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Précis Paper

Insurance Policies, Inception Times, and Contract Interpretation in New Zealand

Discussion of the recent decision of the High Court of New Zealand in *Body Corporate 74246 & Ors v QBE Insurance (International) Limited and Allianz Australia Insurance Limited* [2017] NZHC 1473

Discussion Includes

- Factual background
- Findings of the High Court of New Zealand
- How do the principles of contract interpretation differ between Australia and New Zealand?

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Insurance Policies, Inception Times, and Contract Interpretation in New Zealand

1. In this edition of BenchTV, Stephanie Young (Senior Associate, Moray & Agnew, Melbourne) and Andrew Toogood (Partner, Moray & Agnew, Sydney) discuss the recent decision of the High Court of New Zealand in *Body Corporate 74246 & Ors v QBE Insurance (International) Limited and Allianz Australia Insurance Limited* [2017] NZHC 1473, the importance of specifying an inception time in an insurance policy, and the difference between the approaches of Australia and New Zealand to contract interpretation.

Factual background

2. This case involved an earthquake in New Zealand, which occurred in a very timely fashion, at least from an insurance perspective.

3. A body corporate had insured its property, which was a small commercial building just outside of Christchurch. It had an insurance policy, which covered material damage from 4 September 2009 until 4 September 2010. The insurance policy specified the inception and ending time to be at 4pm.

4. QBE Insurance did not wish to insure the body corporate for the 2010/2011 year, so the body corporate instructed their broker to find another insurer.

5. The broker approached Allianz in August 2010 and provided Allianz with a summary of what the QBE period of insurance was. Allianz provided its terms and its rates to the broker, which were acceptable, so the insurance policy was bound. Interestingly, the insurance policy was not actually executed until about 10 weeks after 4 September 2010 when the QBE policy expired.

6. On the date that the QBE policy expired and the Allianz policy started (4 September 2010), an earthquake occurred in Christchurch (the Canterbury earthquake). This earthquake occurred at 4.53 am on 4 September. A claim was made on the QBE policy, and QBE settled that claim, paying out an amount of $970,000.

7. But in doing so, QBE argued that it was actually only liable for half of that, and that Allianz should pay the other half, on the basis that at the time of the earthquake, there was double insurance. QBE's interpretation was that the Allianz policy had not specified an inception time, and that in the absence of specifying an inception time, the policy started at 12 am.

Findings of the High Court of New Zealand

8. Justice Whata of the High Court of New Zealand was asked to consider three arguments put by Allianz as to why their policy did not respond:
    - first, that the Allianz policy could be interpreted so that it started at 4 pm, i.e. when the QBE policy ended
    - second, that there should be a term implied into the Allianz policy that it did not start until 4 pm
    - third, that the Allianz policy should be rectified, so as to specify a starting time of 4pm

9. It is important to note that the High Court of New Zealand is not the highest court in New Zealand, unlike in Australia.

10. In reaching his decision, Justice Whata applied the principles of contract interpretation. He cited a passage from the English case of *Arnold v Britton & ors* [2015], which provides that when interpreting a contract, the intention of the parties must be identified by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.

11. Justice Whata came down on the side of Allianz. He found the arguments that the policy incepted at 4pm to be more compelling than the arguments made by QBE. In particular, he referred to the fact that overlapping cover had not been requested by the body corporate. Instead, everything seemed to suggest that the body corporate wanted seamless cover.

12. He highlighted that no notice was given under the Allianz 'other insurance' clause, which specifically required notice to be given where there was another insurance policy.

13. He also found it important that, in reading that clause, the whole purpose of the clause seemed to be to avoid double insurance. So, in light of this reading, he understood the intentions of the parties to be to obtain continuous cover, rather than double cover. It was on this basis that he interpreted the policy to start at 4 pm, rather than at 12 am.

How do the principles of contract interpretation differ between Australia and New Zealand?

14. It seems that the process of interpreting contracts in NZ is more liberal than it is in Australia. It also seems as if the Courts in NZ derive guidance from English cases more so than the Courts in Australia do.

15. In Australia, the Courts tend to give effect to the presumed intentions of parties. They emphasise an objective understanding of parties' intentions, over a subjective one. They generally ascertain the meaning of terms in a commercial contract by reference to what a reasonable business person would understand those terms to mean. The starting point will always be to look at the plain and ordinary meaning of the terms.

16. The Courts in NZ seem to follow Lord Hoffmann's line of reasoning in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1997], which was that the context in which a contract comes into being should be considered when interpreting its meaning. Lord Hoffmann further held that extrinsic evidence can be used when interpreting a contract in the absence of any ambiguity in the terms.

17. This is a stark contrast to the position in Australia. The authority in Australia is Justice Mason's decision in *Codelfa Construction v State Rail Authority of New South Wales* [1982]. Justice Mason held in this decision that extrinsic evidence is inadmissible, unless:
    - the words of the contract are ambiguous
    - there is a proven special technical meaning, trade usage or custom
    - the application of the plain meaning of the words would lead to manifest absurdity or inconvenience

18. Justice Mason held that where the written meaning of a word is ambiguous, the Court can have regard to surrounding circumstances, but that those surrounding circumstances are limited to things that occurred before or on the date of policy inception. The parties' negotiations, insofar as they consist of the parties' intentions, are inadmissible in order to interpret the contract.

19. Rectification is an equitable remedy. In relation to the circumstances under which it is available in Australia, generally, it will only be allowed when the parties can show that they have made a mutual mistake. So the Courts have discretion as to whether or not to apply it.

20. In this case, one of the arguments was that the policy should be rectified to include an inception time of 4 pm. But Justice Whata declined to order that rectification was appropriate, primarily because he said rectification would be a remedy of last resort, and that, in circumstances where he had already interpreted that the contract incepted at 4 pm, it would not be necessary.

21. Generally speaking, inception times are always specified in insurance policies in Australia. It is uncommon to not have them included. However, it does happen occasionally that they are not specified, and this is when problems, such as the ones in this case, arise.

22. It is interesting to note that in this case Allianz adduced evidence about the general practice in NZ of specifying an ending time but no inception time, explaining that the reason for doing so is to avoid any potential for inadvertent gaps in cover. Justice Whata did not accept that Allianz had established that this was general practice in NZ.

23. QBE is planning to appeal this decision.

24. The takeaway for practitioners in this decision is that when writing an insurance policy, what the general practice is should not be taken for granted. It is very easy to both check what time another policy expires, and to specify an inception time.

BIOGRAPHY

Stephanie Young

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Stephanie began practicing as a solicitor in 2012, specialising in the area of professional indemnity insurance. Stephanie works on a wide range of claims and her clients include accountants, financial planners, medical service providers and engineers. Stephanie has also defended a number of insured organisations who have been prosecuted by Worksafe in the Victorian Magistrate's Courts. Stephanie holds a Bachelor of Laws and Bachelor of Science from the University of Tasmania.

Andrew Toogood

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Andrew has 15 years of experience acting for Australian and international insurers and risk carrying corporations in a wide variety of insurance matters and injury liabilities litigation. Andrews experience in dust disease and toxic tort claims, coverage disputes, product and public liability claims, construction disputes, commercial litigation and recovery actions has led to him being recognised by the Law Society of NSW as an Accredited Specialist in Commercial Litigation.

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