Judicial guidance on notification of facts that may give rise to a claim

P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd [2021] NSWCA 136

OBSERVATIONS ON THE NOTIFICATION	EXAMPLE OF NOTIFICATION

Kauter Investments
 	
The Court of Appeal made the following comments on the notification:
 	
• The notification was not client specific, transaction specific, or time specific. No particular loss or documents could be identified.
• This was not notification of "facts". It was only a notification of "possibilities".
• In particular:
  ○ the insured does not elaborate on the inability to repay the invested funds – has the time for repayment passed? Is it likely that the funds will not be repaid in total?
  ○ the timeframe is broad – the insured refers to "advisory work" between 2008 and 2011 in a business that was established in July 2005;
  ○ no particular client is identified as no loss has been "crystallised" or "incurred";
  ○ there has not been a formal claim or complaint, and also no verbal claim or even verbal intimation of a claim; and
  ○ the notification does not identify any defect in the advice given or disclosure made by MRS, and indeed positively asserts that there was none.
	Mr Moylan's renewal proposal included details of the fact or circumstances that might give rise to a claim:
	
	"A small number of clients have invested/lent funds to property investments and/or companies that have to date been unable to repay those funds in total.
	
	At the time of the investment all appropriate disclosures were made and clients invested/lent funds with full knowledge of the circumstances at the time.
	
	At this stage no loss has been crystallised and no claim or complaint has been formally lodged.
	
	We wish to advise the insurance company that there is a chance of a claim against Moylan Retirement Solutions in relation to any loss that may be incurred."
	
	The covering letter to insurers wrote that "in relation to the potential claim, at this stage it is just a possibility and no action has been brought" (emphasis added).

***Darshn v Avant Insurance Ltd* [2021] FCA 706** The insured Dr Sri Darshn was involved in various complaints and proceedings for breast augmentation surgery (BAS) performed on various patients at The Cosmetic Institute (TCI). In September 2017 representative proceedings were brought in the Supreme Court of NSW against TCI and other parties (not including Dr Darshn) (TCI Proceedings). In March 2018 proceedings were brought in the District Court of NSW against Dr Darshn and others (Scotford Proceedings). In March 2019 Dr Darshn received a letter regarding claim made by Ms Summers-Hall (Summers-Hall Proceedings).	Dr Darshn pleaded that the following, by themselves or in conjunction, were sufficient notice of facts that give rise to a claim such that s 40(3) of the ICA was triggered: • Collectively, through his lawyer's communications with him and the insurer during the Scotford Proceedings (from March 2019) and the Summers-Hall Proceedings. Relevantly, this included some detail on the TCI Proceedings, that there were substantial overlaps in the causes of action and questions of fact between the TCI and Scotford proceedings, reference to a possibility of Dr Darshn being joined to the TCI Proceedings, and an update that the existing defendants in the TCI Proceedings did not have funds to satisfy any judgment that may be awarded, suggesting that other parties including Dr Darshn would be joined as defendants in the proceedings.

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***Darshn v Avant Insurance Ltd* [2021] FCA 706** In June 2020 Dr Darshn was joined as defendant to the TCI Proceedings. Dr Darshn sought to make a claim for the TCI Proceedings under the 18/19 policy. The Court held that: • Dr Darshn's lawyers' communications collectively gave sufficient notice to insurers because it mentioned the substantial similarity between the claims in the Scotford Proceedings and the TCI Proceedings, and further conveyed the likelihood that Dr Darshn would be joined as defendant to the TCI Proceedings. • Relevant facts can be conveyed in several communications and it is not necessary that notice be given in a single document. • It is not necessary that the giver of the notice have an intention to give notice of the facts that might give rise to a claim under s 40(3).	• Dr Darshn's notifications of a prior complaint, Ms Scotford's claim, Ms Summers-Hall's claim and/or Dr Darshn's oral notification of a subpoena received in the TCI Proceedings (by themselves or in conjunction).
***Euro Pools Plc v Royal & Sun Alliance Insurance Plc* [2019] EWCA Civ 808** The insured notified insurers that three booms had failed in pools it had installed. The insured had devised a solution but was notifying the insurers in case the solution did not work. It later transpired that the insured had not identified the correct cause of the failure and further work was required to replace the boom system at those pools and a number of additional pools. The Court held that: • The insured does not need to know at the time of notification the cause of the problem or all the consequences which may flow from the problem. • It can notify on defects which caused the symptoms of the circumstances notified. Any claim with a causal link to those circumstances will be sufficient. • Crucially, the court stressed the importance in this case of the insured's reference that the solution potentially may not work.	On 9 June 2007, Euro Pools, in a proposal form provided the following known circumstances: "tanks on booms but we are fixing these with inflatable bags". This was notified "on a precautionary basis should there be any future problems".

