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Vale Greg Pynt

Articles

The objective test of non-disclosure in s 21(1)(b) of the Insurance Contracts Act 1984 (Cth) remains elusive in its meaning and operation. Despite the time of assessment being prior to entry into a contract of insurance, disputes over an insured's non-disclosure inevitably arise after a claim is made, when investigations uncover matters an insurer argues were relevant to its decision to accept the risk of a contract of insurance, and the circumstances on which it does. The test in s 21(1)(b) did away with the common law prudent insurer standard of materiality. Despite this, resolution of questions of non-disclosure can be complex exercises in inference drawing, and courts are reticent to give weight to hindsight evidence of insurers. Complex fact scenarios involving the disclosure of opinions and allegations cases have put into question the practical utility of settled principles on the application of the test. Recent cases demonstrate a move towards a broader consideration of circumstances relevant to s 21(1)(b), providing a more flexible construction to resolve conceptual issues that the legislation is otherwise silent on.

An insurer who receives a claim from their insured for a first party loss will often have an eye to recovering their payout from the third party wrongdoer who actually caused the loss. That is, of course, via the insurer's right of subrogation. However, the insured's loss might far exceed the limit in the policy, or a deductible might mean that the insured is left with losses which it wishes to recover from the third party. In such cases, it is common for there to be various stakeholders with sometimes aligned and other times divergent interests. There is the insurer seeking to recover the payment it made under the policy. There is the insured seeking to recover for its uninsured losses or shortfall. Then there is the third party wrongdoer. Questions arise as to which of the insurer or the insured has control of the action and what duties they owe each other throughout the litigation.

The global COVID-19 pandemic has tested the operation of business interruption policies. This article provides an analysis of business interruption insurance following the 'insurance emergency' declared by the WHO from 2020 to 2023 during the COVID-19 pandemic and lessons arising, including the insurance response, the two test cases authorised by AFCA (*Wonkana* on the interaction between the Quarantine Act 1908 (Cth) and the Biosecurity Act 2015 (Cth) and the 10 claims in *Swiss Re International*), policy interpretation, policy exclusions, s 54 of the Insurance Contracts Act, causation and the 'but for' test, the operation of specific terms in business interruption policies such as clauses dealing with disease and prevention of access and claims handling.

Case Note

In this latest instalment of the long-running Leighton Holdings bribery allegations saga, Peden J of the New South Wales Supreme Court, in an impeccably researched and reasoned 695-paragraph judgment, elucidates several core aspects of directors and officers liability (D&O) insurance and challenges an established market assumption regarding the operation of one of its common terms — the so-called Continuity Clause. While initially disconcerting to insurance brokers and policyholders, upon closer analysis the findings are entirely consistent with relevant legal principle, in light of the actual language of the contracts under consideration. They also suggest using the simplest form of drafting to avoid such an unintended outcome in future cases.