Does a Stitch in Time Really Save Nine?

Issues Surrounding Mitigation Costs Under a Policy of Liability Insurance

Notes from an AILA and Level Twenty Seven Chambers Seminar

13 Nov 2018

Introduction
To avoid or minimise the loss caused by an insured peril, an insured may take preventative measures before the happening of the peril, or, take steps to mitigate the impact of the peril once it has occurred. What is the extent of any such obligations, and what if the insured incurs expenses in taking preventative measures or mitigatory steps – can the expenses be recovered from the insurer of the insured peril?

To recover the expenses incurred by an insured in taking preventative measures or mitigatory steps, the insured must show that the expenses were proximately caused by the insured peril and are payable by the insurer under the relevant liability policy.

Duty to avoid insured risk?
There is no common law duty to avoid an insured risk, although a policy may require policyholders to take specific steps to prevent loss, such as fitting locks on windows. There is a strong presumption that a policy will insure against the negligence of an insured: see, for example, *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559. That said, a policy will not insure against an act intended to bring about the occurrence of the insured risk; and nor will a policy extend to an act so reckless as to be regarded as a courting of the risk: see, for example, *Matton Developments Pty Ltd v CGU Insurance Ltd* [2017] 1 Qd R 467 (conduct held not to be "courting the risk").

Duty to mitigate?
An insured does not have a duty to mitigate loss, but at the same time, an insured may be declined indemnity where inaction is itself the proximate cause of the loss because the chain of causation from the insured peril is broken: *City Tailors Limited v Evans* (1921) 126 LT 439; *Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd* (2013) 18 ANZ Insurance Cases 62-000. At common law, in our view, it is preferable to approach the issue of a 'duty to mitigate' by reference to the issue of causation, that is, were the actions of the insured such as to break the chain of causation between the insured peril and the loss? The observations of Mason J in *AFG Insurances Ltd v Mayor, Councillors and Citizens of the City of Brighton* [1971-1972] 126 CLR 655 at 661-662 do not, in our view, go so far as to say that an insured is under a general duty to avert or minimise loss (see the observations of McPherson J in *Re Mining Technologies Australia Pty Ltd* [1999] 1 Qd R 60 at 86).

Entitlement to recover mitigation expenses
An insured has no general law entitlement to recover from its insurer the expenses incurred in avoiding the happening of an insured peril or to mitigate its effects once it occurs. Rather, for an insured to recover, it is generally necessary for an insured to show that the expenses fall within the cover provided by the policy: *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (1974) 48 ALJR 307; *Re Mining Technologies Australia Pty Ltd* [1999] 1 Qd R 60; *Vero Insurance Ltd v Australian Prestressing Services Pty Ltd* [2013] NSWCA 181. As a matter of practicality, the more imminent the occurrence of the risk or the furtherance of the loss, the more likely the expenses will fall within the scope of cover. Thus, recovery of mitigation expenses may arise under an express term (i.e. an insuring clause, express mitigation clause or exclusion) or perhaps, arguably, an implied term. The authorities generally do not support the implication of a term that mitigation expenses will be covered.

It should be noted that there has been some judicial support for the implication of an implied term in the policy, to the effect (adopting the formulation of the term by Davies JA in *Re Mining Technologies Australia Pty Ltd* [1999] 1 Qd R 60 at 72) that where damage would otherwise have occurred is avoided by the exercise of reasonable care, the expense is recoverable under the policy (see also White J at first instance). This was not the majority view on appeal, and in our view an approach which rests upon the proper construction of the policy, rather than an implied term, is preferable.

Causation
Assuming that mitigation expenses are capable of falling within the cover provided by the policy, the remaining touchstone for recovery of mitigation expenses is causation – the expenses must have been proximately caused by the insured peril as opposed to being too remote: *PMB Australia Ltd v MMI General Insurance Ltd* (2002) 12 ANZ Insurance Cases 61-537; *Re Mining Technologies Australia Pty Ltd* (supra). So long as the mitigation expenses are recoverable under the policy, it does not matter if the expenses partly avert or minimise loss and partly serve some other purpose: *ACE European Group v Standard Life Assurance Ltd* [2012] EWCA Civ 1713; *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (supra). What must be shown is that the insured expected or intended that the action would avoid or reduce loss arising because of an insured peril: *ACE European Group v Standard Life Assurance Ltd* (supra).

Roger Traves QC
T +61 7 3229 6077
E TRAVES@QLDBAR.ASN.AU

Roger has been recognised by The Australian Financial Review's Best Lawyers and Doyle's as a leading Silk in the areas of Commercial Litigation & Dispute Resolution, Insurance, Mediator and Wills & Estate Litigation. Clients value his strong and wide-ranging commercial and equity practice which enables him to apply shrewd strategic vision for their matter in hand. He has acted in a number of cases for professional indemnity insurers and has acted for and against insurers of business interests.

Roger is also a qualified mediator and mediates a wide range of disputes involving parties from a diverse range of industries.

Anthony Messina
T +61 7 3008 3998
E AMESSINA@QLDBAR.ASN.AU

Having practised as a barrister and solicitor in a diverse spectrum of commercial litigation, Anthony is able to apply strategic vision to all the advisory and advocacy matters in which he is briefed. Anthony acts on behalf of insurers and insureds across a range of industries including the construction and financial industries. He is briefed to advise on and appear in trials and appeals, applications for interlocutory and final relief, and mediations.

Anthony's recent case examples include: acting on behalf of an insurer of a walling contractor in a case concerning defective design and constructions of a walling system used in mixed-use buildings; acting on behalf of an insurer of a road profiling machine in a case concerning damage to the machine caused during its transportation; acting on behalf of the insured in a case concerning the collapse of a mobile crane (*Matton Developments Pty Ltd v CGU Insurance Ltd* [2015] QSC 072 and on appeal *Matton Developments Pty Ltd v CGU Insurance Ltd* [2017] 1 Qd R 467); acting on behalf of an insured in a case concerning spinal injuries suffered on a cattle station; and acting on behalf of the insured in a case concerning directors' liability to the ATO for unpaid tax.

Nola Pearce
T +61 7 3008 3947
E NOLA@QLDBAR.ASN.AU

Nola brings nearly twenty years of experience as a solicitor to her practice as a barrister. She specialises in professional liability and disciplinary proceedings, whilst also acting in respect of contractual and consumer law disputes, insurance, negligence and commissions of inquiry. She has represented the interests of clients in the civil Courts of most State, Territory and Commonwealth jurisdictions, including various disciplinary tribunals, professional bodies, commissions of inquiry and coronial inquests. Her clients have included high-sensitivity professionals such as barristers, judges, solicitors and a range of medical, financial services and construction professionals who note her in-depth experience and personable approach to matters.

AILA AUSTRALIAN INSURANCE LAW ASSOCIATION

LEVEL TWENTY SEVEN CHAMBERS