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Timbercorp Finance Pty Ltd (in Liquidation) v Vernon Harold Vivian **[2016] VSC 338; 114 ACSR 198** Timbercorp Finance (TF) sued the defendant for money advanced to fund the defendant's investments in managed investment schemes operated by Timbercorp Securities (TS), after the defendant failed to meet his repayments. The defendant filed a counterclaim against TF (by reasons of offsetting claims) and third-party proceedings against TS. He alleged that his financial adviser was TS's agent who encouraged him to make these investments by making misrepresentations, and TF was jointly liable (with TS). The Court held that there would be no cover for the third-party notice in 2015 on the basis that: • The claim sought against TS in the notice was "radically different" from the facts notified in 2009 – it was essentially a "separate and distinct claim". • There was insufficient connection – the claim must arise out of the circumstances notified, not just be reference to the subject matter, but by a chain of causation. • The focus of the notification was the failure to disclose the true financial position of the companies and the risks in the projects which, if the defendant had known, he would have refused to make payment for the invoices for the schemes. In contrast, the claim in the notice was directed at TS's agent regarding misleading or deceptive conduct and negligent financial advice, which induced the investments. In particular, the recommended investments were unsuitable for the defendant's risk profile.	The defendant's lawyer sent a letter of complaint dated 21 July 2009 to the liquidators of TF and TS, which was requested be provided to the relevant insurers. This letter said: *"(b) by reason of the offsetting claims, the clients are not required to make any further payments in respect of loans taken out from Timbercorp Finance to fund the invoices…;* *(d) at the time that the relevant invoices from Timbercorp Securities were rendered, Timbercorp Finance knew that its parent, Timbercorp Limited, was under such financial strain that there were very real risks that… Timbercorp Ltd was insolvent or would soon become insolvent…Timbercorp Securities was in the same position…"* A separate letter alleged that TF was involved in the misleading and deceptive conduct of TS. The third-party notice against TS made allegations against TS' agent and claimed damages for negligence, breach of contract, damages or compensation under the relevant legislation.
Kajima UK Engineering Limited v The Underwriter Insurance Company Limited **[2008] EWHC 83 (TCC)** An insured notified a settlement problem in a construction and advised that an investigation was underway to identify the cause and risks. The insured later advised the insurer that the investigation determined "the problem was an anticipated one and that it has stabilised" but asked for the insurance file to remain open for 12 months to "see if the settlement remained static". In the years that followed several increasingly serious and extensive problems arose. The insurer declined cover for most of these subsequent issues.	On 22 February 2001, the insured notified insurers that: *"Accommodation Pods Settling and Moving Excessively; causing adjoining Roofing and Balconies and Walkways to distort under differential settlement. Service connections also under risk from movement; Potential Internal damage; Tennant [sic] Risk/Danger, and/or Inconvenience.* *Foundations believed not to have unduly settled – but to be level checked by KCEUL.* *Investigation presently underway to identify/confirm cause and potential affect/risks".*

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Kajima UK Engineering Limited v The Underwriter Insurance Company Limited **[2008] EWHC 83 (TCC)** It was held that: • The notification was not a 'can of worms' notification. Rather, it was limited to the specific conditions notified and therefore the notification only covered defects which caused the symptoms, or the consequences, of the circumstances notified. • There must be some causal, rather than coincidental, link. It was insufficient that there was a historical 'continuum' of investigation by various parties which coincidentally revealed several defects. • Here, the essential circumstances notified were the settlement or movement of the pods and distortion of the adjoining balconies, walkways and roofing. Ultimately, the actual and potential consequences of these circumstances were covered by the notification.	In the estimated loss, the highest figure box (£50,000 plus) was ticked with the words 'Potential' typed in beside. In the action tick box the following was said: *"Advising KCEUL Designers – Structural; and Architects Advising Sub-Contractor – Volumetric".* Letters written to these parties were attached to the notification, which sought their comments on the excessive settlement. By the end of April 2001 after receiving the parties' responses, the insured accepted the advice that the movement was within design parameters and at the time there were no problems with the pods. It was always expected that movement would occur. At that stage, remedial work was considered as possibly costing £13,600.
HLB Kidsons (a firm) v Lloyd's Underwriters **[2008] EWCA Civ 1206** The insured is a firm of chartered accountants that claimed under its PI policy for claims made by clients relating to Solutions at Fiscal Innovation Limited (S@FI), a company owned and managed by the insured, which marketed tax avoidance schemes. In 2001, the insured's tax managers considered that a discounted option scheme (DOS) and S@FI's tax avoidance schemes generally were likely to fall foul of tax rules. The board proceeded to conduct its investigations. Subsequently, the insured's clients brought claims against it for having negligently been advised to entered into flawed schemes, i.e. the insured had been mis-selling the schemes. The insured sought indemnity under the policy for these claims. The Court of Appeal dismissed the appeal and held: • The August 2001 letter was not satisfactory but gave valid notification to insurers in attendance at the presentation in October 2001 of circumstances relating to implementation of its products (and not the legality of the products themselves). The primary judge said the letter was "coy in the extreme". • The August 2001 letter with the claims file and bordereau was a valid notification of circumstances. • For all other insurers who did not have the benefit of these documents but only the presentation in July 2002 (after expiry of the policy), no valid notification was given.	The insured relies on the following correspondence: • 31 August 2001 letter the insured wrote to a placing broker in the terms: *"…The products marketed by S@FI Limited have all been validated by virtue of Counsel's opinion (in some cases two opinions) but a tax manager in Edinburgh, Iain Torrance, has expressed the view that the Inland Revenue, if minded, could be critical of some procedures followed in certain cases.* *[We] intend to investigate this view fully…The Board has taken the view that this might be regarded as material information for insurers. There is no sign of a claim arising at the present time, but the Board feels that it is appropriate in the circumstances to advise what is happening and to take your instructions."* • The letter was shown to insurers in October 2001 together with a claims file and a bordereau, which noted "Nature of claim: possible tax errors in fiscal engineering work". • 28 March 2002 letter reported on the investigation and said:

