HIGH COURT OF AUSTRALIA

Public Information Officer

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CGU INSURANCE LIMITED v ANTHONY PORTHOUSE

A barrister, who failed to advise that a compensation claim be filed before an amendment to the New South Wales *Workers' Compensation Act* barred the claim, was not entitled to insurance to cover the damages he would have to pay to his client, the High Court of Australia held today.

In 1999 James Bahmad was injured while performing work under a community service order. He was raking grass on a steep embankment when he slipped and fell, injuring his right shoulder. Mr Bahmad consulted solicitors about rights to compensation. Mr Porthouse, a barrister, was briefed in 2001 to advise whether Mr Bahmad had a claim under the Act or a claim for negligence against the Department of Corrective Services. On 12 June 2001, Mr Porthouse wrongly advised that the Act did not apply as Mr Bahmad was not in paid employment. Around this time, as part of comprehensive tort reform, the NSW government foreshadowed restrictions on common law claims for injuries governed by the Act. Proceedings brought before the commencement date of the amending legislation would be unaffected and it became well known that this date would be 27 November 2001. Before the Act changed, damages for economic loss could not be awarded unless the worker suffered a serious injury. The amendment prohibited the awarding of damages unless the injured worker had a degree of permanent impairment of at least 15 per cent, but Mr Bahmad's injury, although serious, was below this threshold. On 26 November 2001, Mr Porthouse was instructed to draft a statement of claim against the State of NSW. It was filed on 11 December 2001. On 4 November 2002, Mr Bahmad obtained an award at arbitration of $120,687.15. The State applied to have the matter listed for rehearing in the District Court on 15 May 2003. On that day, Mr Porthouse became aware that the State intended to argue that the 2001 amendment to the Act applied to bar Mr Bahmad's claim. Mr Porthouse obtained an adjournment. When the case proceeded on 29 August 2003, it was common ground that if the amended Act applied Mr Bahmad could not recover any damages. The District Court found his claim was covered by the Act before it was amended but a year later the Court of Appeal allowed an appeal by the State.

In May 2004 Mr Porthouse filled out a CGU professional indemnity insurance form for 2004-05. It asked: "Are you aware of any circumstances, which could result in any Claim or Disciplinary Proceedings being made against you?" He answered "No". The High Court noted that the form only asked about the possibility, not the certainty, of a claim being made and that answering the question did not call for an assessment of the prospects of success of any claim or the strength of possible defences to it. Section 6 of the policy stated that it did not cover known claims and known circumstances. "Known Circumstance" was defined in section 11.12 as: "Any fact, situation or circumstance which: (a) an Insured knew before this Policy began; or (b) a reasonable person in the Insured's professional position would have thought, before this Policy began, might result in someone making an allegation against an Insured in respect of a liability, that might be covered by this Policy". In March 2005 Mr Bahmad commenced proceedings against his original solicitors and Mr Porthouse, stating that had his lawyers been reasonably diligent and filed a statement of claim earlier his claim would have escaped the 2001 amendment. Mr Porthouse joined CGU, which refused to indemnify him, as a cross-defendant. In the District Court, Judge Audrey Balla held that both the solicitors and Mr Porthouse had been negligent and gave judgment for $170,000 plus

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costs, to be borne equally between them, but ordered that CGU indemnify Mr Porthouse. She held that the exclusion clause did not apply. The Court of Appeal, by majority, dismissed an appeal by CGU, which had argued that Judge Balla had erred by considering the subjective state of mind of Mr Porthouse when construing the exclusion clause. CGU appealed to the High Court.

The Court unanimously allowed the appeal. It held that the intention of limb (b) of the definition of "Known Circumstance" was to prevent an insured from avoiding the exclusion clause by saying that they did not disclose facts and circumstances because they did not know that these might give rise to an allegation of a liability which might be covered by the policy, even though a reasonable person in the same professional position would have thought those facts and circumstances might give rise to such an allegation. The Court held that Judge Balla's error, which was not corrected by the Court of Appeal, was that she gave no consideration to the section 11.12(b) standard, which was independent of Mr Porthouse's subjective view of facts and circumstances known to him. It held that section 11.12(b) posits an objective standard with a modification related to professional, not personal, matters. Nothing in the policy suggested that the hypothetical reasonable person was to be imputed with the insured's idiosyncrasies or state of mind, or that a conclusion that an allegation might be made had to be plain and obvious. Mr Porthouse knew of the potential effect of the 2001 amendment to the Act on Mr Bahmad's case and of his own role in creating the problem which gave rise to the State's appeal. The High Court held that a reasonable barrister knowing these things would have thought there was a real possibility that an allegation might be made in respect of a liability which might be covered by the policy and that the exclusion therefore applied.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*