Insurance Matters

Sparke Helmore Lawyers

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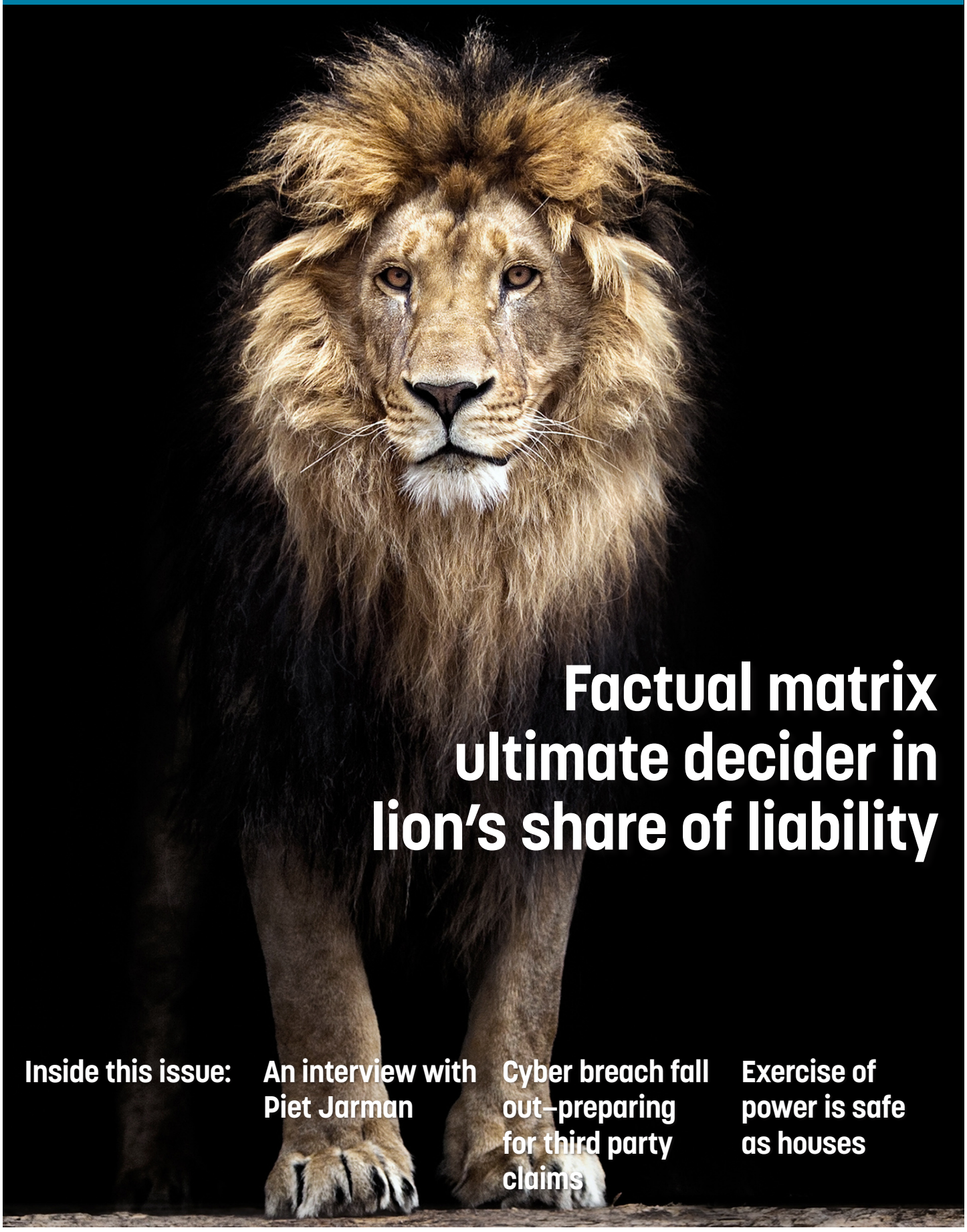

Factual matrix ultimate decider in lion's share of liability

Inside this issue:

Contents

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Looking over the horizon

In our last issue we congratulated Chris Wood on his appointment to Commercial Insurance Group Leader. We are proud to now bring you this issue of *Insurance Matters* together, on behalf of our service lines.

