

Notes from a Level Twenty Seven Chambers Seminar

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Breaches of professional duty and contingent loss – special problems of timing

Limitation defences in professional negligence cases raise a deceptively simple question: when did the plaintiff first suffer damage?

Where a client sues their professional advisor for pure economic loss, special problems are created when the alleged breach of duty exposes the client to a risk. Commonly, the client sues after substantial losses flowing from the materialisation of the risk.

A useful framework for thinking about the problem of when measurable loss is first suffered is to distinguish between cases where professional negligence exposes the client to

- (i) a mere risk
- (ii) a risk which, notwithstanding its contingent nature, has an immediate effect upon the value of an existing right, or
- (iii) the acquisition of inferior rights than the client ought to have obtained. Further, consideration should be given to the infringement of distinct economic interests at different times and the issue of continuing breaches.

Policy Wording Beware: *Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27

Position prior to *Globe Church*

A cause of action under an indemnity policy arises only when all facts necessary to found a cause of action have occurred. In theory, the cause of action for an indemnity policy for property damage may be complete:

When the damage occurred

- (i) Only after a claim is submitted
- (ii) Only after reasonable time has elapsed for the insurer to consider the claim; or
- (iii) Only when the claim is rejected.

The position in Australia prior to *Globe Church* was unclear.

The Policy

The policy in *Globe Church* was an industrial special risks policy.

The indemnity was expressed to be subject to the amount of the indemnity being calculated in accordance with the basis of settlement and the conditions set out in clauses 7 and 14.

The Basis of Settlement relevantly provided *Globe Church* could elect to claim the indemnity value of any damaged property in which event the Insurers were required to pay the value of the property at the time of damage or to reinstate, replace or repair it.

Clause 14 set out the claims procedures and relevantly provided that on the discovery of any property damage, the insured must give notice in writing to the insurer as soon as "reasonably practicable".

Events giving rise to the Claim

- As a result of rainwater and flooding between 8 and 10 June 2007, the property suffered structural damage at some time between then and 31 March 2008.
- The insurers accepted that if that structural damage occurred during that period, it constituted damage against which *Globe Church* was entitled to be indemnified under the Policy.
- *Globe Church* made a claim under the Policy in 2009.
- Insurers denied liability (*Ansvar* on 5 April 2011 and *Allianz* on 30 September 2011).
- Proceedings against the insurers claiming damages for the alleged breach of contract constituted by those denials were commenced on 4 November 2016.

Limitation period

The relevant date for the purposes of s 14(1) of the *Limitation Act 1969* (NSW) was 4 November 2010, being 6 years prior to the date on which *Globe Church* commenced its proceedings for breach of contract.

The insurers argued that the claim was statute barred, the cause of action for damages having accrued at the time of property damage between June 2007 and March 2008.

The arguments before the Court of Appeal

The Insurers argued that a cause of action for breach of contract accrues immediately upon the happening of the property damage. It is at that time that the insurer's obligation to indemnify – that is, to hold the insured harmless against loss – arises.

Globe Church argued time does not start to run until the insurer has breached its promise to indemnify by denying the claim. It argued that a distinction should be made between the promise of an insurer to indemnify and a breach of that promise; and only when the insurer has failed to do what was required of it can a cause of action for damages of breach of contract accrue.

Globe Church ran an alternative argument that the Policy required the performance of the indemnity within a reasonable time of the demand and that the cause of action for breach of contract arose on the lapse of a reasonable time to perform the contractual promise of indemnity.

The Decision

The Court of Appeal held, by a 3:2 majority, that in a property damage indemnity policy, time runs from the date of the damage in respect of which indemnity is sought. The reasoning of the majority was that a contract of indemnity is (and has been understood to be) a promise to hold harmless against loss of the identified kind, which promise is breached when the loss is suffered.

However, Meagher JA and Leeming JA wrote strong dissenting judgments.

The judgment of the majority has not been absent of academic criticism.

More significantly, the way in which the majority characterised the Insurer's fundamental obligation is contrary to the meaning given to substantially the same language by the High Court in *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384.

Subsequent application

Globe Church has been referred to in subsequent cases, including by the QCA in *Delta Pty Ltd v Mechanical and Construction Insurance Pty Ltd* [2019] QCA 62 where the Court reached the same conclusion as the majority in *Globe Church*, and referred to the decision with approval.

Absent clear words within a policy which would lead to a different result, it is clear that *Globe Church* is determinative of when a cause of action arises (for the purposes of the application of the limitation statutes), under indemnity policies of property insurance.

Implications of *Globe Church*

- Insurers are now open to a finding of breach of duty immediately upon the happening of damage. Even absent notification.
- An insurer will immediately be, and remain, in breach until it pays, even if it admits liability.
- There is potential for insurers to be immediately sued under their policies.
- *Globe Church* benefits insurers by allowing the cause of action to flow from an earlier date, thereby reducing exposure to delayed claims.
- *Globe Church* may reduce the appetite of both insureds and insurers to enter into protracted negotiations in relation to difficult or declined claims - the insureds because of limitation issues, and the insurers because it is possible that interest is accruing.
- If the High Court were to consider the issue, a different result may ensue.

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