cbp Lawyers

Insurance Legal update

28 June 2011

Contribution after settlement: *The Owners Strata Plan No. 62660 v Jacksons Landing Development Pty Limited* [2011] NSWCA 415

The Supreme Court of New South Wales refused an application to dismiss proceedings which were brought for want of a cause. Section 36 of the *Civil Liability Act* 2002 (NSW) was held not to apply to consent judgments. Accordingly, where several defendants settled with a plaintiff, there was no common law or statutory bar against those defendants seeking contribution amongst themselves. However, the issue is far from settled.

Facts

The case of *The Owners Strata Plan No. 62660 v Jacksons Landing Development Pty Limited* [2011] NSWCA 415 (**Jacksons Landing**) was an interlocutory application to dismiss cross-claims for contribution.

The respondents were a number of companies owned by or affiliated with Lend Lease Developments Pty Limited (**Lend Lease**). They were responsible for the development of a residential site at Pyrmont, formerly home to the CSR sugar refinery. An engineering firm, Harris Page & Associates Pty Limited (**applicant**), was also involved in the development. The Owners of Strata Plan No. 62660 (**Owners Corporation**) brought an action in negligence against both the applicant and Lend Lease for defects in the sewerage system.

In 2008 the matter settled between the Owners Corporation and Lend Lease for $750,000, but not against the applicant who had constructed the sewerage system. In 2011 a consent judgment was finally entered against the applicant in the sum of $350,000. Following that consent judgment, Lend Lease decided to pursue the applicant for contribution, given that the settlement with Lend Lease was almost double the amount of settlement with the applicant.

The applicant brought a notice of motion to strike out the claim for contribution, relying on section 36 of the *Civil Liability Act* 2002 (NSW) (**CLA**), which is set out below.

The legislative framework

Ball J in the Supreme Court of New South Wales considered section 36 of the CLA, which provides that:

> "A defendant **against whom judgment is given under this Part as a concurrent wrongdoer** in relation to an apportionable claim:
>
> (a) **cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer** in respect of the apportionable claim (whether or

> not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
>
> (b) cannot be required to indemnify any such wrongdoer [emphasis added]."

The applicant relied on section 36 to argue that there was no cause of action against it. Accordingly, the applicant sought an order to strike out the cross-claims under rule 13.4(1)(b) of the *Uniform Civil Procedure Rules 2005* (NSW), which provides that:

> "If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:
>
> ...
>
> (b) no reasonable cause of action is disclosed ...
>
> the court may order that the proceedings be dismissed generally or in relation to the claim."

Interpretation: a three limb test for section 36

Ball J set out three limbs to be satisfied under section 36 before that section would operate to exclude a claim for contribution. Only two of the three were satisfied in this case, and the application accordingly failed. The limbs were:

1 Is the claim apportionable?

First, his Honour noted that the negligence action for defective works was well within the meaning of an “apportionable claim” as defined in section 34 of the CLA. An apportionable claim includes an action for economic loss or property damage arising from a failure to take reasonable care (excluding personal injury). This limb was satisfied.

2 Is the object of the claim a “defendant against whom judgment is given”?

Second, looking at the facts and history of the case, it was clear to his Honour that a judgment had been given against the applicant. The fact that the judgment had been obtained by consent was irrelevant. It was nonetheless a judgment against the applicant who subsequently became the defendant in a claim for contribution.

3 Was judgment “given under [Part 4 of the CLA]”?

The application fell in the third limb. That limb required the judgment to have been given under Part 4 of the CLA. Ball J held that in this case it was:

> "reasonably arguable that the judgment obtained against Harris Page was not a judgment 'given under this part' and that it was not obtained against Harris Page as a “concurrent wrongdoer” (at [16])."

His Honour relied on *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC where Barrett J held that the term “claims” in Part 4 of the CLA refers to “determined or decided claims that have been established as sources of liability” and that a person can only be a concurrent wrongdoer once the court has made such a finding (*Reinhold* at [18]). Before someone can be named a “wrongdoer” at all, the court must have found that person partly responsible for the alleged loss or damage.

>>> return to first page

The application and interpretation

In essence, Ball J held that a party cannot be named a “concurrent wrongdoer” until a court establishes the wrong allegedly committed. A consent judgment, which establishes no liability per se, is not equal to a court’s finding of liability.

Since his Honour found it fit to follow *Reinhold*, when consent judgments were entered against the various defendants to the claim, those judgments did not come within the third limb of section 36 of the CLA and as a result, that section could not apply. The applicant’s attempt to set aside the claims for contribution was therefore ineffective.

However, Ball J suggested that the issues the applicant raised deserved greater attention, given the relative youth of the CLA, and the fact that many of its sections remain largely untested. Although his Honour reached the outcome above, he noted that there was room to come to a different conclusion:

> "The issue raises an important question concerning the scope of the reforms intended to be effected by Part 4 of the *Civil Liability Act*. On [the applicant’s] submission, one consequence of those reforms was to permit individual defendants who were liable to a claim for contribution to settle the claims against it completely by settling with the plaintiff. However, it might be argued that the reforms were not that far reaching... The purpose of the section was not to prevent a claim for contribution if a defendant settled with the plaintiff (even if the settlement involved judgment) if there was no determination by the court of an amount that was a just contribution to the plaintiff’s loss having regard to the extent of the defendant’s responsibility for the damage or loss suffered by the plaintiff (at [18])."

As at the date of this case note, the substantive proceedings for contribution continue between Lend Lease and Harris Page. It is yet to be seen whether the three limb test under section 36 will stand.

Gavin Creighton
Partner
02 8281 4423
gwc@cbp.com.au

James Stanton
Solicitor
02 8281 4599
jrs@cbp.com.au

>>> return to first page