



## corporate risk and insurance update

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**Life in the Fast (Track) lane - policy drafting and the shipyard dilemma**

***Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Limited* [2011] FCAFC 145**

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**Life in the Fast (Track) lane - policy drafting and the shipyard dilemma**

***Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Limited* [2011] FCAFC 145**

The recent decision of the Full Federal Court in *Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Limited* [2011] FCAFC 145 is the latest instalment in an ongoing saga over disputed loss calculation methods in Business Interruption (**BI**) policies.

In our earlier update entitled *Federal Court considers business interruption policy: the perils of poor policy drafting: Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Limited* (see [here](#)) we set out the detailed background to the dispute. We provide a brief summary below.

## **Ship (yard) runs aground**

Tropical Reef Shipyard Pty Ltd (**Tropical Reef**), a provider of ship repair and engineering services, relied heavily on the use of an industrial slipway. Between 4 September 2006 and 3 April 2007, a number of incidents took place which caused damage to the slipway. QBE Insurance (Australia) Ltd (**QBE**) agreed to indemnify Tropical Reef for this damage under two BI policies. The relevant clause in each policy provided:

*...for each week we will pay an amount based upon Weekly Calculations not exceeding the Weekly Sum Insured each week in respect of loss of Turnover suffered by you during the Indemnity Period ... [such payment to] be made every seven days whenever practicable.<sup>[1]</sup>*

QBE, despite indemnifying Tropical Reef, disputed the manner in which Tropical Reef calculated its loss of turnover and argued that the relevant BI policy ought to be given a business like interpretation, taking into account the commercial circumstances it was intended to address. QBE asserted that amounts for each week, whether positive or negative, should be placed in a nominal running account with the final balance, if positive, being payable. This method was rejected by Finklestein J. His Honour held that the policy provided indemnity for losses on a week by week basis, calculated by reference to weekly figures, and not on an annual or some other basis. The matter was therefore referred for final determination.

## **The claim begins to founder**

In light of Finklestein J's determination, Tropical Reef filed an amended claim providing two methods for calculating the loss of turnover experienced. QBE argued that these suggested methods did not replicate the conditions set out by Finklestein J (that 'turnover' must equate to money being 'paid or payable') and consequently sought summary judgment. While the Court agreed with QBE in substance, it nevertheless allowed Tropical Reef to reformulate its statement of claim in accordance with the six point procedure articulated by Finklestein J.

In the subsequent proceedings, Tropical Reef endeavoured to file a further amended claim, which contained both 'primary' and 'alternative' methods for calculating lost turnover. Matters which are filed on the Fast Track list do not have pleadings and consequently each party is entitled to submit statements or summaries which include their primary arguments.[\[2\]](#)

Gordon J found that the primary method failed to observe the condition that each week be considered separately in terms of loss and, furthermore, decided that it was pointless to examine the alternative method as the matter had already been determined by the previous Court. Her Honour therefore refused to give leave to file the amended claim, gave summary judgment under s 31A of the *Federal Court of Australia Act 1976* (Cth) and dismissed the proceedings.

### **Safely off the reef**

In this most recent decision, the Full Federal Court considered whether Gordon J erred in refusing leave to file the amended claim and giving summary judgement under 31A.

The Court found that the interlocutory judgments had failed to properly address the question of causal links between the damage and the loss experienced, as was required by the policy interpretation mandated by Finklestein J. Consequently, the Court found that Gordon J was wrong in deciding that the case had 'no reasonable prospect' of succeeding (under s 31A) by basing her decision on an 'assumed' rather than a considered interpretation of the causal issues (relevant to the loss calculation under the BI policy).

Furthermore, the Court found that Gordon J had erred by refusing to give leave to Tropical Reef to introduce an amended claim which contained its 'primary case'. Firstly, this was because the absence of a stated causal link is not enough to exclude an appellant from bringing its principal case. Secondly, there were no grounds for a s 31A finding and, finally, the case was in the Fast Track proceeding list.

In this present case, the Court held that because the matter was being Fast Tracked, Tropical Reef should not be barred from articulating the primary case which it intended to run. This primary case would obviously have been excluded if leave to file the amended claim was refused.

The Court suggested that establishing a link between damage to Tropical Reef's property and the loss of turnover on a weekly basis may have its problems; however this is something which should be resolved at trial.

Consequently, the Full Federal Court allowed the appeal; dismissing the application by QBE for summary judgment, allowing Tropical Reef to amend its claim and requiring QBE to pay Tropical Reef's costs of the appeal.

## Smooth sailing?

This decision was the sixth judgment in relation to the correct interpretation of QBE's BI policy and how loss should be calculated under it. Consequently, an inordinate amount of time and money has been spent that could possibly have been avoided if clearer wording was used at the time of drafting. This decision re-emphasises the need for all insurers to carefully construct their BI policies in order to avoid the costly repercussions which can arise (as exemplified in this case).

In this case the policy was not a standard ISR wording, and as suggested in our 2009 update, in such circumstances it may be beneficial for insurers to include sample calculations or a claims protocol in a schedule to their policies. Sample calculations showing the way a policy is intended to operate limit the likelihood of misinterpretation of the loss calculation and therefore support an insurer's position if a dispute arises.

In relation to Fast Track proceedings, this decision illustrates that courts may be more generous in issuing leave to amend claims, especially if the amendment contains a primary argument. This is because the courts have to rely upon statements or summaries rather than pleadings to comprehend what each party is arguing. However, a party must also be careful to organise their factual allegations in a coherent sequence or else the matter may be examined under unanticipated sections of the *Federal Court Act 1976* (Cth) such as s 31A.

It is interesting to note that an insured or insurer cannot automatically expect a quick resolution to a case which is filed as a Fast Track matter. This case is still ongoing two years after it was initially heard.

As Gray J in granting leave to appeal opined:

*...The circumstances surrounding the case have become very complex. In many respects their complexity is an object lesson in the difficulties that can be created by attempts to take shortcuts in the resolution of legal disputes...The proceeding was originally commenced in the fast-track list of the Court. Accordingly, there is some irony in the fact that it is now well over a year and a half since the proceeding was commenced.*[\[3\]](#)

In other words, as in this case, seeking early resolution of what was deemed to be a 'small issue' in fact led to the ship (or the matter) running aground, rather than docking safely in the yard.

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[1] *Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Limited* [2011] FCAFC 145 at [9].

[2] [http://www.fedcourt.gov.au/how/fast\\_track\\_list\\_key\\_elements.html](http://www.fedcourt.gov.au/how/fast_track_list_key_elements.html)

[3] *Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Ltd* [2011] FCA 592 at [2].

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