

Insurance CaseNote

July 2010

No Claim, No Gain: *Cassidy v Leslie [2010] NSWSC 742*

The facts

Mr Leslie, a valuer, held professional indemnity insurance with Calliden Limited (**Calliden**) for the period 21 January 2008 to 21 January 2009.

On 14 January 2008 Mr Leslie provided a valuation report to the plaintiff on the market value of a property for the purpose of lending monies. Mr Leslie valued the property at \$1.5M. A loan of \$900,000 was advanced. On 11 April 2008 Mr Leslie received an email from the plaintiff's solicitor informing him that "*an insurable event may occur...where a shortfall occurs in the auction of the property a claim will be made...*"

Mr Leslie did not notify Calliden of this email during the policy period. The envisioned shortfall eventuated when the property was sold for \$350,000 in October 2008. On 4 April 2009 Mr Leslie was served with a statement of claim which he notified to Calliden on 20 April 2009.

Calliden denied indemnity on the basis that the claim did not fall within the policy period. Mr Leslie issued a cross claim against Calliden. The Court had to decide the following questions:

- Did the email dated 11 April 2008 constitute a claim within the terms of the policy?
- If the answer to the question was yes, was Calliden entitled to deny indemnity on the basis the claim was not notified within the period of insurance? (On this point, Calliden conceded that if question 1 was answered in the affirmative, section 54 of the *Insurance Contracts Act* 1984 would operate so that the failure to notify had no effect upon the entitlement to indemnity).

Did the email constitute a claim?

Based on the policy wording a "Claim" was defined as:

- a writ, statement of claim, summons, application or other originating legal or arbitral process, cross-claim, counter claim or third or similar party notice served on the Insured for compensation
- a written assertion of a right to or a demand for compensation.

Calliden accepted the email constituted a written assertion, but maintained it did not contain an existing right to compensation as the right asserted was, at best, a contingent one. That is, as of the date of the email, no loss had occurred nor was there any certainty as to its future occurrence.

Justice Hoeben disagreed and found the terms of the policy did not confer a requirement that there be an *existing* right to claim. To include the word 'existing' would be to reverse the *contra proferentem* rule. Furthermore, his Honour stated that a "right" can be contingent or conditional. The breach by the valuer had already occurred by the time he received the 11 April 2008 email and it was unlikely the property would sell for more than one-third of the valuation.

Point forward

Careful consideration should be given to the definition of 'claim' within policies. In circumstances where the same or similar definition of claim as above is used, conditional or contingent claims may likely fall to be considered as claims under a policy.

Gavin Creighton
Partner

8281 4423
gwc@cbp.com.au

Jackie Haski
Senior Associate

8281 4491
jah@cbp.com.au

[>>> return to first page](#)

T 61 2 8281 4555
F 61 2 8281 4567
E law@cbp.com.au
I www.cbp.com.au

Level 42, 2 Park Street
Sydney NSW 2000
Australia

DX 280 Sydney
Advoc Asia member

Colin Biggers
& Paisley

LAWYERS