Case Notes

GIO v Newcastle City Council
(1996) 9 Australian & New Zealand Insurance Cases
¶ 61-301 at 76,356

At 10.27 on the morning of 28 December 1989, the City of Newcastle was struck by an earthquake that resulted in extensive property damage within the City and in surrounding areas. A number of people were killed and others were injured when the main auditorium of the Newcastle Workers Club (the Club) collapsed. The effect of the auditorium collapse was such that the entire Club premises had later to be demolished.

A Coronial Inquiry was held into the twelve deaths arising from the earthquake and heard evidence which contended that Newcastle City Council (the respondent, NCC) bore some responsibility for the deaths which had occurred at the Club. It was accepted that NCC had last inspected the Club premises in July 1988 and that a *Certificate of Structural Soundness* was issued at that time. However, evidence before the Inquiry suggested that the building was not structurally sound at the relevant time, and expert opinion indicated that a critical support member was missing from the auditorium roof and that the auditorium would therefore have been susceptible to collapse when the earthquake struck. It was asserted that NCC could not have properly carried out the inspection of July 1988.

The present litigation relates only to the damaged Club premises (the premises claim). In its December 1994 statement of claim, the Club based its action against NCC in this respect upon an alleged breach of statutory duty. Bainton J described this as :

> "...an assertion that the Council did not comply with its obligations in respect of extensions to the Club, being building work in the Council's area imposed

[1] Per Kirby P, (1996) 9 *Australian & New Zealand Insurance Cases* ¶ 61-301 at 76,356, at page 76,362 quoting Bainton J at 8 Australian & New Zealand Insurance Cases ¶ 61-249 at 75, 795.

on it by the Local Government Act 1919 and its subsidiary legislation..."[1]

Put differently, it is clear the Club claimed that *an* effective cause of their loss was the faulty building inspection. Presumably, the argument would run on to say that *but for* the faulty inspection, the auditorium would have been repaired to its correct specification and the collapse of 28 December 1989 may have been avoided. NCC appears to have not sought to deny this suggestion, liability was admitted and NCC sought an indemnity for itself from GIO. As general insurer to the Council, GIO had previously indemnified NCC for its liability in respect of death and personal injury claims arising from the collapse of the Club. Yet, GIO refused to indemnify NCC for damage to the Club premises.

The Insurance Contract

Before turning to what the Court of Appeal had to say, it is necessary to describe the general structure of the insurance contract between GIO and NCC. 'Liability coverage' under the agreement was separated into two mutually exclusive parts of the contract.[2] Under Part One of the agreement — insuring clauses (a) and (b) — NCC could seek indemnity for general public liability in respect of personal injury, property damage or defective products where the liability was *'...caused by an occurrence in connection with the Business of the (Council).'* Indemnity for liability arising out of negligent acts, errors or omissions could only be sought under Part Two of the agreement — insuring clause (c). In August 1991 the policy was amended by endorsement to confirm that indemnity for negligent advice which may have been tendered by NCC on or after 31 January 1988 was restricted also to Part Two of the agreement.

The practical effect of structuring the liability coverage into two parts is revealed when one looks beyond the insuring terms and turns to the claiming provisions. For NCC to make a valid claim under Part One of the agreement the liability needed to be one which had arisen during the insurance period and in respect of which NCC had provided written notice to GIO as soon as it was possible to do so. Put differently, Part One of the contract provided indemnity for *claims arising and notified*, in which case GIO would remain liable to indemnify NCC for Part One claims even if the contract had been terminated before a claim was made by NCC. Part Two of the contract was based on a less generous claiming rule. GIO agreed to indemnify NCC for its negligence only in respect of claims that had actually been made during the period of the contract. Thus, as Part Two was a *claims made* insuring clause, GIO may have been

[2] Above, at n 1, at page 76, 359.

clear of its obligation to indemnify NCC in respect of its negligence liability as soon as the contract was terminated.

