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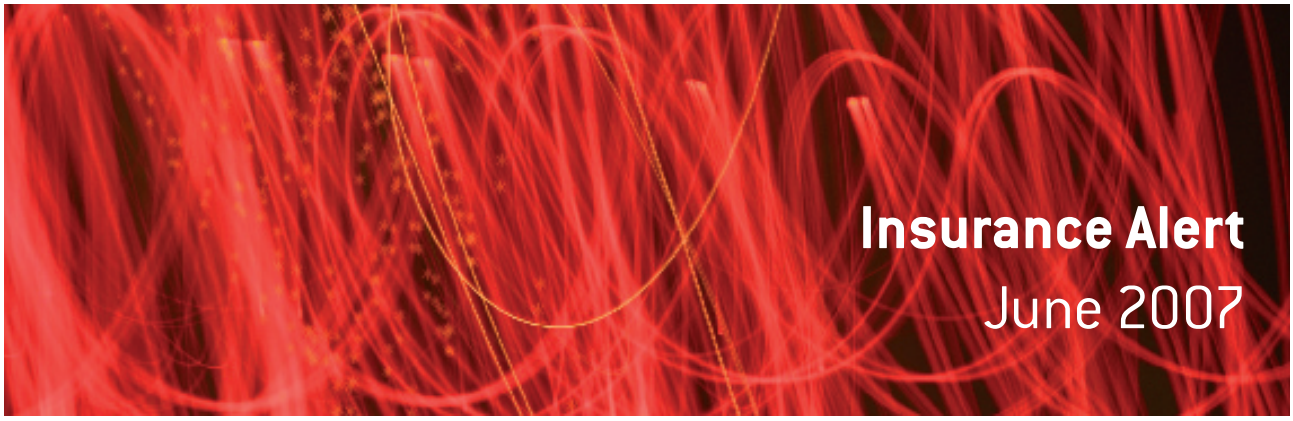

Greater Certainty For Claims Made Policies

"In a judgment delivered on 4 June 2007, the NSW Court of Appeal has confirmed that a claims made insurance policy will not respond to a charge under section 6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 for causes of action which accrued prior to the commencement of the policy. In doing so, the NSW Court of Appeal has specifically rejected a contrary line of authority adopted in the Federal Court of Australia."

The decision is *The Owners – Strata Plan 50530 v Walter Constructions Group Pty Ltd* [2007] NSWCA 124. The decision gives greater certainty to insurers who have issued claims made policies to corporate insureds who have since become insolvent, or individual insureds who are bankrupt, cannot be found or who have died.

Facts

The plaintiff was a residential strata plan owner. The strata plan was created in 1995 following the construction of the residential development in the period 1994 to 1995. The development was built by Walter Constructions Group Limited ("Walter"). There were defects in the construction which the Court accepted on a factual basis were manifest at the date the strata plan was created.

Walter Constructions Group Limited had a claims made professional indemnity policy with QBE for the period 31 December 1999 to 31 December 2001. There was no retroactive date limiting the policy.

Sometime between 31 December 1999 and 31 December 2001 the strata plan made a claim on Walter in relation to the defective works. Walter was later placed into liquidation. The strata plan subsequently sought to bring a claim under the policy directly against QBE pursuant to section 6 of the *Law Reform (Miscellaneous Provisions) Act* 1946.

The Legislation

The legislation is remedial. It allows plaintiffs direct access to an insolvent, bankrupt, deceased or otherwise impecunious defendant's insurance policies. It establishes a charge on that insurance money. However, the legislation specifically provides that the charge on that insurance money is created on the *"happening of the event giving rise to the claim for damages"* against the insured.

The Arguments

QBE argued that the cause of action accrued sometime in 1994 or 1995, before the policy existed. QBE argued that the accruing of the cause of action

is the *"happening of the event"* when the statutory charge was created. As the policy did not exist at the time the charge on insurance monies was created, the charge could not attach to the later policy.

The strata plan owner did not dispute the date the cause of action accrued but argued that the *"happening of the event"* when the charge was created is when the court gives judgment on the claim for damages. As that time is the present, and presuming a claim was made on the insured during the policy period, the strata plan owner therefore argued that the relevant policy was insurance monies to which the charge attached.

The Decision

Justice Hodgson, with whom Justices Giles and Tobias agreed, accepted QBE's argument. They determined that the cause of action accrued in 1994 or 1995. They accepted that is the relevant time of the *"happening of the event"*. Consequently the QBE policy of insurance did not then exist and could not be charged under the legislation. In doing so, Justice Hodgson adopted the reasoning of prior NSW Supreme Court decisions including *Manettas v Underwriters at Lloyds* and *Schipp v Cameron*.

His Honour went on to consider and reject contrary authority, relied on by the strata plan owners, of Justice Lindgren of the Federal Court in the decision of *FAI General Insurance Co Limited v McSweeney*. In that judgment, Lindgren J preferred an interpretation of section 6 that the charge descends at the time of the Court's adjudication, not at the time of the accrual of the cause of action.

There is now consistent authority of the NSW Court of Appeal that where the cause of action complained of accrued prior to the commencement of the claims made policy, the insurer who issued the claims made policy can escape a charge and a direct exposure to the claimant under section 6 of the *Law Reform (Miscellaneous Provision) Act* 1946.

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