



## BWL Update

# Legislative developments Third Party Claims Act (NSW)

19 March 2019

The recent decision in *Rushleigh Services Pty Ltd v Forge Group Limited (In liq) (Receivers and Managers Appointed)* [2018] FCA 26 (**Rushleigh**) demonstrates that a Court may grant leave to a claimant to sue the insurer of a wrongdoer in circumstances where the wrongdoer is an insolvent company.

The decision confirms the importance of ensuring that trade partners have adequate insurance in place, that certificates of currency are up to date, and that in the event of the demise of a trade partner that it is not necessary to exhaust all other avenues of recovery before commencing a claim against an insurer if there is a policy that responds to a claim.

On 1 June 2017, a new law came into force in NSW confirming a third party claimant's direct right of recovery from insurers. *The Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) (the Act)* provides that a claimant can recover an insured amount directly from an insurer in certain circumstances, and recovery by the claimant discharges any liability of the insurer to the insured in respect of the liability.

Previously, uncertainty was created by section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (LRMP Act)* which created a statutory charge over insurance monies. Section 6 has been criticised for being outdated, complex, confusing as it contained no limitation of time provisions, and inappropriate for claims for pure economic loss. In the 2013 decision of *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212, the Court of Appeal stated, "section 6 should be repealed altogether or redrafted in an intelligible form". This led to the NSW Law Reform Commission calling for legislation changes after its 2016 review "Third party claims on insurance money: Review of s6 of the Law Reform (Miscellaneous Provisions) Act 1946".

The new legislation means that, rather than a claimant pursuing claims against defendant companies, who are often in a form of external administration, claimants may now have standing to make a claim directly against an insurer. The right to proceed against the insurer requires leave of the court. The Act does not specify the test to be met for the exercise of the court's discretion, however the court must not grant leave if the insurer can show that they have no liability under the policy.

The insurer is entitled to rely on the same defences it would have as if the claim was brought by the insured (i.e. if the insurer could deny liability under the policy the insurer can rely on this against the third-party claimant). The insurer is also able to rely on any defences the insured would have in the third party's claim (e.g. contributory negligence by the third party).



Though section 5 of the Act provides no guidance on the exercise of the court's discretion in circumstances where the relevant insurance policy responds, the Court in *Rushleigh* stated that cases dealing with s6 of the LRMP Act apply equally to s5 of the Act. It then went on to cite *Bede Polding College v Limit (No 3) Limited and Anor* [2008] NSWSC 887, in which the court approached the question of leave on the basis that the plaintiff had to show three things:

1. There was an arguable case against the insured;
2. There was an arguable case that the policy responds; and
3. There was a real possibility that, if judgment were obtained, the insured would not be able to meet it.

In granting leave to the Applicant, the Court in *Rushleigh* made clear that:

1. Claimants can make a direct claim to recover loss suffered from an insolvent company against the company's insurer; and
2. The availability of the proof of debt procedure provided by the *Corporations Act* is not a bar to making a claim under the Act (however, it could, in some circumstances, be a relevant factor in the exercise of the discretion to grant leave). Thus, claimants are not required to exhaust all avenues of recovering a debt from the insured before filing an application to join the insurer under the Act. The Act effectively acts as a direct and independent path to insurance monies.

For more information, please contact a member of our team:

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