Recently, on 1 March 2017, Sparke Helmore merged with Perth-based insurance firm Jarman McKenna, to combine and strengthen our insurance offerings in Western Australia and nationally. In this issue we take time out with Jarman McKenna Founding Partner, Piet Jarman, to welcome him, four other partners and his team to the firm, and find out about the expertise and experience they bring to the Group.

We look at how inconsistent conduct by an insurer and its lawyers can lead to a loss of legal professional privilege over confidential communications and the consequences of privilege being waived. Also, in our final instalment of the cyber breach series, we go over the types of third party claims that may be brought against a company once a breach has occurred.

We examine a significant case impacting the NSW strata scheme, which confirms that strata managers and owners corporations are under no obligation to consider the financial interests of individual lot owners when making a decision in the best interests of the property. Finally, a decision by the Victorian Court of Appeal has stressed that courts will look at all aspects of the factual matrix, not just contractual provisions, when considering the apportionment of liability and costs awarded.

We're delighted to share that Commercial Insurance Partner and Board Member, Gillian Davidson, was named a finalist in the 2017 *Lawyers Weekly* Partner of the Year Awards, which took place on 28 April. The Awards recognise outstanding performance by partners in law firms, their impact on the growth of their firm and how their leadership has shaped culture and strategy. On behalf of the Insurance Group, congratulations Gillian!

We're also very pleased to let you know that we've been shortlisted again for Insurance Specialist Law Firm of the Year at this year's Australasian Law Awards. Winners will be announced on 18 May.

If there are any additional topics you'd like us to explore, please email us at james.johnson@sparke.com.au or chris.wood@sparke.com.au

We hope you enjoy this issue of *Insurance Matters*.

James Johnson and Chris Wood
National Insurance Group Leaders
Sparke Helmore Lawyers

An interview with Piet Jarman

By Avalon Scott

Piet Jarman has an impressive track record and reputation for insurance litigation in Perth. On 1 March his firm Jarman McKenna merged with Sparke Helmore—a move that strengthens both firms' insurance offerings in Western Australia and nationally. Piet tells us about his more than 50-strong team and what the merger means for clients.

Tell us about the Jarman McKenna team that joined Sparke Helmore.

Jarman McKenna first opened its doors on 1 July 2003—Rani Aria Retnam, Chris Rimmer and I were all founding partners. Over the 14 years our doors were open, we grew the firm into one of Perth's leading insurance practices, which I am immensely proud of. In addition to Rani, Chris and I, partner Garry Nutt formed part of the leadership group, supported by an extremely dedicated and professional team of legal and administrative staff who assisted, advised and represented (and still do) insurers, insureds, brokers, underwriters and agents on a broad range of matters, from workers' compensation to professional indemnity and liability.

The fact that we still work with a number of our foundation clients—some of which are Australia's largest insurance companies—is testament to the calibre of our practitioners and their dedication to going above and beyond. Our clients value us for our high level advocacy, expertise and commitment and I know from the conversations I've had that they are as excited and optimistic about the merger as we are.

You've said in previous interviews that merging with Sparke Helmore is a "client-driven move". How so?

Everything we did, every decision we made at Jarman McKenna was completely client-centric. Merging with Sparke Helmore came about when we recognised that our clients were increasingly requiring national legal support—so that's what we set out to deliver to them. Thanks to existing relationships with Sparke Helmore, we were able to start the merger conversation and get the ball rolling quite quickly. It didn't take long to realise our firms would make a sound culture and values fit (this was a top priority for us), and now here we are.

Jarman McKenna founding partners (left to right): Piet Jarman, Chris Rimmer and Rani Aria Retnam.

What else influenced Jarman McKenna's decision to merge and why Sparke Helmore?

There were plenty of other factors to take into consideration. This wasn't a decision we took lightly. Looking at the legal landscape, we could see that a lot of clients were consolidating their panels and looking for firms that deliver holistic service suites on a national scale. As we shared a number of clients with Sparke Helmore, it just made sense to join forces.

In addition to the culture and values fit, Sparke Helmore ticked a lot of other boxes—greater development opportunities for our staff, a strong reputation backed by a long-standing history and a vision to become a world-class Australian law firm.

Can you tell us about the expanded capabilities that the merged insurance team will have and what this means for clients?