That Part One was a *claims arising and notified* insuring clause and Part Two a *claims arising and made* insuring clause is of great importance to the case. In December 1991 the policy expired and was not renewed. On 8 December 1994, NCC made a claim against GIO seeking indemnity for the premises claim. For NCC to succeed, it had to show that the claim fell within Part One of the policy and was therefore one which could still be made three years after the policy expired. Otherwise, if the claim properly fell within Part Two of the policy, NCC would have to argue that s 40 of the *Insurance Contracts Act* 1994 (Cth) operated to save the claim.

Proceedings in the Court of Appeal

After two earlier Supreme Court hearings, the first of which was before O'Keefe CJ in the Commercial Division and the second before Bainton J in the Construction Division, the matter found its way to the Court of Appeal. The net result of the earlier cases was that GIO was held liable to indemnify NCC for the premises claim. GIO appealed both decisions and the Court of Appeal heard the matter in a combined action. By unanimous decision, Kirby P, Sheller and Powell JJA upheld the appeal, reversed the earlier outcome and determined that GIO was not liable to indemnify NCC for the premises claim. The substantial reasoning of the Court is found mainly in the judgment of Kirby P, in whose view the case turned on three principal issues.

Did the Premises Claim Fall Within Part One of the Policy?

For NCC to seek indemnity under Part One, it had to be shown that the liability arose during the period of insurance, that the relevant loss was caused by an "...occurrence in connection with the business of the insured...", and that NCC had provided sufficient notice to GIO. While there was some argument about notice, the Court found that NCC had fulfilled its obligations to notify GIO and that the liability arose during the insurance period. But could it be said that the relevant loss was *caused* by an "...occurrence in connection with the business of the insured..."?

Both primary judges addressed the question of causation, but whereas O'Keefe CJ Comm D cited the collapse of the building as the relevant event, Bainton J pointed to "...the earthquake and the contemporaneous

[3] Above, at n 1, at page 76, 364.

collapse of the building."[3] Kirby P had difficulty with both suggestions. On the one hand, as his Honour pointed out, if the collapse of the building was relied upon as the relevant causal event, then the *cause* and the relevant *damage* would be one and the same thing. The logic of an argument in which cause and effect appeared as an identity, ie that the damage was caused by itself, was unacceptable to Kirby P who preferred the view that "...the relevant occurrence must be limited to the earthquake itself..."[4]

Having isolated the cause of the collapse of the premises, Kirby P went on to dismiss the proposition that an earthquake could be thought of as "...an occurrence in connection with the Business of the Insured", and so it followed that the premises claim could not be made under Part One of the policy[5]. Thus, and this is a point to be considered further below, it was as a result of the manner in which his Honour formulated the issue of causation that the NCC claim was defined as one which could not be made under Part One of the contract.

If the Premises Claim Fell Within Part Two, What Was the Effect of That?

For NCC to claim indemnity under Part Two of the policy, the Council's primary liability to the Club had to fall within the categories of negligence described in that part of the contract. However, and as we have noted above, the premises claim made by the Club asserted that NCC was in breach of a statutory duty, not that the Council had acted negligently. Furthermore, both primary judges took the view that issuing a certificate of structural soundness was properly characterised as "...fulfilment by the Council of its...statutory dut(y)...(not)...the rendering of professional advice..."[6]

In the Court of Appeal, Kirby P took an altogether different view and held that issuing the certificate amounted to the giving of professional advice, the test for which required no more than that NCC had provided "...advice and services of a skilful character according to an established discipline..."[7] However, once it had been accepted that the premises claim was based in negligence, NCC faced yet another problem. As we have already noted, the indemnity provisions in Part Two were qualified and narrowed by a *claims made* recovery rule. Also as we have noted above, NCC made its claim for indemnity against the premises claim three years

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4 Above, at n 1, at page 76, 364.

5 Above, at n 1, at page 76, 364.

6 O'Keefe CJ Comm D at 8 Australian & New Zealand Insurance Cases ¶ 61-227 at 75, 492, cited by Kirby P at page 76,364.

7 At page 76,365, where Kirby P cites *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647 (CA) at 657 and *Carr v Inland Revenue Commissioners* [1944] 2 All ER 163 (CA) at 166-167 as authority for this proposition.

after the expiration of the policy with GIO. On this point, NCC argued that s 40 of the *Insurance Contracts Act 1984* (Cth) operated to save the indemnity claim.

