INSURANCE - OWNER'S RIGHT UNDER THE CONTRACTOR'S POLICY WHERE THE OWNER IS SEPARATELY INSURED

Commercial Union Assurance Co of NZ Ltd v Murphy (1989) 1 NZLR 687

In *Commercial Union Assurance Co of NZ Ltd v Murphy* (1989) 1 NZLR 687, the building contract provided that the Builder must at all times keep the works insured for their full value in the joint names of the Builder and the Owner. The Builder insured with Commercial Union (C.U.). The policy was expressed to extend to include the interest of the Owner. The policy included Condition 7 which read:

> "This insurance does not cover any loss, destruction, damage or liability which is insured by or would, but for the existence of this Policy, be insured by any other policy or policies, except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this insurance not been effected."

The nearly completed house which the Builder was building for the Owner was damaged by fire. It cost $67,115.80 to reinstate. The Owner had a separate policy with Guardian Assurance. Guardian paid the owner $60,000 under that policy and by way of subrogation sued C.U. in the name of the Owner to recover $67,115.80. CU argued that, in view of Condition 7 of its policy, it was only liable for $7,115.80, being the excess beyond the amount paid under the Guardian policy.

The New Zealand Court of Appeal rejected this argument and awarded against C.U. the full damages of $67,115.80. The Court said:

> "It seems to us that the proper inference is that the builder and the owner intended that the full risk should be borne by the insurers selected by the builder; it was fortuitous that insurance taken out by the owner happened to remain in place also. The supervening agreement was that insurance should be the responsibility of the builder. We do not think that the standard condition 7 in the Commercial Union policy can have been evolved with any eye to such a case, although in its literal language and considered in isolation it could apply."

The Court found that the provision of the C.U. policy which provided that the policy extends to include the interest of the Owner prevailed over condition 7.

This was not a case of double insurance where the insurers may be required to contribute equally. It was fortunate for the Builder that the Court came to the conclusion that the C.U. policy completely indemnified the Owner. Had it not, the Owner (and Guardian Assurance by way of subrogation) may have recovered from the Builder for a breach of the requirement of the construction contract that the Builder must insure for the benefit of both the Builder and the Owner.

- Philip Davenport

INSURANCE - SET OFF OF UNPAID PREMIUMS

Accident Compensation Commission v C.E Heath Underwriting (1990) VR 224

The Supreme Court of Victoria in *Accident Compensation Commission v C.E Heath Underwriting* (1990) VR 224 held that a workers compensation insurer was not liable to pay the insured $33,000 in respect of compensation due to a worker because the insured owed $450,000 in unpaid premiums.

The insured employer was insolvent and the worker was paid by the Commission, which sought to recover from the insurer the amount paid.

The case highlights a potential risk in other areas of insurance for a Principal who relies upon the Contractor to effect insurance (or vice versa). Unless receipts for premiums are sighted, in the event of a claim by the Principal on the the insurer, it is possible that the insurer may be entitled to deduct unpaid premiums from amounts which would otherwise be payable to the Principal.

Under Clause 21.2 of General Conditions AS2124-1986, if the party liable to insure fails to produce to the other party evidence of compliance with insurance obligations, there is provision that the other party may pay the premiums.

- Philip Davenport

LEASES - DUTY TO MITIGATE LOSS

Vickers v Stichtenoth Investments (1989) 52 SASR 90

When a tenant abandons the leased premises, can the landlord leave the premises empty and sue for rent as it falls due, or must the landlord take steps to mitigate loss by attempting to find a new tenant for the unexpired period of the lease?

In *Vickers v Stichtenoth Investments* (1989) 52 SASR 90, in the South Australian Supreme Court, Bollen J held that, when a tenant abandons the leased premises, the landlord is under a duty to take reasonable steps to mitigate loss by seeking another tenant. He held that the ordinary principles of contract law, including the duty to mitigate loss, applies to leases.

-Philip Davenport