



Access to Insurance Policies Denied

Wingecarribee Shire Council v Lehman Brothers Australia Limited

On 19 May 2009 Rares J handed down an ex tempore decision ordering the production of insurance policies, notifications and relevant correspondence by a company in administration in proceedings which had otherwise been stayed.

On 26 May 2009, this decision was overturned by the Full Court of the Federal Court of Australia comprised of Jacobson, Middleton and Perram JJ (Full Court).

Wingecarribee Shire Council (Council) commenced proceedings last year against Lehman Brothers Australia Limited (Lehman) for damages arising out of, amongst other causes of action, alleged misrepresentations that induced the Council to invest in Collateralised Debt Obligations (Proceedings). After the Proceedings were commenced, Lehman went into administration and a stay was ordered.

On 30 April 2009, during a directions hearing, the Council filed a motion to seek leave to proceed against Lehman and, if such leave was granted, orders that Lehman produce any insurance policies which may respond to the claims made by the Council in the Proceedings. Further, the motion sought ancillary correspondence between Lehman and insurance brokers or insurers relating to claims notifications under the relevant policies or notification of circumstances giving rise to a claim,

where relevant. On 8 May 2009 leave was granted to proceed and on 19 May 2009 Rares J ordered the production of the insurance policies and notifications and relevant correspondence, allowing some time in relation to that correspondence for Lehman to consider potential claims for privilege and redaction of documents.

Rares J, in handing down his decision, emphasised that it was one which was made in the context of urgency. Rares J has yet to provide written reasons, but in his ex tempore judgment, he gave the following reasons for his decision:

- A proposal for a Deed of Company Arrangement for Lehman included a release by the creditors for claims against the company, its officers and its employees, and in the proposal it was said that if such release was given, current claims against Lehman would be extinguished.
- The Court had to balance the need to preserve the statutory scheme under the Corporations Act 2001 (Cth) which provided a scheme by which creditors were given information about companies in administration, and the need to preserve an applicant's statutory charge under section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (section 6).¹

¹ Section 6 creates a statutory charge over insurance proceeds that is intended to ensure that specific claimants benefit from the proceeds of insurance policies rather than the general body of creditors and allows those claimants to sue the insurer(s) directly rather than the insolvent insured.

- Section 23 of the Federal Court Act 1976 (Cth) (FCA) and the Court's inherent jurisdiction gave the Court the power to protect its processes from abuse in the sense that Rares J was concerned that the releases would mean that there would be no assets to satisfy any judgment in favour of the Council in the Proceedings.
- Council needed the information in order to vote at the creditors meeting so that it did not mistakenly enter a vote that would potentially compromise its rights under section 6.

The end result is that Lehman is not required to produce in the Proceedings documents that are generally considered to be highly confidential. However, given that Rares J's decision was overturned on the basis of the exercise of a discretion, it may be that the Full Court's decision can be confined to the particular circumstances of this case.

The Full Court did not overturn Rares J's decision on the existence of the powers under section 23 of the FCA and the inherent jurisdiction to protect the Proceedings from the apprehended abuse of process, but instead examined whether there was any error in the discretion to exercise that power.

The Full Court held that there was such an error, in that there was no abuse of process in the Administrators carrying out their statutory function in recommending a Deed of Company Arrangement. Further, if there was any abuse of process, that would not have been cured by the order for the production of the documents, as there was no evidence that the majority of creditors would vote differently if those documents were produced.

Linda Murphy
Partner

T: 02 8281 4685
E: ljm@cbp.com.au

Alexandra Bartlett
Solicitor

T: 02 8281 4432
E: aeb@cbp.com.au