Did s 40 of the Insurance Contracts Act 1984 (Cth) Save the Claim Under Part Two of the Policy?

So far as is relevant, s 40 reads as follows:

> "1) This section applies (where)...the insurer's liability is excluded or limited by reason that notice of a claim against the insured...is not given to the insurer before the expiration of the contract ...
> 3) Where an insured gave notice in writing to the insurer of facts that might give rise to a claim against the insurer as soon was reasonably practicable (and did so)...before the insurance cover...expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of insurance cover provided by the contract."

For s 40 to apply, it must be first shown that the relevant insuring clause excluded or limited the liability of the insurer where notice of a claim against the insured was not made within the period of insurance. In respect of Part Two of the policy between GIO and NCC, Kirby P noted that the liability of the insurer was not limited by a requirement that notice be given but by a condition that the relevant claim be actually *made* during the period of the contract. His Honour then contrasted the narrow claiming rule in Part Two with the more generous *arising and notified* rule in Part One of the policy and tried to make sense of that clear distinction in light of the wording of s 40. Although Kirby P accepted that NCC had provided sufficient notice to GIO and that s 40 may have saved a late claim made under Part One of the policy, he also concluded that s 40 did not operate to save a late claim under Part Two.[8]

Comments

The decision of the Court of Appeal, and the judgment of Kirby P in particular, adopts a clear position on two definite points. First, that s 40 of the *Insurance Contracts Act 1984* (Cth) does not operate to save a late claim for indemnity where the insuring clause is based on a *claims made* recovery rule. Second, when a Local Authority issues a building certificate, the

[8] Overruling the conclusions of both primary judges; page 76,367.

carrying out of that function may be seen as the tendering of professional advice. In so far as NCC sought to argue that GIO should indemnify them for the premises claim under Part Two of the policy, the combination of the position taken by the Court on those two points was fatal.

While there may be room to argue the decision on each of the points last mentioned,[9] there is another level at which the reasoning of the Court might be tested. We should recall that the premises claim was made by the Club on the basis that NCC had breached its statutory duty to properly inspect the auditorium.[10] Looked at from that point of view, the liability of NCC can be seen as one of general public liability arising under Part One of the policy, in which case the problem which emerged from the lateness of the claim for indemnity from GIO would be avoided. So why was the case not decided on that basis?

As discussed above, Kirby P counted the premises claim as one which fell outside Part One of the policy because the cause of the relevant damage, ie, the 1989 earthquake, was not an occurrence within the business of NCC. It is on this point that questions arise and for which some background may be helpful.

Inasmuch as the Workers Club auditorium was almost entirely empty of people when the Newcastle earthquake struck, it was fortuitous; most of the injuries and deaths occurred in other rooms that were indirectly affected or in the carpark below into which the auditorium collapsed. Only a handful of people were inside the room at the time, one of the deceased was a technician working on sound and lighting equipment to be used for a performance that evening. If the earthquake had struck at 10.27 pm rather than 10.27 am on 28 December 1989, the death and injury toll would have been much higher for the reason that somewhere between one and two thousand[11] people would have been in the room. Of all venues where large crowds of people gathered to hear popular music, the Club auditorium was by far the largest of its type in Newcastle at the time. This matter of detail is important for one particular point; in so far as this case relates to an inspection of a building, it has to be remembered that the Club auditorium was no mere building: it was the leading venue in Newcastle for major concerts and other large scale entertainments.

Then we should remember the nature of the error apparently made during the NCC inspection of the auditorium in July 1988. What was it that NCC failed to detect? The detail of this is unclear, the Court cites a failure to note that a critical chord beam was missing from the roof of the

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9 And there would appear to be some basis for this, particularly the somewhat enlarged definition of 'professional advice' offered by Kirby P at page 76,365. However, those arguments are beyond the limits of this paper.

