wotton kearney

Case Alert

Shaping the future of insurance law

27 FEBRUARY 2019

NSW Court of Appeal resolves uncertainty about date of accrual of cause of action against a first party property insurer for limitation purposes

Globe Church Incorporated v Allianz Australia Insurance Ltd [2019] NSWCA 27

AT A GLANCE

- Wotton + Kearney acted for Allianz in a NSW Court of Appeal proceeding where judgment was issued yesterday clarifying – albeit by a 3-2 split decision - the issue of when a cause of action accrues against a first party insurer for limitation purposes.
- The decision confirms that the cause of action against an insurer for damages for failure to hold the insured harmless against loss accrues on the happening of the insured event, that is, the occurrence of the damage.
- This decision clarifies that NSW law on this issue sits comfortably with established judicial precedent in the UK and other Australian jurisdictions.
- This case is important to all insurers and insureds (and to all insurance lawyers) as it provides a measure of guidance – at least until the High Court considers the issue – for determining when a cause of action against an insurer will be time-barred.

The issue – when does a cause of action accrue against an insurer of a first party property policy?

Under s14(1) of the *Limitation Act 1969 (NSW)* a cause of action against an insurer for breach of contract will be barred if it is not commenced within 6 years from the date on which that cause of action accrues.

The critical question is the date on which a cause of action accrues against an insurer of an indemnity policy for breach of the insurance contract.

Pursuant to a decision of Davies J, this issue was referred directly to the NSW Court of Appeal as a separate question.

The contextual background – judicial precedent on this issue is well settled in the UK; but there's some possible conflict in Australia

There are two key principles, both of which are settled law in the United Kingdom and in a number of Australian jurisdictions, where there is definitive appellate level authority:

(1) a cause of action against the insurer of an indemnity policy accrues immediately on the occurrence of the insured event;

(2) the limitation period for commencing proceedings against an insurer for breach of an indemnity policy begins to run on the occurrence of the insured event.

Jurisdiction	Case name	Reference
UK	*Callaghan v Dominion Insurance Co Ltd*	[1997] 2 Lloyd's Rep 541
Western Australia	*CIGNA Insurance v Packer*	(2000) 23 WAR 159
Tasmania	*Associated Forest Holdings v Gordian Runoff*	[2015] TASFC 6

The position on this issue in New South Wales has, until now, been uncertain – which is why it was referred as a separate question directly to the Court of Appeal.

This problem was considered by Stevenson J in 2016 in *Carillion v AIG* (2016) ANZ Ins Cas 62-115 (NSWSC). In *Carillion*, Stevenson J concluded that, notwithstanding the UK authority and the appellate authority in other Australian jurisdictions, he was required to follow the NSW Court of Appeal decision in *CGU v Watson* [2007] NSWCA 301, which he considered was to the contrary. Specifically, Stevenson J took the view that the Court of Appeal in *Watson* had approved the comments by Giles J in *Penrith v GIO* (1991) 24 NSWLR 564 that the cause of action against the insurer did not accrue until the insurer has been required to pay and has refused to do so.

There has been ongoing debate about whether the Court in *Watson* approved that portion of Giles J's decision in *Penrith* or whether those comments were dicta.

The relevant facts of the *Globe Church v Allianz* case

This case involves a claim by Globe Church, the insured on a 2007-2008 ISR Policy (2008 Policy), for property damage that is said to have occurred to the insured property as a result of rainwater and flooding during a storm event in or about June 2007. The 2008 Policy was co-insured by Allianz and Ansvar.

The insured first made a claim on the 2008 Policy in 2009 and the insurers declined indemnity for that claim in 2011.

By a statement of agreed facts, the parties agreed that the damage that was the subject of the insured's claim on the 2008 Policy occurred before the March 2008 expiry of the 2008 Policy, which was 8 years before the commencement of the action in 2016.

So, if the insured's cause of action accrued at the time of the damage (i.e. the insured event), the claim would be time barred under the applicable 6-year limitation period.

The insured argued that a distinction should be made between the promise of an insurer to indemnify and the breach of that promise; and that the cause of action for damages for breach of contract only accrued when the insurers failed to do what was required of them. The insured argued that the time in which to bring the claims did not begin to run until the insurers breached their promises to indemnify by denying the claims in 2011 – in which case, the claims would not be statute barred.

The decision of the NSW Court of Appeal

The majority opinion by Bathurst CJ, Beazley P and Ward JA specifically held that the Court of Appeal in *Watson* did not endorse the dicta of Giles J in *Penrith* on the timing of the accrual of the cause of action for breach of a contract of indemnity insurance. The majority held that the intermediate appellate authority (i.e. *CIGNA v Packer* and *Associated Forest Holdings v Gordian*) is not plainly wrong and should be followed. Consequently, the majority held that the insured's claim for indemnity under the 2008 Policy was statute barred, as the claim accrued on the occurrence of the insured event (i.e. the damage). Based on the agreed facts that occurred, at the latest, by 31 March 2008. The proceedings were not commenced until 2016.

Meagher JA and Leeming JA both wrote dissenting opinions that took issue with the proposition that an insurer could be in breach of a promise to indemnify immediately on damage occurring. Meagher JA held that the "*insurers' promise was to indemnify the insured by paying an amount of money ascertained in accordance with the Basis of Settlement provisions in the policy…the undertaking is to make good the insured's loss after it had occurred and by payment*". Meagher JA concluded that in the absence of an express provision in the policy regarding the timing for insurers to perform an obligation to make payment in accordance with the Basis of Settlement, that obligation had to be discharged within a reasonable time.

Regarding the concerns raised by the dissent, the majority observed that "*it should be remembered that it is open to the parties to a contract of insurance to negotiate for clauses to protect against concerns of that kind".*

Whether this is the last word on the subject remains to be seen.

In the meantime, the weight of authority in Australia is that a cause of action against an insurer on an indemnity policy accrues on the occurrence of the insured event, which in the case of a first party property policy is the occurrence of damage to the insured property. By contrast, in the case of a third party liability policy, the insured event is the establishment of the liability of the insured to a third party.

Need to know more?

For more information please contact us.

Adam Chylek
Partner, Sydney
T: +61 2 8273 9940
E: adam.chylek@wottonkearney.com.au

Matthew Foglia
Special Counsel, Sydney
T: +61 2 8273 9905
E: matthew.foglia@wottonkearney.com.au

Thomas Cavanagh
Senior Associate, Sydney
T: +61 2 8273 9971
E: thomas.cavanagh@wottonkearney.com.au