Contaminating the duty of disclosure?

NSW Court of Appeal continues to shift disclosure onus to insurers of commercial policies

Marketform Managing Agency Ltd v Amashaw Pty Ltd [2018] NSWCA 70

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Summary

In a similar vein to *Stealth Enterprises*[1], the NSW Court of Appeal has upheld a Supreme Court decision that an insurer was not entitled to deny indemnity for non-disclosure of underground contamination, where the policy specifically provided Pollution Liability cover, and because the event giving rise to the insured liability was sudden, specific and identifiable. However, the Court also found that the insurer was only required to pay for damage rectified and not measures to prevent future damage, resulting in a substantial reduction in quantum.

Factual background

The respondent (**Amashaw**) was the operator of a petrol station and was required by statute to monitor groundwater in and around its site. It obtained reports through an engineering company, which identified chemicals in the groundwater in November 2011 and March 2012.

The November 2011 report was obtained shortly before insurance cover was bound. A number of chemical concentrations exceeded relevant assessment criteria. The NSW Environment Protection Authority (**EPA**) made a number of recommendations, requiring Amashaw to continue to monitor the site, which they did.

In May 2013, Amashaw discovered there was a substantial petrol leak and on 3 June 2013 there was an explosion in a sewer owned and operated by Sydney Water, who sought to recover the costs of remediating the contaminated sewer and preventing further runoff from Amashaw's site.

Amashaw incurred costs of $1,197,320 to make good the damage and to prevent further contamination to the sewer, following which it made a claim on its public liability policy held with the appellant (**Marketform**).

Marketform denied indemnity for the following reasons:

1. Amashaw had not disclosed the November 2011 and March 2012 reports at the time of renewal.
2. The damage occurred progressively due to a build-up that started before November 2011, meaning there was no 'sudden, specific and identifiable event', and was therefore not covered under the policy.
3. Indemnity could in any event only extend to remediation costs and not to preventing further damage.

Supreme Court

The primary judge held that Marketform was wrong to deny the claim. His Honour found there was no material non-disclosure, and that the damage was caused by a sudden, specific and identifiable event and not gradual contamination.

However, his Honour held that indemnity ought to extend only to the remediation costs and not to the costs of further preventative measures. Therefore, the majority of costs incurred did not reflect an insured liability, meaning that Marketform was only required to indemnify Amashaw for $274,000.

Court of Appeal

Innocent non-disclosure

Marketform sought to rely on section 21(1)(b)[2] of the *Insurance Contracts Act 1984* (Cth) (**the ICA**) to deny the claim on the basis of non-disclosure by Amashaw for failing to disclose the findings of contamination in the reports of November 2011 and March 2012. It argued that a reasonable person in the position of the insured would have appreciated that the matters raised in the reports were matters relevant to Marketform's decision to provide cover.

The primary judge noted that Marketform was "a regular insurer of service stations, who would have known that service stations are likely to be contaminated", and that the proposal had "not asked any questions" regarding contamination. His Honour was of the view that the reports only demonstrated historic and gradual contamination, and did not suggest the potential for a pollution event.

The Court of Appeal considered the context of the policy, being a Public Liability Combined Liability policy, which had a specific section providing cover for 'Pollution Liability', arising from 'a sudden, specific and identifiable pollution event'.

The Court found that the EPA did not express concern about the reported existing contamination (or likelihood of further contamination) and that Amashaw took the steps as recommended. On this basis, the Court held that a reasonable person in Amashaw's position would have been justified in continuing to believe that the existing contamination was the result of historical leaks and spills as opposed to an event that needed to be disclosed.

The insuring clause

Marketform argued that no cover was available as the contamination was gradual and thus did not fall within the insuring clause for Pollution Liability as it was not a sudden, specific and identifiable event.

The Court of Appeal found that that the petrol leak was a sudden, specific and identifiable event, caused by the failure of a valve. That failure caused pollution by petrol contamination and therefore the loss suffered by Sydney Water.

Extent of indemnity

Amashaw sought to claim the costs of rectification and the costs to prevent further damage on the basis that the recovery sought by Sydney Water was analogous to a claim in nuisance.

The Court accepted Marketform's argument that indemnity only extended to the costs of rectifying the damage. Given that the event had already occurred, the costs of abating the nuisance were within the scope of cover. However, the Court held that the costs incurred to prevent further loss were not within the scope of cover, consistent with the primary judge's decision.

Implications for insurers

1. The decision in this case and in *Stealth Enterprises* emphasises that it is even more important for insurers and specifically underwriters in niche products or industries to ask specific questions about every matter the underwriter wishes to consider in determining whether to accept cover, as a court is likely to accept that the insurer is aware of the relevant risks for that particular niche product or industry.

2. It remains important to consider the context of what is insured under the policy in accordance with section 21(1)(b) of the ICA. However, this seemingly nuanced distinction by the Court of Appeal seems to disregard the sophistication of the insured and its knowledge of the industry in which it is operating, and to shift the onus of asking relevant disclosure questions back to insurers, even in regard to commercial insureds. This appears to be counterintuitive to the prescriptive amendments to section 21 of the ICA made in 2013, with the result that the onus of the duty of disclosure is reversed in a fashion more akin to the requirements of section 21A and section 21B of the ICA, which are stated to only apply to eligible or 'consumer' policies.

3. The Court's comments that the trial judge was correct in not requiring the insured to disclose the historic and gradual contamination suggests an approach that only requires an insured to disclose a matter or circumstances that might be subject of cover – as opposed the something like gradual contamination, which was clearly excluded. If this approach were adopted more widely, this would significantly restrict the disclosure obligations of a commercial insured under section 21 of the ICA.

4. It is always important to analyse the scope of cover available especially in circumstances where the insured has already incurred the costs in relation to an insured event. Although the insurer in this case was required to indemnify its insured, it avoided over $900,000 of the claim by taking a thorough approach to the scope and distinguishing the insured exposure from the uninsured exposure.

[1] *Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Limited* [2017] NSWCA 71.

[2] As it was prior to the December 2013 amendments.

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