Browne Jacobson

Date of incident or date of coverage decision – when does the cause of action commence?

11 November 2022

Previous
Duty to defend - when is it triggered?

The recent NSW Court of Appeal case of **Ali v Insurance Australia Limited** considered whether a cause of action against an insurer arose when the insurer decided to decline a claim or when the underlying incident occurred. The answer came down to the specific language used in the policy wording.

Facts of the case

Following a break-in at his home, Mr Ali made a claim under his Home and Contents insurance policy with Insurance Australia Limited (IAL). IAL later declined the claim.

Mr Ali commenced proceedings against IAL, alleging that it wrongfully declined cover under the policy. IAL alleged that Mr Ali's action was statute-barred, relying on section 14 of the Limitation Act 1969 (NSW). Specifically, IAL reasoned that its liability under the policy arose on the date of the break-in and not the date it declined cover. The District Court accepted IAL's argument and dismissed the proceedings as being out of time.

Mr Ali appealed the decision.

Judgment

The key question for the appeal court was whether the primary judge was correct in his assertion that the cause of action occurred at the time of the alleged break-in.

Mr Ali's policy documentation was criticised by the courts as 'not being a model of concision or clarity' as it was too difficult for policyholders to identify what was intended to be guidance rather than a policy term.

Notably, it was found that precise legal terms such as 'indemnity' were also avoided and substituted with the word 'cover' throughout the documentation.

A further passage titled 'listed events', stated "We cover your home or contents when certain things happen…You can make a claim if a listed event you are covered for takes place and causes loss or damage to your home or contents during the policy period. The listed events we cover under your policy are…'. From the view of a reasonable insured, the court concluded that the word 'when' performs a conditional rather than temporal function, suggesting the policy is only applicable when a listed event occurs.

In this context, 'cover' in relation to 'when certain things happen', was held to not be obviously construed as a contractual promise to indemnify the insured at the time of the occurrence of the listed event. This is because this would result in an overly technical reading of words, which was otherwise intended for the non-technical insured. Furthermore, the word 'can' was held to signal that the insurer's liability is contingent on the making of a claim.

Lastly, the subsection titled 'Our agreement with you' also used ‘cover’ in a liberal fashion, stating, ‘your current Certificate of Insurance shows the insurance cover you have chosen…It also shows the period your policy covers – we only cover you for incidents that happen during this time’. The court held this wording did not clarify the operation of the policy in terms of the time when liability arose.

In reaching this decision, the court reinforced the general construction outlined in HDI Global Speciality SE v Wonkana whereby:

- the Court is required to determine the intention of the parties expressed in the words recording the agreement;
- the task is to be approached objectively, considering what a reasonable person would have understood the language to convey;
- the language of the contract is to be given its natural and ordinary meaning, with regard to the circumstances and objects of the document;
- the language of an insurance contract in particular, is to be construed from the perspective of a reasonable prospective insured; and
- as a last resort, ambiguity in a policy of insurance should be resolved by adopting the construction favourable to the insured (the contra proferentem rule).

It was therefore held that the judge had made an error in determining the word ‘cover’ had a largely fixed meaning that was interchangeable with the word ‘indemnify’. Applying Wonkana, a reasonable non-expert in insurance law would not have understood ‘cover’ to mean ‘indemnify’.

The Court of Appeal held that in circumstances where IAL had a choice as to how it worded the policy, the wording did not support the contention that the insurer was liable to indemnify the insured when the property damaged occurred.

Contents

Contact

Tim Johnson

Partner

tim.johnson@brownejacobson.com

+44 (0)115 976 6557

Our expertise

Services

Coverage disputes and policy interpretation

Insurance claims defence

Policy drafting and distribution