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Dissecting Decisions

Risk Management & Insurance

Who is Insured When the Whole Family Lives on the Farm?

By Debra Lane

On the 28th of June 2017, Judge Beazley of the South Australian District Court delivered a decision commenting on the construction of a "Farm Pack" Personal Insurance Policy and a "Small Farm" Rural Insurance Policy in the context of a summary judgment application.

The plaintiff, Joshua Liddy, claimed damages for personal injuries sustained by him at a property at Delamere on the 31st of December 2007. The defendant resided on the property at the time.

The Action

The defendant joined the insurer, QBE, to the proceedings as a third party seeking indemnity in relation to the plaintiff's claim pursuant to one of the two policies of insurance. (The other third parties were the insurance broker and the corporate entity).

One of the policies was issued to named insureds which included the defendant's parents. In the other policy the named insurer was a corporate entity controlled by the defendant's father.

In November of 2013, the plaintiff discontinued the proceedings against all but the current defendant, from whom damages were claimed as occupier of the main homestead.

The defendant asserted that the policies of insurance provided cover to him during the relevant period as, during that period, he (as a member of his father's family) normally lived at the "***home on the said property***" and he sought indemnity from QBE pursuant to each policy of insurance for any legal liability which he might face for the injuries sustained by the plaintiff.

In January of 2012 (by letter from its solicitors), QBE declined indemnity on the bases that the defendant was not a named insured under the policies, nor did he fall within the meaning of "***family***" as defined within the policy, for the purpose of the relevant insuring clauses.

In August 2014 had QBE issued an Interlocutory Application seeking summary judgment against the defendant or, alternatively, judgment in its favour on the defendant's claim for a declaration that he was entitled to indemnity pursuant to the terms of either policy and on the claims for damages for misleading and deceptive conduct pursuant to Section 82 of the *Trade Practices Act* and/or Section 12GF of the *ASIC Act* and/or in negligence.

The Master heard the submissions of QBE and the defendant provided a number of drafts of a Second Third Party Statement of Claim. In May of 2015 the Master declined to strike out the then current Third Party Statement of Claim and gave leave to the defendant to file an amended Third Party Statement of Claim.

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In that document the defendant asserted that the second and third third parties were each authorised representatives of QBE pursuant to Section 761A of the *Corporations Act* and, on that basis, that QBE was responsible for any loss or damage suffered by him as a result of their conduct.

The defendant asserted that in or about June of 2007 his father advised the broker, in response to a renewal invitation for the two policies of insurance, that his son, Jonathon (the defendant), was living at the property with his wife and two children. The broker was alleged to have responded with words to the effect *"I will make the adjustment, if necessary".*

The defendant asserted that he was referred to in the primary policy in that he was a *"child of the named insured"* and that he normally resided in their home at the property.

Accordingly, he claimed he was entitled to indemnity pursuant to Section 48 of the *Insurance Contracts Act* in respect of any other head of claim.

As to the alternate policy, the defendant asserted that his father (Kevin Brown) was the sole Director of the named insurer, Highbrooke Pty. Ltd. and the defendant fell within the description of *"family"* for the purposes of that policy.

It was the defendant's case that it was not necessary for him to be named in the policy at common law and pursuant to Section 48 of the *Insurance Contracts Act.*

A summary judgment application having been rejected by a Master at first instance, QBE appealed.

The Appeal

It was assumed for the purposes of the appeal hearing that there were two separate policies of insurance, being a "Farm Pack" Personal Insurance Policy and a "Small Farm Rural" Insurance Policy.

The personal insurance liability policy was referred to as the "primary policy", pursuant to which the named insureds were Kevin Brown, Barbara Brown, Highbrooke Pty. Ltd. and the business name, Fleurieu Springs Estate.

This policy provided cover pursuant to its 'home building and home contents' section which included personal legal liability to others expressed in the following terms:

> *"We insure you and your family against any claim for compensation or expenses which you or your family become legally liable to pay for:*
>
> (a) *the death of, or bodily damage to, any person … resulting from an occurrence during the period of insurance arising out of the ownership of the home buildings or occupancy of the home buildings …"*

The primary policy also purported to provide extended cover in the event that the section covered the home contents and the home building was *"(the insureds) primary residence"* in which case it purported to insure *"you and your family for the death or bodily injury to any person anywhere in the world"* if the home buildings is your *"primary residence".*

"*Occurrence"* was defined as *"an event … which results in personal injury which you neither expected nor intended to happen"* and *"home buildings"* were defined as *"the dwelling used primarily as a place of residence at the farm"* and specifically included in ground pools.

"*Family*" was defined as "*you and your spouse (legal or defacto) and children who normally live in your home".* It also included "*you and your spouse's parents who normally live in your home*".