The expertise of the partners and lawyers at Jarman McKenna spanned all the main lines of insurance. We have worked extensively with many of Australia's largest insurers and self-insurers, and place a great deal of value on the strong personal connections we have developed and on our thorough understanding of these organisations' needs. Like Sparke Helmore, we were predominantly known for our general liability, property, workers' compensation, professional indemnity, directors' and officers' liability.

Each of our partners brings a wealth of experience—Rani has been practising insurance law for defendant insurers for 25 years, with majority of her practice in the workers' compensation space as well as some unique experience working in seafarers' compensation. Her expertise in this area led her to draft the precedent opinion on claims management strategies that we used at Jarman McKenna. Rani is also known for her seminars on workers' compensation dispute resolution and the training programs she coordinates for clients.

Chris specialises in general and professional liability, workers' compensation, motor vehicle personal injury, and property and business interruption. He has acted for all major workers' compensation insurers in Western Australia, and currently acts for a number of Australian insurers and London-based syndicates, as well as underwriters in these areas of law.

Garry has 18 years' experience specialising in workers' compensation. He has advised and acted on more than 5,000 claims, representing clients before various courts, including the Supreme Court of Western Australia and the High Court of Australia.

I have practised insurance law for more than 35 years, advising on and litigating workers' compensation, property and business interruption, general liability and motor vehicle matters.

Many of our practitioners have a great depth of litigation experience in compulsory third party (CTP), liability, professional indemnity and workers' compensation, which complements Sparke Helmore's existing spread of capabilities really well.

Since the announcement of the merger, we have been working closely with Sparke Helmore to make this transition a seamless one that will mean even better service for our clients.

Looking to the future, what are you most excited about?

A flag for my beloved Dockers, of course!

In all seriousness, merging with Sparke Helmore has definitely been a career highlight for me. Jarman McKenna was around for 14 years, but Sparke Helmore's history goes back more than 130 years. I'm excited to be part of a firm that has such a strong reputation in the industry and that is known for its market-leading insurance practice.

More widely, I think the industry is changing and that can bring a sense of nervous excitement for a practitioner that's been around as long as I have! Panel processes are one example and so are the disruptors we have to deal with on a daily basis—cyber is probably the number one new obstacle that comes to mind, particularly in insurance law. It's keeping us on our toes because it presents a whole new realm of possibilities and challenges to us and our clients. But that's what makes this job so interesting.

Are your communications under lock and key?

By Patrick McGrath

It is not uncommon for insurers to assume that legal professional privilege protects communications between their lawyers and the experts they retain to provide advice on indemnity. This assumption was recently questioned in *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* [2016] NSWSC 1599 (*Mobis*), where the Supreme Court of New South Wales considered an argument that privilege in confidential communications between an insurer's lawyer and an expert engineer had been waived.

What happened?

Mobis owned a warehouse in Sydney, which was insured under an Industrial Special Risks policy issued by XL Insurance. The policy contained an exclusion for faulty or defective design. The warehouse was severely damaged during a hailstorm, with the company claiming more than $65 million in storm damage losses.

XL retained engineering consultants Costin Roe (via Crawford & Company) to undertake a structural review of the warehouse, assess design issues—including compliance with relevant Australian Standards—and the potential for recovery. Costin Roe's preliminary report stated that, "Based on the information we have available…it is our opinion that the original structural design as documented on the drawings provided complies with the requirements of the relevant Australian standards". Costin Roe went on to conclude that, "the collapse of the warehouse was a direct result of the hailstorm…During this storm the superimposed loading due to hailstones, water and ice on the roof greatly exceeded the design loads required in accordance with the Australian standards".

On 5 June 2015, XL granted indemnity to Mobis and paid the insured €10 million, asserting that it was the maximum limit of XL's liability under the policy. As a result, Mobis was left with an uninsured loss.

Commercial list proceedings

Mobis issued proceedings seeking declaratory relief regarding the available limit, contending that XL's limit was, in fact, approximately $72 million on the proper construction of the policy. During the course of the proceedings, expert reports from an engineer and a meteorologist were served by Mobis, which caused XL's legal advisers to reconsider whether the defective design exclusion applied.

XL sought to re-engage Costin Roe to provide expert evidence, however, it was determined that Costin Roe had designed other structures damaged in the same storm and so another engineer was retained. That engineer expressed concerns with the warehouse design and its compliance with Australian standards. With this evidence, XL filed a notice of motion seeking leave to amend its response to include a plea that it was not liable to indemnify Mobis under the policy, because the design exclusion applied. Mobis opposed the application. In issue were the lateness of the amendment and the question of whether XL was permitted to resile from its earlier grant of indemnity.

