

Case Note

**Major Engineering Pty Limited v CGU Insurance Limited, 9 August 2011
(Supreme Court of Victoria, Court of Appeal)**

Legal Costs Extensions and Notional Liability



Rob Minc
Principal
Meridian Lawyers
Tel +613 9810 6765
6 October 2011

This case provides some useful commentary on:

- legal costs extensions;
- product liability exclusions in liability policies and how they are to be applied.

Background

In 2004, during the Sydney – Hobart Yacht Race, two hydraulic cylinders fitted to the keel of the racing yacht, Skandia (formerly called “Wild Thing”) failed. This caused the yacht to capsize necessitating the abandonment of the crew and resulting in loss and damage to the yacht’s owner, Timelink Pacific Pty Ltd (‘Timelink’). This hydraulic equipment was to enable the keel to be held in the position desired from time to time depending on sailing conditions, to maximise the yacht’s speed.

The two hydraulic cylinders were supplied by Major Engineering Pty Ltd (‘Major’). Timelink sued Major in relation to the failure of these hydraulic cylinders and was unsuccessful. The litigation involved 2 appeals to the Supreme Court of Victoria, Court of Appeal.

Major then sued CGU seeking indemnity under the costs extension provisions of its ‘Liability Insurance – Broadform Policy’ for about \$1million net of costs recovered from Timelink. This extension was said to apply to Legal Costs. In the case of:

- (1) Public Liability and Products Liability; or
- (2) A claim of Public Liability or Products Liability being made against You,

for which indemnity is, or would be, available under this Policy, We will pay Your Legal Costs.

Further, the policy contained the following Exclusions:

We will not indemnify you against the following:

19. Treatment, Design and Professional Risks Liability caused by or arising out of Your performance or failure to perform the following:
 - (a) The rendering of professional advice or service.
 - ...
 - (c) Making or formulating a design or specification within the domain of theengineering profession.

Findings

The Costs extension

In order to determine whether the costs extension applied, the Court of Appeal found that “Major must prove that Timelink’s claim against it, if it had been successful, would have resulted in a liability in respect of which Major would have been entitled to an indemnity under the policy.”

In other words, consideration of a notional or hypothetical liability was required.

The notional claim for consideration

The Court warned against giving too much weight to the way that a claim is initially articulated by a claimant warning that “pleaded claims are often pitched, even by “learned and skilled lawyers” more widely in pleadings than they are in a final address to a Court adjudicating upon such claims. While it is understandable that a claimant will initially make allegations as wide and comprehensive as possible, the relevant claim is that which is actually litigated, in this case, the supply of hydraulic cylinders which did not meet specifications. Therefore, the Court concluded that if Timelink’s claim had been successful, it would have been covered under the operative clause of the policy.

Exclusion Clauses

In relation to exclusion 19(a), CGU alleged that a professional service was provided – being the performance of its contract to supply the cylinders which Timelink alleged were defective. The Court found that Major performed no service other than to supply a particular product by reference to its manufacturers name, the Parker Company. This could not sensibly be characterised as “professional” or a “service” and that “it was difficult to see how selling a product, even a bespoke product, could be characterised as providing a professional service so as to take it outside the scope of the Policy.” The exclusion is concerned with the provision of a service, not the sale of a product. In ordinary business parlance, there is a recognised difference between ‘sales’ and ‘service.’ In the context of a public liability policy (as opposed to a Professional Indemnity Policy), the Court considered such an exclusion should be given a narrower meaning.

The Court found that, if this exclusion applied, it would be difficult to see how many products emanating from that business would not be specifically excluded.

Exclusion 19(c) was found not to apply because Major did not design the cylinders and CGU did not establish that any design by Major had anything to do with the notional liability. Rather Major’s notional liability was about the size and capacity of the cylinders.

This case provides some valuable guidance about when legal costs extensions are to apply and that product liability exclusions need to be considered in the context of the risk being insured.

SYDNEY

Level 5, 345 George Street
Sydney NSW 2000
T +61 2 9018 9999
F +61 2 9018 9900

MELBOURNE

5 Burwood Road
Hawthorn VIC 3122
T +61 3 9810 6777
F +61 3 9810 6770

NEWCASTLE

Level 8, 77-79 Hunter Street
Newcastle NSW 2300
T +61 2 4908 4200
F +61 2 4908 4299