Anything to disclose?

By Arthur Moses and Bruce Miles

All practising barristers have recently renewed their professional indemnity insurance. The NSW Court of Appeal recently considered the meaning of an exclusion clause relating to 'known circumstances' in a barrister's professional indemnity insurance: *CGU Insurance Ltd v Porthouse [2007] NSWCA 80*.

Background

In May or June 2000, the barrister was briefed to advise in relation to a client who had been injured while performing work pursuant to a community service order. It became known that amendments to the Workers Compensation Act would commence on 27 November 2001. The barrister did not advise of the need to file a statement of claim prior to 27 November 2001.

The client's claim against the State of New South Wales was successful at arbitration and the Crown applied for a re-hearing before the District Court. The client was again successful before the District Court and the Crown appealed to the NSW Court of Appeal. The Crown's appeal was successful with a verdict for the defendant.

The client subsequently commenced proceedings in the District Court against the solicitors and the barrister for negligence. The barrister was found to have breached his duty of care by failing to advise his client of the need to commence proceedings prior to 27 November 2001.

The barrister had cross-claimed against his insurer who had denied liability on the basis that known circumstances were excluded from the policy, being

> any fact, situation or circumstance which: ... a reasonable person in the Insured's professional position would have thought, before this policy began, might result in someone making an allegation against an insured in respect of a liability, that might be covered by this policy

The proposal form was completed on 30 May 2004 and the policy began on 30 June 2004. At this time, the Crown's appeal to the NSW Court of Appeal had been lodged and submissions filed. The barrister knew that if the Crown's point was correct, the client would lose his case. The appeal was not heard until 19 July 2004 and the decision was handed down on 27 August 2004.

In relation to the negligence action, Judge Balla held that the insurer had not shown that, at 30 June 2004, a reasonable person in the barrister's professional position would have thought that the client might make an allegation against him in respect of a liability which might be covered by the policy.

The appeal

The issues before the Court of Appeal were (1) whether the test posed by the exclusion clause was objective or subjective, and (2) whether, on the facts, the insurer had established that a reasonable person would have considered that there is a reasonable possibility that an allegation might be made.

All three judges held that the test was an objective one. Both Hodgson JA at [31] and Young CJ in Eq at [52] held that examining the subjective views of the insured and asking if they were unreasonable was a permissible exercise to the extent that it assisted the court in considering what a reasonable person in the insured's professional position would have thought. Hunt AJA held at [97] that the test was solely objective and in forming a view as to whether the test was met does not consider at all the subjective views of the insured.

Each judge reached a different conclusion as to whether Balla J was in error in concluding that the insurer had not established that a reasonable person would have considered that there is a reasonable possibility that an allegation might be made.

Hodgson JA simply concluded at [33] that he was not satisfied that Balla J had erred and found some support for this by considering at [34]-[35] whether a reasonable person would have issued a notice to their existing insurer of facts that might give rise to a claim, bringing into effect section 40(3) of the *Insurance Contracts Act 1984* (Cth).

Hunt AJA reached the opposite conclusion, holding at [97]-[98] that Balla J had erred in applying the wrong test and the Court of Appeal should make its own finding of fact. His Honour noted at [102] that if the client was unsuccessful in the Crown's appeal, he would know that this was due to the failure of his solicitors and barristers to commence the proceedings before 27 November 2001.

Accordingly his Honour was of the opinion that, while the Crown's appeal was still pending, the reasonable person in the barrister's professional position would have contemplated the real possibility that the client would, at the very least, make an allegation of negligence against his barrister.

Young CJ in Eq agreed with Hodgson JA in the result, but for different reasons. His Honour appears to hold at [56]-[57] that Balla J erred in finding that the test was not entirely objective. If her Honour had fallen into error in this regard, it did not affect the result as he would have reached the same conclusion.

Summary

For those of us at the Bar not specialising in insurance law, this case is a good illustration of the nature of a 'claims made and notified' policy such as our professional indemnity insurance. The dissenting judgment of Hunt AJA is that on 20 May 2004 when the barrister completed the proposal form, he should have answered yes to the question 'Are you aware of any circumstances which could result in any claim or disciplinary proceedings being made against you?'. That answer would have the effect that the new policy would not cover claims arising out of those facts.

However this then raises the question as to what a barrister's obligation is to notify his insurer under a then current claims-made policy. In that respect Hodgson JA made some useful observations at [35]:

> A finding that a reasonable person in the position of the respondent would have thought that there existed circumstances that might give rise to a claim means that such a reasonable person would have believed it appropriate to give notice as contemplated by s40(3) under any existing claims-made policy. And while I think a reasonable person in the professional position of the respondent may well have believed it appropriate to give notice under s40(3), I do not think it can be said that such a person would have believed it appropriate to do so .

It is apparent from this reasoning of Hodgson JA that if there are circumstances that may give rise to a claim, the prudent approach may be to give notice of those circumstances under the current policy, bringing into effect s40(3) for the *Insurance Contracts Act 1984* (Cth). This would avoid the potential for time consuming and unnecessary litigation between a barrister and his or her insurer.

This case is a warning to barristers to err on the side of caution in notifying your current insurer, prior to the expiration of cover, of any facts and circumstances that may give rise to a claim.