Before the application, XL's solicitor swore two affidavits, one of which annexed a copy of the Costin Roe report. The application was allowed by the Court and XL amended its response.

Mobis seeks to access the privileged communications

Mobis subpoenaed Costin Roe to produce documents, including communications between Costin Roe and XL's solicitors before the Costin Roe report was provided and at the time when XL's solicitors sought to re-engage Costin Roe as experts. XL claimed privilege over these communications.

Mobis sought orders granting access to the documents on the basis that XL had impliedly waived privilege. It argued that:

- it was inconsistent for XL to seek to resile from its grant of indemnity while

simultaneously seeking to maintain privilege over the Costin Roe communications (that were central to establishing XL's position before the grant of indemnity and whether it had knowledge of facts or circumstances enlivening the defective design exclusion), and

- XL had impliedly waived privilege because information contained in the affidavits filed by its solicitors and the annexure of the Costin Roe report were inconsistent with maintaining privilege.

What conclusion did the judge come to?

Justice Beech-Jones referred to the operative principle in *Mann v Carnell* (1999) 201 CLR 1, that the Courts will consider a waiver where there is inconsistency "between the conduct of the client and maintenance of the confidentiality". His Honour also noted the approach in *Osland v Secretary, Department of Justice* [2008] HCA 37 that, when looking at a privilege holder's inconsistency, consideration must be given to the context in which the disclosure occurred and the reason for the disclosure.

His Honour also considered *Federal Commissioner of Taxation v Rio Tinto* (2006) 151 FCR 341. In this case the Full Court stated that the waiving of privilege is not resolved by simply asking whether the privilege holder has put their state of mind in issue, but whether they have placed the contents of the otherwise privileged communications in issue, either in making a claim or by way of defence.

Having regard to these cases, Justice Beech-Jones determined that XL had not raised its state of mind as a substantive issue, nor had it placed the contents of the Costin Roe communications in issue. It had simply sought to rely on the exclusion clause in its amended pleading and, therefore, there wasn't any inconsistency on its part.

It was found that the purpose and context of the information disclosed in the affidavit was to explain the reasons for XL's delay in relying on the exclusion clause in its original pleading. Having regard to that purpose and context, the Court was not satisfied that there was any inconsistency in the disclosure of the Costin Roe report with the maintenance of privilege over the experts' communications with XL's solicitors.

A reassuring stance

Mobis is an important reminder of the potential for the loss of privilege over confidential communications with experts because of inconsistent conduct on the part of the insurer or its legal advisers. However, it is reassuring to know that courts will examine the context in which any disclosure is made and the reasons why it occurred when determining whether privilege has been lost.

We would like to acknowledge the contribution of Matthew Davis and Christopher Chivers to this article.

Cyber breach fall out–preparing for third party claims

By Colin Pausey and Steven Canton

In *Insurance Matters* Issues 9 and 10 we looked at how a company prepares for a cyber breach and the types of losses that businesses can directly experience following a breach. In this article, we look at the actions that may be brought against a company by others following a cyber breach—otherwise known as third party claims.

The most common third party claim arises out of a breach of the Australian Privacy Principles (APP), for failing to properly hold personally identifying information on behalf of individuals. If there is a direct financial loss as a result of the theft of personally identifying information, a claim for the recovery of the loss can be brought against the company.

Can an individual bring a claim for compensation if there is no direct financial loss?

Currently there is no private cause of action for the tort of breach of privacy in Australia, but a claim can be brought by an individual as a complaint under the *Privacy Act 1988* (Cth) and is dealt with by the Office of Australian Information Commission (OAIC). The Act also allows for a representative complaint to be brought.

When responding to a complaint, the Commission is empowered to:

- make enquiries
- attempt to conciliate the complaint
- conduct an investigation
- accept an enforceable undertaking, and
- make a determination on the complaint.

