fulfil its intended use or function". He was not satisfied that the exclusion applied.

51 The Queensland Court of Appeal disagreed.

High Court's decision

52 The High Court overturned the Court of Appeal's decision and restored the decision of the trial judge.

53 According to the High Court the question posed by the Efficacy Clause was whether the liability of Selected Seeds for the damage to the Shrimps' land arose out of the failure of the seeds to fulfil their use or function. The answer to that question was "No". The liability was not caused by the failure of the seeds to produce Jarra grass. It arose by reason of the direct effect of the seeds upon the land. The seeds were so contaminated that only Summer grass was produced. Consequently the Efficacy Clause did not apply.

G R Hancy

15 December 2010