NORTON ROSE FULBRIGHT

You're on notice! Developments in insurance notifications under claims made policies in Australia

Ray Giblett
Partner

Tim Chan
Special Counsel

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Norton Rose Fulbright Australia

"The world is full of obvious things which nobody by any chance ever observes." — Arthur Conan Doyle, *The Hound of the Baskervilles*

1.
Statutory Intervention

Statutory Intervention

Section 40 of the *Insurance Contracts Act 1984*

40 Certain contracts of liability insurance

(1) This section applies in relation to a contract of liability insurance the effect of which is that the insurer's liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of the insurance cover provided by the contract.

(2) The insurer shall, before the contract is entered into:

(a) clearly inform the insured in writing of the effect of subsection (3); and

(b) if the contract does not provide insurance cover in relation to events that occurred before the contract was entered into, clearly inform the insured in writing that the contract does not provide such cover.

Penalty: 300 penalty units.

(3) Where the insured **gave <u>notice</u> in writing** to the insurer of **<u>facts</u> that might give rise to a claim** against the insured **<u>as soon as was reasonably practicable</u> after the insured became aware of those facts but before the insurance cover provided by the contract expired**, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.

2.
Case Law Developments

P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd [2021] NSWCA 136

"A small number of clients have invested/lent funds to property investments and/or companies that have to date been unable to repay those funds in total.

At the time of the investment all appropriate disclosures were made and clients invested/lent funds with full knowledge of the circumstances at the time.

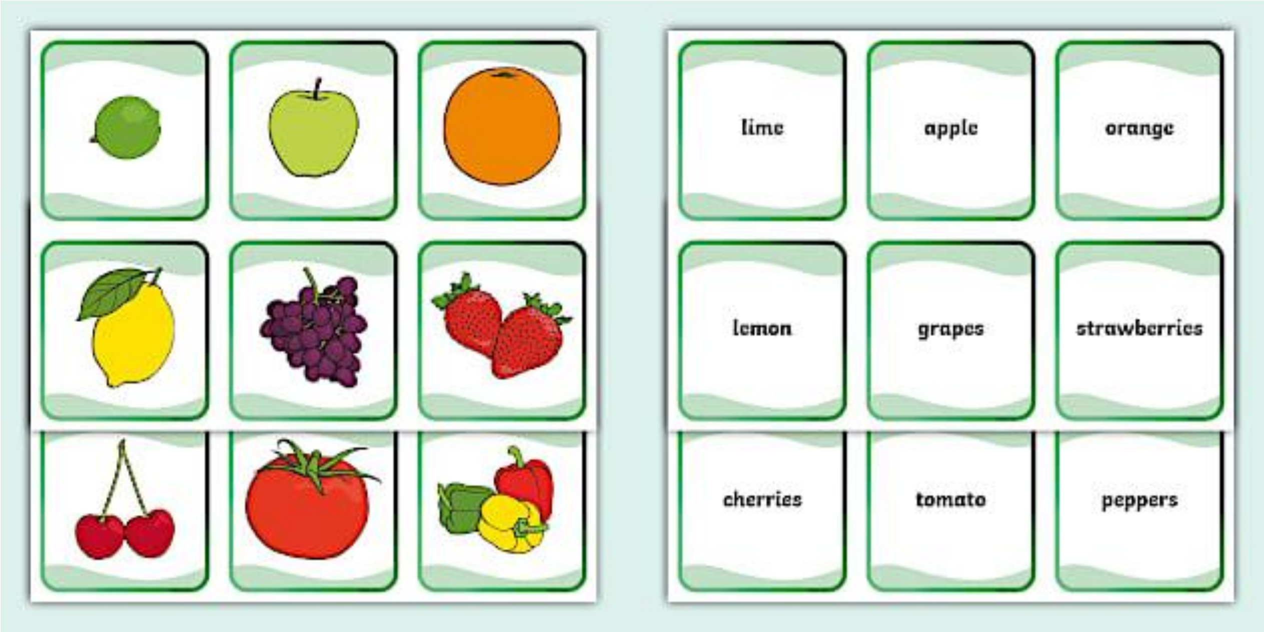
At this stage no loss has been crystallised and no claim or complaint has been formally lodged.