A determination by the Commission can also include a financial determination. When making a determination the Commissioner is guided by the *Guide to privacy regulatory action* published by the OAIC, which states the following principles:

- where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
- awards should be restrained but not minimal
- in measuring compensation, the principles of damages applied in tort law will assist, although the ultimate guide is the statute
- aggravated damages may be awarded in an appropriate case, and
- compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

Awards of compensation by the Commission, as a generalisation, range between $5,000 and $20,000 and are not subject to thresholds for an award as would be the case under, for example, the *Competition and Consumer Act 2010* (Cth) (CCA) or the *Civil Liability Act 2002* (NSW).

Will there be a tort for breach of privacy?

In the Australian Law Reform Commission (ALRC) Report into *Serious Invasions of Privacy in the Digital Era*, the ALRC "recommended that the Commonwealth should create a private right to sue for a serious invasion of privacy".

The recommended cause of action bears many similarities to the cause of action first proposed by the ALRC in 2008. As recently as March 2016, the NSW Standing Committee on Law and Justice produced a report entitled *Remedies for serious invasion of privacy in NSW* (Standing Committee Report). While the law reform process has looked at intentional acts, the Standing Committee Report has also included cyber breaches that allow access to personally identifying information as a pre-cursor to the proposed cause of action.

What other third party claims can potentially arise?

The Ashley Madison cyber breach in 2015 has been the genesis for a number of class actions against Ashley Madison and its parent company. However, in the Australian context, unless there is direct financial loss resulting from a cyber breach, the type of claim that could be brought is still unclear—with the exception of a privacy complaint.

One of the class actions issued against Ashley Madison (all of which were stalled because the Plaintiffs were required to identify themselves as someone other than "John Doe") was brought by a group of plaintiffs who paid an additional fee to be de-identified when they had tired of the services rendered.

Similarly, if a claim is brought in Australia involving misleading and deceptive conduct, it is difficult to know how damages will be assessed for each individual unless there is a quantifiable loss.

If the consequence of misleading or deceptive conduct is personal injury, no claim can be made because of s 137C of the CCA.

A claim can be brought for breach of a guarantee concerning the provision of a service under schedule 2 of the CCA, however, damages will be assessed under part VI of the CCA, with thresholds of between 15% and 33% of a most extreme case applied to claims for damages for non-economic loss.

What to expect in the near future?

Even if the tort of breach of privacy does arise in the future, unless there is a direct financial loss, it is unlikely that affected persons will suffer personal injury of such a magnitude that it will allow their condition to be assessed within the current tort framework. The types of third party claims that may be brought in the future include:

- liability in negligence or contract for failing to properly protect personal information against cyber-attacks or misuse (e.g. customer information)
- liability for misleading or deceptive conduct that may arise out of a failure to comply with the company's own privacy policy
- fines on companies or individual directors imposed by regulators such as the Information Commissioner or ASIC, and
- claims by third parties arising from failing to disclose market sensitive cyber-risk information in prospectuses or disclosure documents, or to comply with continuous disclosure obligations (relevant to listed companies).

It is anticipated this area of law and the types of claims available following a cyber breach will evolve quickly, beyond the current third party claims concerning direct financial loss and complaints before the Commission.

Notification and response costs

Even though there may be no direct claim for damages by affected persons, there are still significant costs that a company—without adequate insurance at the time of a cyber breach—may incur. These include the cost of responding to a cyber breach, notification costs (if notification of affected persons is required) and the cost of addressing complaints.

Exercise of power is safe as houses

By Wes Rose and Rui Chen

The role of strata managers in exercising the functions of owners corporations was clarified in a recent Supreme Court of NSW decision. The case reaffirms that in NSW the duties owed by owners corporations, and strata managers acting on behalf of owners corporations, are governed by the statutory regime set out in strata titles legislation. It also confirms that there is no additional common law duty requiring an owners corporation or strata manager to consider a lot owner's individual financial interests in the management of the strata scheme, particularly when raising levies or special levies to meet the costs of maintenance, repair and development works.

The issues at hand

There were two sets of proceedings before the Court concerning Strata Plan 11478—a strata scheme for a building on Kenneth Street, Tamarama (the Scheme).

In the first proceeding, Ms Jennifer James who was an owner of a lot in the Scheme sued the owners corporation and the Scheme's strata manager. She claimed the conduct and management of the Scheme had been negligent and oppressive, and had caused her to suffer financial loss as she was subjected to strata levies that shouldn't have been imposed or were excessive in amount.

In the second proceeding, the owners corporation sued Ms James to recover contributions to strata levies it claimed were due. Ms James raised the matters she alleged in the first proceedings as part of her defence to the claim for unpaid levies.

