

Case Alert

Shaping the future of insurance law

Decision confirms need to address clear criteria in pursuing direct recoveries against insurers

***Sergienko v AXL Financial Pty Ltd* [2019] NSWSC 1610**

17 JANUARY 2020

AT A GLANCE

- On 21 November 2019, the Supreme Court of NSW dismissed an application brought by the fourth and fifth defendants seeking leave for joinder of an insurer in place of a deregistered legal practice under the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (the 'Act').
- With direct recoveries against insurers becoming more prevalent since the commencement of the Act, this decision further clarifies the matters a Court will consider and give weight to when determining an application for leave to proceed against an insurer under the Act.
- This decision confirms there are well-established criteria that a Court will consider when assessing an application for leave to proceed against an insurer under section 5 of the Act. It's also a reminder that plaintiffs must provide supporting evidence, including a proposed pleading that sufficiently articulates the cause of action against the insured defendant, as well as the insurer, by addressing the cover available under the policy.

RELEVANT FACTS

Principal claim by Sergienko

The principal proceedings involve a claim by the plaintiff, Sergie Sergienko against AXL Financial Pty Ltd (AXFL), Oliver Roths and Roths Holdings Australia Pty Ltd (collectively, Roths) seeking equitable relief regarding the terms of a Deed of Settlement between Sergienko and those defendants (relating to other Supreme Court proceedings) (the Deed).

The dispute relates to the following terms of the Deed:

- AXFL to grant Sergienko an equitable mortgage over a property in Killarney Heights NSW (the property) to satisfy AXFL's obligations under the Deed to pay a certain amount to Sergienko, and
- Roths to transfer shares held by them in another company, PLC Financial Solutions Pty Ltd (PLC), to Sergienko.

Sergienko alleges AXFL failed to deliver a mortgage in registrable form or to pay the amount secured by that mortgage on time and that Roths failed to transfer their shares in PLC to Sergienko.

IWC Industries Pty Ltd (IWC) and DK Excavation and Concreting Pty Ltd (DK) were joined as fourth and fifth defendants to the principal proceedings on their own application to the Court.

IWC and DK became aware of a caveat lodged by Sergienko on the property, which AXFL held on trust as trustee for the DK Excavation and Concreting Unit Trust (DK Trust) of which DK is the sole beneficiary. IWC was appointed trustee of the DK Trust in place of AXFL.

IWC and DK Cross-Claim

IWC and DK issued a cross-claim in the proceedings seeking an order that the property vest in IWC, in place of AXFL, and that AXFL be ordered to pay IWC any amounts owing.

DK and IWC allege that the property was held by AXFL as trustee for DK Trust and that AXFL acted in breach of trust by entering into a settlement on the terms alleged by Sergienko.

Joinder Application – AXL Legal (deregistered) / Lawcover

DK had instructed AXL Legal Solicitors Pty Ltd (AXL Legal), a now deregistered legal practice, to draft a trust deed for the DK Trust and to act on the conveyance of the property from DK to AXFL. IWC and DK allege that AXL Legal failed to advise DK of the risks associated with vesting the property in AXFL or of the need to lodge the Deed of Unit Trust with the Land Titles Office NSW, as well as a caveat over the property recording DK's financial interest.

IWC and DK made an interlocutory application seeking leave to join Lawcover to the proceedings as the professional indemnity insurer for the AXL Legal (deregistered) under the Act.

Lawcover opposed the application for leave, given the limited information available and inability to garner cooperation from the director of AXFL and AXL Legal (before deregistration) regarding the allegations and claim being made.

Lawcover was also critical of the deficiencies in the pleadings within the proposed further cross-claim sought to be filed by IWC and DK against AXL Legal (by its insurer, Lawcover).

Specifically, Lawcover submitted:

- The application failed to address those matters that must be established before leave is granted under section 5 of the Act, including the existence of a responding policy of insurance that extends cover to AXL Legal.
- The proposed cross-claim pleads insufficient material facts and fails to plead an arguable case in negligence against Lawcover's insured, AXL Legal.
- The proposed cross-claim fails to address 5B and 5D of the *Civil Liability Act 2002 NSW* (CLA) regarding the allegations of negligence made against Lawcover's insured and does not identify the risk of harm or reasonable precautions AXL Legal ought to have taken to address the risk.
- The proposed cross-claim fails to disclose any allegations sufficient to permit a finding that the Lawcover policy responds to provide cover to the now deregistered AXL Legal. Specifically, Lawcover submitted that it is not known whether the policy exclusion at clause 9 (a) (vii) has application to exclude cover or the claim.
- Lawcover submitted that it is unable to form a view as to cover under the policy given the lack of information available. Relevantly, it was submitted that there is "no insurance controversy to quell", which is a relevant matter when refusing leave.



The Court accepted Lawcover's submission that the proposed cross-claim failed to establish the matters relevant to satisfy section 5 of the Act.

THE DECISION

The Court affirmed the matters to be established to enliven the discretion to permit the joinder of an insurer directly under section 5 of the Act are that there is:

- an arguable case as to the liability of the insured (AXL Legal)
- an arguable case that the policy responds to the claim against the insured, and
- a real possibility that if judgment is obtained, the insured would not be able to meet it.

The Court found that an insurer is entitled to know the case the insurer would have to meet and accepted that until the claim is properly articulated, Lawcover will not know whether the policy responds to the claim.

The Court accepted Lawcover's submission that the proposed cross-claim failed to establish the matters relevant to satisfy section 5 of the Act.

The motion was dismissed, and leave refused as the proposed cross-claim failed to properly plead a case in negligence against the insured or adequately establish the existence of a reasonably arguable cause of action against the insurer.

IMPLICATIONS FOR INSURERS

This decision confirms there are well-established criteria that a Court will consider when assessing an application for leave to proceed against an insurer under section 5 of the Act.

It's also a reminder of the Court's preparedness to scrutinise a claimant's allegations against an insured defendant and its insurer when determining an application for leave to pursue an insurer under the Act. Considerable weight is given to the supporting evidence and whether the proposed pleading articulates an arguable case on liability against the insured defendant and policy response against the insurer.

The decision confirms it is paramount that the supporting evidence and proposed pleading sufficiently outline the cause of action against the insured defendant and insurer by addressing the cover available under the policy.

NEED TO KNOW MORE?

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