THE DISCOVERABILITY OF INSURANCE DOCUMENTS

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The Discoverability of Insurance Documents

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Relevance

1. The traditional position taken by the Courts is that, unless the question of insurance is a substantive issue in the case, the defendant's insurance policy, and correspondence between the defendant and its insurer, are generally irrelevant and therefore are not discoverable.

2. In *Beneficial Finance Corporation Ltd v Price Waterhouse* (1996) 68 SASR 19, a case in which auditors were sued for negligence, the Full Court of the Supreme Court of South Australia held that the auditors' insurance policy was irrelevant to any pleaded cause of action and did not have to be discovered.

3. In *Kirby v Centro Properties Limited* [2009] FCA 695, a case in which investors alleged a failure to disclose price-sensitive information, Justice Ryan refused the plaintiff's application to compel discovery of the defendant's insurance policies, finding that they were irrelevant.

4. There are exceptions to the general rule that the defendant's insurance policy is irrelevant and therefore not discoverable or otherwise compellable:

   (a) if the question of insurance, or the terms of the insurance, are relevant to a pleaded allegation, the insurance policy at least will probably be discoverable (*Bennett v WMC (Olympic Dam Corporation) P/L & Akula P/L (In Liq) & CGU Insurance Ltd & Ors* [2008] SADC 42);

   (b) there are various statutory provisions which provide a basis for compelling production of insurance policies. Those statutory provisions expressly or impliedly contemplate the production of insurance policies in connection with the relief sought. In particular:

      (i) s. 51 *Insurance Contracts Act 1984 (C'th)*: claims against an insurer in respect of the liability of the insured or third party beneficiary;

(ii) s. 247A *Corporations Act 2001 (C'th)*: applications by a member of a company or managed investment scheme to inspect the books of the company (*Merim Pty Ltd v Style Limited* (2009) 255 ALR 63; *London City Equities Ltd v Penrice Soda Holdings Ltd* [2011] FCA 674; *Snelgrove v Great Southern Managers Australia Ltd (In Liq)* [2010] WASC 51);

(iii) s. 440D and 471B *Corporations Act* and s. 58(3)(b) *Bankruptcy Act 1966 (C'th)*: applications for leave to proceed against a company in administration or liquidation or a bankrupt (*Lopez v Star World Enterprises Pty Ltd* [1997] FCA 454; *Snelgrove v Great Southern Managers Australia Ltd (In Liq)* [2010] WASC 51; but see *Commonwealth Bank of Australia v ACN 076 848 112 Pty Ltd* [2015] NSWSC 666 at [5] – [11]);

(iv) s. 562 *Corporations Act*: provisions relating to the application of proceeds of contracts of insurance;

(v) s. 117 *Bankruptcy Act*: provisions relating to policies of insurance against liabilities to third parties;

(vi) s. 596A and 596B *Corporations Act*: examinations (usually by liquidators) of officers and other people in relation to the "*examinable affairs*" of companies in liquidation (*Grosvenor Hill (Queensland) Pty Ltd v Barber & Anor* (1994) 120 ALR 262 at 273; *Re BPTC Ltd (in liq)* (1994) 14 ACSR 460; *Re Interchase Corporation Ltd* (1996) 68 FCR 481 at 485; *Re Allstate Explorations NL* (2003) 46 ACSR 379; *Re Clutha Limited (in liq)* (2003) NSWSC 235; *Meteyard v Love* (2005) 65 NSWLR 36; *Korda (Receiver and Manager), Re South Eastern Secured Investments Ltd* (2010) 191 FCR 63; *In the Matter of Banksia Securities Ltd* [2013] VSC 416 at [25] – [26]);

(vii) s. 601AG *Corporations Act*: claims against an insurer of a deregistered company.

Discretion

5. If insurance documents are considered to be relevant, courts have a discretion to exclude or limit their admission into evidence pursuant to s. 135 and 136 of the *Evidence Act 1995 (C'th)* or *Evidence Act 2008 (Vic)* if the probative value of the evidence is substantially outweighed by the danger that the evidence might:

   (a) be unfairly prejudicial to a party; or

   (b) be misleading or confusing; or

   (c) cause or result in undue waste of time.

Privilege

6. If the defendant's insurance policy, or even correspondence between the defendant and its insurer, are considered to be relevant, the next questions that should generally be asked are:

   (a) whether they are not required to be produced because they contain privileged information by reason of sections 118 or 119 of the *Evidence Act* or common interest privilege at common law;

   (b) whether any such privilege has been waived.

7. For example:

   (a) in *Westminster Airways v Kuwait Oil* [1951] 1 KB 134 at 136, correspondence between the insured and the insurer was found to be privileged on the basis that it was brought into existence in contemplation of anticipated litigation;

   (b) in *Ensham Resources Pty Ltd v Aioi Insurance Company Ltd* [2012] FCAFC 191, the Full Federal Court upheld the decision of a judge that reports provided by a loss adjuster to the solicitors for the insurer were privileged, even though the reports had been completed years before the litigation had commenced (see also *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 at [23]);

(c) in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 12)* [2014] FCA 481, Justice Bromberg found that the privilege in an otherwise privileged report had been waived when it was provided to the insurer because the insured and the insurer did not have a common interest in the information in the report (but see *Leader Westernport Printing Pty Ltd v IPD Instant & Duplicating Pty Ltd* (1988) 5 ANZ Insurance Cases 60 – 856).

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