On 11 February 2009, the Consumer, Trader and Tenancy Tribunal made orders, as a result of Ms James's application, to appoint Advanced Community Management (ACM) as compulsory strata manager for Strata Plan 11478 under s 162 of the *Strata Schemes Management Act 1996* (SSM Act). Under the orders ACM could exercise all functions of the owners corporation.

This compulsory appointment, which continued till late October 2013, was made because the owners corporation was in a dysfunctional state and unable to properly address a number of pressing issues, including the disrepair of the building. Thereafter, ACM continued as strata managing agent on a voluntary basis under agreements with the owners corporation.

ACM set about addressing each of the Scheme's unresolved issues, undertaking remedial work arising out of a building condition report, fire upgrade work required by Waverley Council, the construction of balconies at lot owners' requests, resolving a dispute over exclusive use rights for common property space and levies that needed to be raised for the Scheme.

In 2014, Ms James commenced proceedings against the owners corporation as well as ACM and its director (the Defendants), claiming damages for pure economic loss because of alleged negligence and oppression during the Scheme's management between February 2009 to April 2014. The Supreme Court ruled in favour of the Defendants and dismissed Ms James's claim with costs.

Why was the claim dismissed?

Ms James's negligence claim against the Defendants featured a novel duty of care, that a strata manager (as agent of the owners corporation) must exercise reasonable care, so that individual lot owners in a strata scheme would not suffer financial or economic loss. This duty was said to include an obligation to consider the financial positions of individual lot owners and their capacity to bear the cost of maintenance, repair and development of the strata scheme's common property.

Justice Darke referred to *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 in stating that it is not open to first instance judges to find a novel duty of care, however, his Honour took the opportunity to consider and reject the existence of such a duty.

Justice Darke observed that the statutory regime prescribed by the strata titles legislation states the functions and duties of an owners corporation and of a managing agent appointed to carry out all functions of an owners corporation. The imposition of the novel duty, centred on the avoidance of loss to individual owners through unnecessary or excessive levies, would cut across the statutory regime to an intolerable extent. His Honour commented on the incongruity that would exist between the duty alleged and the strict duty of an owners corporation under s 62 of the SSM Act, to repair and maintain common property and to levy contributions in shares proportionate to unit entitlements under s 78(2) of the SSM Act.

In considering the evidence before him, Justice Darke found that even if ACM owed the type of duty alleged by Ms James, that the evidence did not establish it was negligent. Among other things, his Honour noted that ACM engaged advisors and relied on expert advice to address the Scheme's unresolved issues. The evidence also failed to establish that Ms James suffered any financial loss as a consequence of ACM's conduct.

In addressing the oppression claim, his Honour affirmed the decisions in *Houghton v Immer (No 155) Pty Limited* (1997) 44 NSWLR 46 and *Young v Owners – Strata Plan No 3529* (2001) 54 NSWLR 60, which held that the doctrine of fraud on a power applies to the exercise of powers by an owners corporation. His Honour found that the evidence did not establish that ACM's exercises of power were anything other than *bona fide* as authorised by the SSM Act—that is, they were for proper purpose—nor did the evidence show that ACM's exercises of power caused such unfairness, prejudice or discrimination against Ms James that its conduct should be regarded as oppressive. The evidence again failed to establish any financial loss suffered by Ms James as a result of ACM's conduct.

Lessons learned

This case demonstrates that it is prudent for strata managers to engage relevant advisors and rely on expert advice when making decisions on the need, scope and costs of any repair, maintenance and development works, to mitigate professional negligence claims by individual owners and owners corporations. It is also vital that decision-making processes in respect of works and the striking of levies are thoroughly documented, and accurate records are kept.

It illustrates that individual owners, including potential purchasers of lots, should ensure they have the financial capacity to bear the present and future costs of levies or special levies to fund maintenance, repair and development works for a strata scheme. This is all the more important now that the Supreme Court has reaffirmed there is no obligation on an owners corporation or strata manager to consider the financial impact of such levies on an individual lot owner. Further, financial hardship will not bar an owners corporation, or strata manager acting on behalf of an owners corporation, from pursuing a lot owner for unpaid levies.

Sparke Helmore Lawyers acted for the Second and Third Defendants in this matter.

