ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

BB V HELENA COLLEGE COUNCIL INC T/AS HELENA COLLEGE [2021] WADC 42

District Court of South Australia, Sharp DCJ, 28 May 2021

Whether third party insurers were liable for damages payable by a defendant incorporated association

Key words: Incorporated Association, South Australia, Liability, Damages, Historical Child Sexual Abuse, Insurance, Insurers' Liability

1. The plaintiff (BB) commenced as a student at Helena College Primary School (the School) in Darlington, Western Australia in 1986. She remained there until the end of 1990, when she was 12 years of age and had completed Grade 7. The defendant, Helena College Council Inc (the Council) owns and operates the School. It is an incorporated association under the *Associations Incorporation Act 2015* (WA).

2. BB was sexually assaulted in 1988 when in grade 5 at the School. The teacher who assaulted her was convicted and imprisoned for multiple assaults against her in 2006.

3. BB commenced proceedings against the Council in 2020. A writ was issued claiming damages from the Council for personal injuries (mainly psychiatric injuries), loss and damages which BB sustained as a result of child sexual abuse whilst a student at the School. The indorsement to the writ stated that the child sexual abuse suffered by BB at the School occurred as a result of the negligence and/or breach of statutory duty of the Council or the Council's servants and/or agents.

4. Before the trial commenced, the matter was settled as between the parties. Therefore, the amount of the damages payable having been settled, this hearing was to determine the liability of the defendant's insurers, QBE (first third party), IAG (second third party) and Berkshire Hathaway (third third party).

5. The insurers did not dispute the reasonableness of the settlement. However, the first and third parties denied any liability to the defendant School, while the second third party accepted that it must indemnify the defendant, but not for the whole of the defendant's liability to BB.

6. The positions of the respective insurers were:
    a. QBE did not accept that it must indemnify the defendant for the whole of its liability to the plaintiff, unless the defendant proved that the plaintiff's psychiatric conditions were the 'result of an accident' and if and unless the defendant complied with the 'reasonable care' condition in the relevant policy.

b. IAG agreed to indemnify the defendant. However, IAG considered that it was liable for only half of the amount of the defendant's liability to pay damages and costs to the plaintiff, 'being its assessment of that proportion of the defendant's liability incurred in the second third party's policy period'.

c. Berkshire Hathaway did not accept that it must indemnify the defendant for its liability to the plaintiff, because of the application of the 'Prior Notification Exclusion' in its policy. In effect, Berkshire Hathaway said that the Council in 2001 and 2002 had notified its then insurer about BB's claim and, by doing so, enlivened the 'Prior Notification Exclusion'. Berkshire Hathaway contended that the effect of this was that its liability to the Council was excluded.

7. There was no doubt that BB suffered significant psychiatric injuries as a result of the assaults. This was accepted by the third party insurers. The Court held that these were a single indivisible injury.

8. However, the QBE policy, assumed from an original MLC policy, required that the injuries be caused by an 'accident'. Accident was not defined in the policy, but the parties agreed that it should have its natural meaning of 'an unlooked-for mishap or an untoward event which is not expected or designed'.

9. The Court held that the psychiatric injuries were the result of an 'accident' (at [247]). The acts of the convicted teacher were 'so removed from what he was employed by the Council to do, namely to teach, that those acts cannot be regarded as acts in the course of his employment' (at [229]). The Council of the School bore responsibility, but the testimony of the surviving Council members was such that there was no evidence to indicate that the Council perceived that there was a risk that the convicted teacher would sexually assault students at the School and therefore that the Council had deliberately incurred that risk.

10. QBE's policy also had a 'reasonable precautions' condition. The Court held that QBE bore the onus of proof in that regard. Did the Council breach the reasonable precautions condition? The Court found that the Council did not breach the condition because the principal at the time conducted in-depth investigations and reported these to the Council. All parties agreed at a meeting at the time that, although there were unwise actions by the teacher involved, they were not those of a sexual predator (at [267]):

> I find that the steps taken by the Council in 1987 were sufficient to satisfy the Reasonable Precautions Condition. QBE is liable to indemnify the Council for the settlement amount of its liability to BB and the defendant's defence costs of the plaintiff's action against it.

11. Since IAG accepted liability on the basis that the sexual assault injuries were an 'Occurrence' as defined in its policy, the Court said that IAG was liable to indemnify the Council for the settlement amount of its liability to BB and the defendant's defence costs of the plaintiff's action against it.

12. As regards the third insurer, Berkshire Hathaway (BH), the issue was one of prior notice. Its policy had a prior notification exclusion clause. BH became an insurer via a broker's engagement. BH was informed by the broker in 2017 that 'the Council had been contacted by a former student (not BB) who attended the school 30 years previously…asking the Council to provide free education for her children because a former teacher had sexually abused her' (at [274]), and that the former student was making 'a demand for compensation from the Council for

injuries sustained as a result of the student having been sexually abused…' (at [275]). Later notification regarding BB's claim came in 2019, which meant that the 20818/19 policy applied.

13. Was this prior notice such that the prior notification exclusion applied? The Court held that it was not. The Council's communications were with the broker and not the insurer.

14. Therefore, the Court held that all three insurers were liable to the defendant Council for the whole of the settlement amount of its liability to the plaintiff, and the defendant's defence costs of the plaintiff's action against it, subject to any excesses payable by the defendant under the relevant policy or policies.

IMPLICATIONS

It is important that insured organisations understand the particular terms of their policies and managers are aware of notice procedures and other conditions of the policy. Not to comply may put the policy coverage at risk. Similar conditions also commonly apply to cyber beach policies and again the governing body and managers should be aware of essential notices and actions required under the policies.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/wa/WADC/2021/42.html

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