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HLB Kidsons (a firm) v Lloyd's Underwriters **[2008] EWCA Civ 1206** • It is possible for the insured to give notice of a 'hornets' nest' or 'can of worms' type of circumstance.	• 28 March 2002 letter reported on the investigation and said: *"…A meeting was held [with counsel] who had raised observations on two transactions concerning Discounted Option Schemes. The result of the meeting was a general view that the technical efficiency of the products was accepted but in some instances there might be procedural difficulties involving the Trustees for each scheme affecting the implementation of the scheme and this might lead to the possibility of criticism in the future…"* • This letter was presented to some of the insurers in April 2002 and to the remainder in July. • The full extent of problems was not clear until September 2003.
American Home Assurance Company v Kirby **[2003] NSWCA 395** The insured is an accountancy firm that, in 1990, commenced a claim against a former client for monies unpaid for its services. The client issued a cross-claim, alleging negligence in the preparation of accounts and breach of contract by the insured. The cross-claim was notified to insurers and accepted. Over time, the cross-claim was amended further alleging that the insured had breached its fiduciary duty such that the client lost the benefit of a call option and that the client was now entitled to equitable compensation and/or damages. The insurers declined liability for these allegations, saying these were significantly different from the circumstances notified – the Court agreed with this and held that the amendments were not causally linked to the notification in 1991.	In 1991, the attachment to the notification of the cross-claim read: *"The firm provided accounting services to prepare financial accounts and income tax returns for "three Sanderson Group" companies for years ended 30/6/87,88 and 89.* *The accounts were finished up to signature stage.* *Bills were sent for work done.* *These were not paid.* *Debt collection activity commenced.* *This was resisted and a cross-claim for damages lodged."* The relevant amendments to the cross-claim in 2000 were that the insured was liable for breach of an obligation of fiduciary duty and/or in negligence as a consequence of the insured being a fiduciary, preferring their interests over the duty owed to the client such that the client lost the benefit of a call option claim and was now entitled to equitable compensation and/or damages.

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***Newcastle City Council v GIO General Ltd* [1997] HCA 53** On 28 December 1989, an earthquake in Newcastle injured and killed many people and caused significant property damage, including at the Newcastle Workers Club. The injured persons, deceased's relatives and owners of damaged property claimed damages alleged caused by the Council's negligence. The Court of Appeal held that s 40 did not apply because the policy wording was purely a "claims made" policy (and not a "claims made and notified" policy). The policy did not require notification of claims to be a condition precedent to the insurer's liability to indemnify. The High Court reversed the Court of Appeal's decision, holding that s 40 could apply to purely "claims made" policies, and the conditions in s 40(3) were satisfied by the steps taken by Council at the time of the coronal inquest and in compliance with its obligations under the policy.	In July 1990, the Council sent a fax of the following article to the GIO under cover of a note that said: *"Potential PI claim against Council re earthquake damage to Newcastle Workers Club. I forward extract from Newcastle Herald of this date (18th inst) which is self-explanatory and for your information only at this time.* *Should there be any further developments in this regard I will keep you informed."* The Newcastle Herald report dated 18 July 1990 on the coronial inquest stated: *"Newcastle City Council has to accept some responsibility for the building collapses at Newcastle Workers Club and Hamilton which resulted in twelve deaths a barrister told the coronial inquest into the Newcastle earthquake deaths yesterday."* Four further letters were sent in December 1991 alerting the insurers to the possibility of claims against Council as a result of the earthquake before expiration of cover that month.