10 And so was made under the principles of Breach of Statutory Duty, a tort quite distinct from the tort of negligence.

11 Actual figures on the night may have been higher, but certainly no lower. The musical performance was to be given by internationally known touring act, *Crowded House*.

auditorium. But in general terms, what is a chord beam? By way of illustration, consider the arch of the Sydney Harbour Bridge and think of the steel girders which constitute the outside and inside curves of the arch; they are the chord-beams in that structure; without any one of them the Bridge would certainly collapse. The failure of the NCC inspection appears to have been something more than a minor slip.

Finally on background, there is one other point worthy of being made. In the hours and days directly after the earthquake, many local people would have agreed that the earthquake alone was *the* cause of the collapse at the Club. But that was a simple view which did not last long. As the epicentre of the earthquake was far from the City, a more or less uniform shock wave travelled across the area with the result that no one part of Newcastle suffered utter devastation out from which there radiated a pattern of ever-lessening damage. Indeed, the effect of the earthquake was idiosyncratic across the City.

The immediate area about the Club is a commercial district in which there were (and are) a number of large, multi-storey buildings. Within that part of Newcastle, the auditorium was the only significant structure to collapse entirely. In the months after the earthquake, a general question which arose in the minds of many people was the obvious one, why did building A collapse when a comparable building B next door was only damaged? A more particular question arose in respect of the Workers Club; who was to blame for leaving a major public venue in a state from which it was susceptible to collapse?

How is all of this relevant to the case? Its relevance is in the proposition which it supports, namely that the case appears to be wrongly decided and that the key to that error lies in the form in which the question of causation was stated. With all respect to Kirby P, it is difficult to accept that, on the facts of the matter, the question of causation is properly addressed in terms of a contest between a force of nature and a collapsing building.

Surely causation has always to be assessed as between the parties to the primary claim; ie, NCC and the Club?[12] And what is it that establishes a relevant nexus between those parties? The faulty inspection and issue of an erroneous certificate of structural safety by NCC in July 1988, as a result of which the auditorium was left in a state of unrepair from which it collapsed when struck by an earthquake eighteen months later.[13] This is the position taken by Sheller JA who states, citing *March v E & MH Stramare Pty Ltd*,[14] that the words 'caused by an occurrence' in the insurance policy

[12] "As the purpose of the inquiry into causes is to attribute or apportion legal responsibility, and not to find ultimate explanations, ...(the law) focuses upon ... (what is) relevant to responsibility in a particular case." *National Insurance Company of New Zealand Ltd v Espange* (1961) 105 CLR 569, at 592.

[13] Sheller J, at page 76,368.

[14] (1991) 171 CLR 506.

refer to an occurrence which is relevant between the parties. His honour then goes on to say that " ...the occurrence is...the insured's act which rendered it legally liable to pay..." and further on that

> "...with the greatest respect I do not think that (GIO's) liability to indemnify...is excluded merely by saying that damage was caused by the earthquake...what is causally relevant is the act of the insured which rendered it legally liable to pay compensation, everything suggests that was an occurrence in connection with the insured's business..."

Furthermore, is it not also arguable that, in the context of such an important public building, NCC was under a statutory duty[15] to properly inspect the Club auditorium? It is relevant here to note that the collapse of the auditorium was the most tragic aspect of a widespread disaster; of all deaths arising from the earthquake, only one occurred somewhere other than the Club. And so it is also relevant to say that if this is a question which turns on considerations of policy and community standards, ie, was NCC under a statutory duty to properly inspect the auditorium, there can be little doubt on which side of the argument those factors must weigh most heavily.

If the causation question is put as suggested, and the basis of liability is agreed to be a breach of statutory duty in the faulty inspection, NCC's claim for indemnity falls squarely within Part One of the policy and the matter of its late submission to GIO is irrelevant. On this view, the earthquake is not excluded as a cause of the collapse of the Club, but it is identified as a matter which is largely irrelevant to the case. Put differently, NCC was seeking indemnity for a claim against it in respect of the faulty building inspection, NCC was not seeking indemnity for a claim which asserted the earthquake should be thought of as an occurrence that was within the course of the business of the Council.

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[15] Which is, of course, a question quite distinct from whether NCC acted negligently. It may be that the facts of the case support both conclusions.