wotton kearney

Case Alert

Shaping the future of insurance law

25 NOVEMBER 2019

NSW Court of Appeal provides guidance on applications for the determination of separate questions

Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Limited **[2019] NSWCA 262**

AT A GLANCE

- Wotton + Kearney act for a valuation firm in proceedings commenced in the Supreme Court of NSW regarding that firm's valuation of a property at Wallalong, NSW. The valuers asserted a limitation defence and applied to have it determined as a separate question. The application was refused at first instance and the valuers sought leave to appeal.
- The NSW Court of Appeal granted leave to appeal and re-exercised the Court's discretion to order that the limitation defence be determined as a separate question. The majority held that the potentially significant saving of cost and time warranted such an order, in circumstances where the separate question was a discrete legal one that would not require a lengthy hearing.
- For insurers and insureds, this decision provides appellate court guidance on when a separate question determination is appropriate, particularly regarding limitations defences that have the potential to bring an early end to proceedings and avoid significant defence costs and damages awards.

Case facts

On 14 June 2018, a lender (the lender) commenced proceedings against a valuation firm (the valuer) in the Supreme Court of NSW, seeking damages for professional negligence and statutory breaches regarding a valuation prepared for mortgage lending purposes for a property at Wallalong, NSW (the property). Wotton + Kearney acted for the valuer.

The property was valued for mortgage lending purposes at $7,450,000, against which the lender lent the sum of $3,073,000 to an individual borrower.

On 23 May 2012, after the borrower defaulted on the loan, the lender exercised its rights under the mortgage and entered into a contract for the sale of the property for $1,250,000.

The valuer raised a limitation defence and applied to have it determined as a separate question. The primary judge dismissed the valuer's application and the valuer sought leave to appeal. On appeal, the valuer successfully argued that the primary judge made two material errors of fact in refusing the valuer's application and that the Court of Appeal should exercise the Court's discretion afresh.

The issue

While the valuer acknowledged the well-established authority that a court should exercise caution when asked to order the determination of separate questions, it contended that the proposed separate question(s) raised a discrete question of law which, if answered in its favour, would resolve the proceedings entirely. The valuer said that the lender's causes of action accrued when it became clear that the lender could not recoup the amount advanced under the mortgage from the sale of the mortgaged property.

The lender argued that any cause of action will only arise when it is ascertained, or reasonably ascertainable, that the monies advance (or the balance) cannot be recouped from the borrower under a personal covenant in or implied into the mortgage, or in loan documentation associated with the mortgage.

The decision

The Court of Appeal held (per Bell P) that any hearing of the separate question would essentially be confined to that legal question and that such a hearing, with the benefit of written submissions, would take no more than a day and in all likelihood considerably less.

This was in stark contrast to the likely length of a full hearing (estimated by the parties' solicitors as 1-2 weeks), which would necessarily involve expert evidence regarding the competence of the valuation and the lender's reliance.

Having identified that contrast, Bell P held that:

- "[a] much longer hearing also means a much more expensive hearing. There is also the public interest entailed in the efficient use of scarce judicial resources"
- there would be a "very significant saving of cost and time" if the proposed separate question was answered in favour of the valuer
- even if the proposed separate question was determined adversely to the valuer, any additional expense associated with the hearing of the separate question would be "marginal", and
- no issue relating to the credibility of witnesses would arise due to a separate question hearing, given the narrow and legal nature of the proposed separate question.

Simpson AJA agreed with the orders of Bell P but for slightly different reasons and noted that the valuer's limitation defence would "all but terminate the principal proceedings, with significant savings in time and costs to the parties, as well as judicial resources".

The Court of Appeal (McCallum JA dissenting) ordered that the valuer's limitation defence should be separately determined.

Despite the material error made by the primary judge, Bell P and Simpson AJA were only prepared to re-exercise the discretion in favour of the valuer based on Counsel's assurances about how the separate question would be run, so that it would be a discrete legal question rather than involving factual enquiry. Such concessions may not be possible in every case.

Implications for insurers

Courts are generally hesitant to make orders for the determination of separate questions, particularly regarding limitation defences, no doubt because of the serious consequences for a plaintiff if the defence is established.

However, the Court of Appeal's recent decision shows that if a defendant can identify a discrete legal question, and a disparity between the time and costs associated with the determining that question versus the substantive issues at a final hearing, the defendant may be able to persuade the Court that a separate determination is appropriate.

In circumstances where a limitation defence in favour of a defendant usually has the effect of resolving a claim in its entirety, running that point before significant costs are incurred has obvious potential benefits for defendants and their insurers.

The decision provides appellate court guidance on when a separate question determination is appropriate.

Need to know more?

For more information please contact us.

Adam Chylek
Partner, Sydney
T: +61 2 8273 9940
adam.chylek@wottonkearney.com.au

Stephen Morrissey
Special Counsel, Sydney
T: +61 2 8273 9817
stephen.morrissey@wottonkearney.com.au