Factual matrix ultimate decider in lion's share of liability

By Kerri Thomas and Jehan Mata

A recent decision of the Victorian Court of Appeal, *Nillumbik Shire Council v Victorian YMCA Community Programming Pty Ltd* [2016] VSCA 192 (*Nillumbik*), is a reminder that apportioning liability between an occupier and a land owner is not always as simple as looking at their contract. Understanding how the parties engage day-to-day will often be as important as the contract. The *Nillumbik* case also highlights another important aspect of litigation strategy—how to ensure your settlement offers help with recovering costs (and some traps to avoid).

Background

A swimming teacher worked for the YMCA at Eltham Leisure Centre, which was owned by Nillumbik Council but managed and operated by the YMCA under a contract between it and the Council.

On 23 April 2005, she fell into the pool. As she fell, her foot became wedged between the pool wall and the handrail of some steps, which caused her an injury. She sued both the YMCA and the Council.

Plaintiff wins at first instance

The County Court upheld the Plaintiff's allegations that the YMCA had breached its duty of care as an occupier and employer, and that the Council had breached its duty of care as an occupier.

The Court also decided that the YMCA had breached its contract with the Council. As a result, the Court ordered the YMCA to indemnify the Council under an indemnity clause in the contract. The trial judge went on to say that, if it had not been for that clause, the Court would have found the Council and the YMCA equally liable for the damages.

"[The] conduct of the parties will influence the Court's thinking..."

The YMCA appealed against the finding that it had breached the contract. The Council cross-appealed against the equal apportionment of liability. The Court of Appeal upheld both appeals and the case was sent back to the County Court to be re-heard by a second trial judge.

The second trial judge concluded that both Defendants had "failed to identify the foreseeable risk of injury that the structure of the handrail posed and consequently, both failed to respond to the risk". Both were held liable again. The Court decided that it was unclear exactly what had caused the fall, but that it did not matter because what was relevant was the structure of the handrail. The Court again decided both Defendants should contribute equally to the damages.

The Council appealed a second time about the apportionment of liability. The YMCA appealed against the Court's decision that the Council acted reasonably in rejecting two settlement offers made early in the proceedings, which were relevant to costs.

The Council's appeal on contribution

The Council argued that:

- The Court had not properly considered the degree of departure from the standard of care and the causal potency of each Defendant's conduct. The Council contended that, as the employer, the YMCA had more responsibility to the Plaintiff and was better placed to minimise the risk of injury because it had extensive experience in managing swimming pools.
- The Court could have made a decision about what caused the Plaintiff's fall. The Council submitted that by not reaching a conclusion, the Court had not properly considered the extent of the YMCA's responsibility for the fall.
- The Court had not properly considered the fact that the Council had delegated to the YMCA, under their contract, responsibility

for establishing and implementing an occupational health and safety management system. The Council argued that the contractual delegation meant the YMCA should bear more responsibility for failing to realise the handrail was a hazard.

- The Court should not have placed any weight on the fact the Council performed its own safety audits.
- The Court should have found it relied on the expertise of the YMCA on structural matters.

The decision

The Council's appeal failed. The Court of Appeal found there were contradicting accounts of the cause of the fall and it was open to the trial judge not to make a finding. It was also open to the trial judge to disregard the cause of the fall when determining liability.

Importantly, the Court of Appeal held that delegating the day-to-day running and maintenance of the centre did not relieve the Council of its own obligations under the contract. In practice, both parties worked together to ensure the centre was properly operated and maintained. The Council's behaviour, which was apparent in the evidence before the second trial judge, demonstrated it had an independent and concurrent obligation to ensure the safety of the premises. The Court of Appeal also looked at the Council's 16 years of experience in managing the centre before the YMCA contract. Finally, the Court confirmed that the risk the handrail presented to pool users was inherent in its structure and form, which fell within the Council's responsibility as owner.

All of the practical considerations were critical in apportioning liability between the Defendants—not the contract alone.

YMCA's appeal on costs

The YMCA made two settlement offers to the Council early in the proceedings. The County Court held that it was reasonable for the Council to reject them because the offers were made too early in the proceedings and there was insufficient detail to enable the Council to properly consider them. When the offers were made, there had been no discovery or interrogation. As a result, it was not possible to ascertain what prospects of success the Plaintiff had. The offers did not explain the YMCA's grounds for denying liability, so that the Council could assess whether these were factually or legally correct. The County Court held that the Council was not obliged to ask for further information when receiving such an offer. Accordingly, the offers by the YMCA did not assist with costs, even though it did better than the offers in the result.

