



July 2000
Issue 7

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FORTUNE MANNING LAW PARTNERSHIP

Insurance Brief

WHEN ARE HOUSEHOLD GOODS NOT HOUSEHOLD GOODS?

Commercial Union Assurance Co v Hazelwood Smith

Supreme Court of Victoria –
14.4.00

A couple purchased a property and took out home and contents insurance. Before all their possessions were delivered to the new home, a fire at their old home destroyed all of their belongings.

The home and contents policy over the new home provided:

"Your buildings and contents are insured while at your situation. Cover for your contents while away from your situation is not provided unless we say so".

An additional clause in the Policy also provided as follows:

"Cover for contents away from your situation.

Your contents are insured while they are away from your situation, but still in Australia."

In the lower court the judge found that the belongings claimed for which were destroyed by the fire were in fact "contents" which were insured under the new Policy. It was held that the parties intended the goods to be covered from the time the insurance was effected

even though they had not yet made it to the new (insured) home.

The insurer appealed and argued that if the belongings were to be covered it was necessary that they had first been at the situation at some time. The insured argued that the definition of "contents" in the Policy did not specify that the belongings first needed to be contained in buildings at the situation. Nowhere in the Policy was it specified that the goods had to be first delivered to the premises at the situation before they could later be regarded as being contents "away from" the situation. It was argued that the words "away from" merely meant "not at".

The insurer also argued that for the belongings to be "contents" they had to have been contained sometime within the land or buildings at the situation.

It was held that the Policy did **not** include cover for goods which had not first been at the situation. In the Court's view that interpretation reflected the assumption in the Policy that people moving from one residence to another would have contents insurance at the former location as well as at the new location. No intention was shown in the Policy to provide coverage for goods before they reached the new location.

A common sense outcome? Probably although the case was decided on the particular policy wording. Whether a New Zealand Court would follow the decision is debatable as our Courts have said in a number of recent decisions that the onus is on the insurer to clearly

spell out the extent and limits of cover.

CLAIMS MANAGERS - TAKE CARE WHEN SETTLING!

Allison v KPMG Peat Marwick

Court of Appeal – 17.12.99

It has long been established at common law that to settle with one joint tortfeasor will release the other joint tortfeasor(s). The rule was modified by section 17(1) Law Reform Act 1936 to allow proceedings against a joint tortfeasor despite a judgment having already been obtained against his fellow joint tortfeasor.

Settling with one but not all tortfeasors liable in respect of a given loss is an issue of considerable practical importance for claims staff.

In **Allison**, the plaintiffs sued their auditors in respect of an audit report on which they had relied in purchasing a business. The proceeding included a claim against the vendor of the business which was earlier settled.

Both the vendor and auditors were being sued in respect of the same loss to the plaintiff but the question arose whether they were joint tortfeasors and, if so, whether the auditors were released from any liability by the earlier settlement with the vendor. It was held that the auditor was a concurrent rather than joint tortfeasor and that neither the common law nor, on a careful analysis, the settlement agreement, released the auditors.

For claims managers the message is clear: in any partial settlement in a

multi party proceeding or a proceeding where non parties may also have a liability, the terms recording such settlement must make explicit that the settlement is with the settling tortfeasor only and is not a release of other liable persons whether they are party to the proceeding or not.

TESTING FAST CARS - THE SEQUEL

Rogers v HIH Casualty & General Insurance (NZ) Limited

Court of Appeal – 11.04.00

It may be recalled from the last issue of *Insurance Brief* that HIH was successful in the High Court in declining cover to Mr Rogers whose Ferrari had been written off on the Pukekohe racetrack. HIH was said to be entitled to decline the claim on the basis of an exclusion which said that cover was not available when the car was:

"Either practising for or taking part in any race, time trial, rally, sprint or drag race, or similar motor sport event, demonstration or test."

In a very short judgment, the Court of Appeal overturned the High Court and said that the exclusion did not apply and Mr Rogers was entitled to cover. It was said that the words "motor sport" qualified each of the succeeding words "event, demonstration or test". The Court of Appeal did not think that the events of the day were a demonstration or a test let alone a "motor sport demonstration or test" with the latter having overtones of sporting competition. The Court felt that all that Mr Rogers had been involved in on the Pukekohe racetrack was advanced driving instruction.

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Moreover, the Court felt that the preceding words in the exclusion clause of "race, time trial, rally, sprint or drag race" qualified the latter part of the clause such that for the exclusion to apply there had to be a need for competition. It was said to be an essential requirement of the exclusion that competition be present before the exclusion would operate. In this case there was no competition.

The Court of Appeal accepted that the insurer did not intend to cover the type of event in which the car was damaged. However, the Court offered yet another warning to insurers that the drafting of policies needs to be undertaken with care if an insurer wanted to exclude risks. The Court said:

"What the insurer needed to do was to word the exclusion so as to shut out activity which while not sporting competition, and not reckless, posed risk. The insurer did not go so far and cannot strain this policy wording to do so."

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**Barrister/Advocates
Immunity from Suit
Extinguished in the UK**

In a decision in the House of Lords in London on 20 July 2000, the immunity from suit of barristers for negligence arising from work connected to the conduct of a matter at hearing has been extinguished.

Although the New Zealand legal profession is structured a little differently, a variation of that immunity has existed here and confirmed in a number of cases. However a recent Court of Appeal decision (**Harley**) was implicitly critical of the immunity. Whether the New Zealand Courts will follow the House of Lords, will have to await an appropriate case.