The words "*you, your"* were defined as "*the person(s), companies or firms named on the current policy schedule as the" insured""*.

The named insureds in the Schedule to the so called alternate (Small Farm Rural Insurance) policy were Highbrooke Pty. Ltd. and the business name, Fleurieu Springs Estate.

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The alternate policy provided cover for liability to others in two sections in the following terms:

> *"Section 1: Home Buildings and Home Contents*
>
> *Your personal liability to others.*
>
> *What we will pay.*
>
> *If this section covers your home buildings … we insure you and your family against any claim for compensation or expenses which you or your family become legally liable to pay for:*
>
> *(a) The death or bodily injury to any person resulting from an occurrence during the period of insurance arising out of the ownership of the home buildings or occupancy of the home buildings."*

and

> *"Section 4 - Legal Liability:*
>
> *Legal liability*
>
> *This section covers you and your family for your legal liability for injury or damage to other people or their property.*
>
> *We will pay the following to you or on your behalf for:*
>
> - *Any amount that you are legally liable to pay including costs awarded against you.*
> - *Personal injury … which occurred within the period of insurance.*
> - *We will defend any proceedings against you seeking damages for personal injuries … in your name and on your behalf even if the suit is groundless or fraudulent."*

As at the 31st of December 2007, the defendant was residing at the main homestead on the farm property. The plaintiff asserted that on that day he was visiting the defendant at the farm property when he struck his head sliding down a waterslide into a small wading pool and, in consequence, suffered catastrophic injuries including permanent tetraplegia.

Three years later the plaintiff commenced the proceedings initially claiming relief against the defendant, his father, Kevin Brown, Highbrooke Pty. Ltd. and a company, Second Valley Nominees Pty. Ltd. for damages based on their respective interests in the property.

As the appeal was pursuant to Section 43 of the ***South Australian District Court Act,*** it proceeded by way of a re-hearing.

The plaintiff and the second and third third parties did not appear on the hearing of the appeal, nor did they make any submissions.

The principles of the law on summary judgment were reviewed with reference to recent authorities including *Davies v Minister for Urban Development & Planning*[1] and *Proude v Visic No. 4*[2] and *Groom v State of South Australia*[3].

Reference was also made to the *Estate of the Late Sir Donald Bradman v Allens Arthur Robinson*[4] and *Spencer v Commonwealth*[5].

In summary, His Honour found the test was whether QBE as appellant had established that the defendant had no reasonable basis for his claim for relief. Further, it must be evident or obvious that there was no reasonable basis for it so that it was capable of ready resolution without prolonged argument.

Contrary to the dicta in *Spencer v Commonwealth*[6] and *Ceneavenue Pty. Ltd. v Marta*[7], Judge Beazley set out in detail the respective submissions of Counsel on what he said was a complex question of construction - which was not assisted by some poor drafting of

1 [2011] SASC 87
2 [2013] SASC 154
3 [2017] SASCFC 35
4 (2010) 107 SASR 1
5 (2010) 241 CLR 118, at pp 139-141
6 Supra
7 [2008] 106 SASR 1, pp 80-82

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sections of the two policies, noting that the general principles of construction with policies of insurance are well settled.

The defendant submitted that it would be absurd or manifestly unjust if a child of the named insured, at least for the purpose of the primary policy, could be denied cover, notwithstanding that he lived at the farm permanently.

The Judge expressed himself to be conscious of the case law that he should not conduct a mini trial nor make a final determination as to the proper construction of the disputed words in the policy but found that there were significant differences between the primary policy and the alternate policy.

He accepted the Master below did not deal with some of the arguments presented by both Counsel and disagreed with some of his reasons.

Conclusion

In relation to the 'Primary Policy', the Judge had no doubt that the defendant had a reasonable basis for his claim to indemnity. Without attempting to finally resolve the proper construction of the words "*home*" and "*family*", in the ***"Home Buildings and Home Contents"*** Section 1 of both policies he found there was a clear and reasonable basis for it to be construed as a ***"dwelling and not as a permanent residence of the insured".***

As to the 'Alternate Policy', the Judge considered QBE's submission had more force because the 'named insured' was a corporation but accepted the defendant's submission that the issue should be left to trial given the factual dispute about whether the defendant's father, as sole Director of the corporation, was acting in the course of his duties.

The Judge also concluded that the defendant had a reasonable basis to claim an indemnity pursuant to Section 4 "***Legal Liability"*** part of the Alternate Policy.

He left the proper construction of both policies to the Trial Judge, dismissing the insurer's appeal.

The ultimate result of the action after this preliminary skirmish is awaited with interest.

* Originally published by Australian Insurance Law Bulletin 2018 Vol 33 No 10

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