The YMCA unsuccessfully appealed against the aspects of the County Court decision. In dismissing the YMCA's appeal, the Court of Appeal largely agreed with the trial judge's analysis—the offers were too early and insufficiently detailed.

Contribution

Contribution and apportionment of liability between occupiers and owners is a common issue in civil litigation. This case demonstrates that all aspects of the factual matrix will guide a court's decision on how liability is ultimately apportioned. The day-to-day conduct of the parties will influence the Court's thinking as to ultimately where the lion's share of liability will rest. In deciding how to approach such a case, it is important to have a thorough understanding not just of the contract, but of what the parties are actually doing and whether day-to-day activities reflect the contractual provisions or deviate from them.

Offers and costs

Nillumbik is also a reminder that, to obtain an order for indemnity costs on the basis of an offer, the offer must be a reasonable and genuine attempt to compromise, and the rejection of the offer must be plainly or manifestly unreasonable in the circumstances. This case draws on a body of case law, which has reaffirmed numerous times that merely making an offer is not adequate to guarantee costs protection. Offers must not only be reasonable, but should clearly outline why the offer should be accepted. In short, the more detailed an offer, the better chance one has of making a claim for costs when relying upon it.

Recent developments

There has been a range of recent legal developments that affect decision-makers in insurance organisations, self-insureds and reinsurers.

Easing of regulations on RPAs receives a mixed response

In September 2016, amendments to Part 101 of the *Civil Aviation Safety Regulations 1998* (Cth) came into effect, relaxing rules governing the operation of remotely piloted aircraft in Australia. However, those who expected a raft of breaches of the new regulations might be surprised by the lack of reported incidents. Opponents of the amendments say it is still too early to prove their concerns are unfounded and significant risks remain to both the public and the aviation industry as a result of the easing of regulations.

The contribution doctrine versus "other insurance" clauses

Where an insured has a liability to pay compensation and has two or more insurance policies that might respond, the insured is entitled under s 76(1) of the *Insurance Contracts Act 1984* (Cth) to recover the full amount of its loss from any one of its insurers. The decision in *Lambert Leasing* confirms that other insurance clauses can operate validly in policies if the relevant entity did not enter into both contracts of insurance.

Cases concerning s 54 of the Insurance Contracts Act rock the boat for insurers

Section 54 of the *Insurance Contracts Act 1984* (Cth) has been considered in more depth in two decisions involving watercraft, that were not subject to the *Marine Insurance Act 1909* (Cth). In one case the insurer was prevented from relying on an exclusion and in the second the insurer was prevented from relying on a coverage suspension that would have, but for s 54, entitled it to reject the claims.

Very considerable consequences for overstating serious injuries

On 2 November 2016, the County Court of Victoria dismissed legal proceedings seeking serious injury certification for pain and suffering, arising from injuries sustained during employment. Sparke Helmore represented the Defendant.

When causation presents a hurdle to professional negligence claims

Two recent cases serve as a reminder that, even if a plaintiff proves a professional's negligence, another hurdle remains—causation. Two recent decisions involving solicitors who had failed to make sufficient inquiries on behalf of their client lenders before they entered into transactions, were found to have breached their duty of care. Nevertheless, the Plaintiffs' claims were unsuccessful because they failed to establish that the solicitors' breach caused the particular loss or damage.

Appetite for class actions prompts procedural changes

A new practice note in the Federal Court and amendments to the civil procedure regime in Queensland are the latest responses to the growing number of class actions. The changes are indicative of legislative and judicial appetite to step in and regulate the conduct of representative proceedings.

The latest iteration of the long-awaited mandatory data breach notification law

The Privacy Amendment (Notifiable Data Breaches) Act 2017 (Cth) has been passed. This is the latest iteration of the long-awaited mandatory data breach notification law first floated in 2013, but which lapsed when Parliament was prorogued before the federal election that same year. Organisations will need to review their privacy and compliance programs to make sure they are in line with the legislation before it comes into effect.

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Piet is one of Perth's leading insurance counsel with particular expertise in liability, property, workers' compensation, professional indemnity and CTP.

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