Insurance/
Reinsurance

February
2014

DIRECTORS' DEFENCE COSTS: NEW ZEALAND SUPREME COURT ALLOWS BRIDGECORP APPEAL

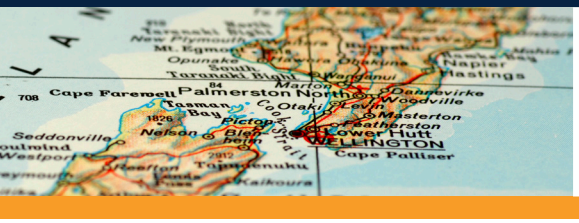
We have previously reported on the high profile *Bridgecorp* decisions of the High Court and Court of Appeal of New Zealand. The NZ Supreme Court (the country's highest court) has recently provided the latest instalment of this saga in a decision[1] which was an unwelcome Christmas present for directors and officers (and other professionals insured under defence costs-inclusive liability policies) in New Zealand who, as a result, may not be able to access defence costs cover where the amounts claimed exceed the limits in combined limit policies.

This decision is also of significance to directors and officers, other insured professionals and insurers operating in Australia, where certain States and Territories (New South Wales (NSW), Australian Capital Territory (ACT) and Northern Territory (NT)) contain equivalent legislation to that considered in *Bridgecorp*.

In our October 2013 Bulletin, we said that the earlier *Bridgecorp* NZCA decision and, in particular, the decision of the NSWCA in *Chubb Insurance Company of Australia Limited v Moore*[2] would provide comfort to Australian directors that they should be able to access their cover for defence costs. We noted, however, that Australian directors may wish to maintain any arrangements put in place to deal with the potentially adverse consequences of the original *Bridgecorp* NZHC judgment (such as separate limits or separate policy coverage for defence costs) until the result of the *Bridgecorp* NZSC appeal was known and assuming no change in Australia to the position stated in *Chubb*.

In light of this recent *Bridgecorp* NZSC decision and the pending special leave application to the High Court of Australia in *Chubb*, we consider that these structures should be maintained (or entered into) where there is a prospect of claims being brought against directors in New Zealand and, for the time being, in Australia until the *Chubb* appeal is determined and the position in Australia is confirmed or clarified.

1. BFSL 2007 Ltd (in liquidation) v Steigrad [2013] NZSC 156.
2. [2013] NSWCA 212.



Background

The relevant legislation in NZ, NSW, ACT and NT[3] creates a statutory "charge" over insurance monies which are, or may become, payable in respect of an insured's liability to pay damages or compensation.

The precise scope and effect of this legislation has, however, been difficult to determine with the NZHC (but not the NZCA or the NSWCA) holding that a "charge" under the relevant legislation prevented D&O insurance policy funds being advanced to meet the directors' defence costs following notification of the existence of the charge.

In contrast, the NZCA and NSWCA found that a charge under this legislation cannot apply to defence costs paid by insurers before liability has been determined. In Chubb, it was also held that the relevant NSW legislation does not apply to claims brought outside NSW. This was not an issue in *Bridgecorp*.

3. Section 9 of the NZ Law Reform Act 1936, which is substantially mirrored in NSW by section 6 of the Law Reform (Miscellaneous Provisions) Act 1946, in ACT by Section 206 of the Civil Law (Wrongs) Act 2002 and in NT by Section 26 of Law Reform (Miscellaneous Provisions) Act.

NZ Supreme Court decision

The former directors of *Bridgecorp* are being sued for damages in excess of NZ$340 million for breach of their director duties. They have been convicted of offences under the Securities Act 1978 for breach of statutory duties.

There were two relevant insurance policies taken out by *Bridgecorp* with QBE – one for statutory liability with a limit of NZ$2 million (exhausted in defence of the Securities Act proceedings), and the other for D&O liability with a limit of NZ$20 million, which provided that QBE would advance defence costs as and when those costs were incurred if QBE had given its prior written consent.

The majority (3:2) followed the NZHC decision that the charge attaches at the time the event giving rise to the claim occurs, even if the liability to third party claimants has not yet been determined. Thus, where the claim is for an amount exceeding the limit of liability under the policy, reimbursement of directors' defence costs can only be made at insurers' risk of paying additional sums over the policy limits if, once the claim has been determined, there are insufficient insurance monies remaining to meet the third party liability. The majority were influenced by a view that depletion of the potential monies available to a successful third party would effectively (and unfairly) require the claimant to fund an unsuccessful defence.

In contrast, the minority followed the decision in *Chubb* that the charge should only attach to insurance monies that would be payable in respect of the insured's liability to pay damages or compensation, and that the charge only became fully operational once that liability has been determined.

Payment of amounts due before that time can be made in accordance with the contract of insurance. To find otherwise would be altering the contractual rights as between the insured and the insurer and impacts on their ability to defend the claim.

At present this minority view remains the position in Australia but, as noted above, *Chubb* is the subject of a pending application for leave to appeal to the High Court of Australia. We will report further on this in due course.

For more information please contact Andrew Dunn, Partner, on +61 (0)2 9320 4603 or andrew.dunn@hfw.com or Richard Jowett, Partner on +61 (0) 438 56 2072 or richard.jowett@hfw.com or Brendan McCashin, Special Counsel, on +61 (0)3 8601 4527 or brendan.mccashin@hfw.com or John Barlow, Partner, on +44 (0)20 7264 8188 or john.barlow@hfw.com or Karyn Sheridan, Associate, on +44 (0)20 7264 8476 or karyn.sheridan@hfw.com or your usual contact at HFW.

HOLMAN FENWICK WILLAN
Level 41, Bourke Place
600 Bourke Street
Melbourne, Victoria 3000
Australia
T: +61 (0) 3 8601 4500
F: +61 (0) 3 8601 4555

Lawyers for international commerce hfw.com