We wish to advise the insurance company that there is a chance of a claim against Moylan Retirement Solutions in relation to any loss that may be incurred."

- The Court found that there was no valid notification of "facts that might give rise to a claim" by Mr Moylan, a financial planner and principal of Moylan Retirement Solutions (MRS) (the Insured) under s 40(3) of the *Insurance Contracts Act 1984* (ICA).
- Appeal was upheld

P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd [2021] NSWCA 136

"sufficient correspondence between the facts notified as likely to give rise to a claim and a claim subsequently made for the latter to be identified as "the" or a claim arising or resulting from those facts"



What does this mean?

- Notified facts do not need to identify the likely claimant or claimants, or quantum of loss.
- The notification may be of a problem which of itself may give rise to a claim or claims by persons or entities having particular characteristics: see *DIF III – Global Co-Investment Fund LP v DIF Capital Partners Ltd* [2020] NSWCA 124 at [171].
- Notifications and claims are closely examined to ensure this test is met.

Darshn v Avant Insurance Ltd [2021] FCA 706

September 2017

Class Action Proceedings commenced in Supreme Court of NSW against various TCI entities and other doctors of TCI.

Dr Darshn not named as a defendant.

March 2018

Dr Darshn sued by past patient but not part of the class action. Similar circumstances to the class action.

Defence counsel appointed by Avant

January 2019

Dr Darshn served with subpoena by plaintiffs in class action. Dr Darshn consulted Avant's medico-legal advice hotline.

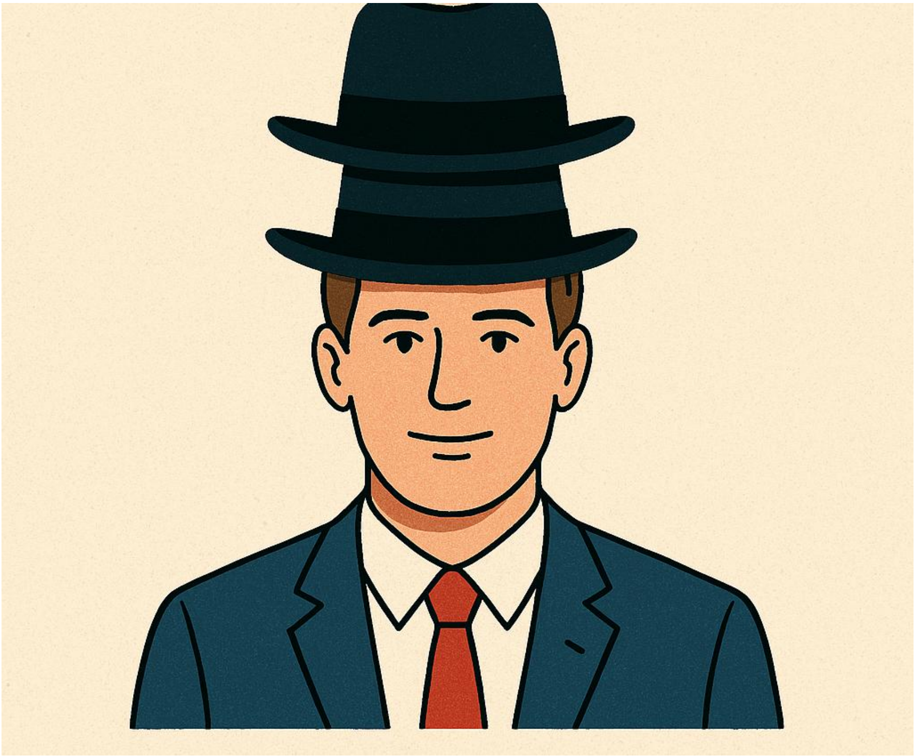
Solicitor for Avant requests subpoena but Dr Darshn didn't send it.

June 2020

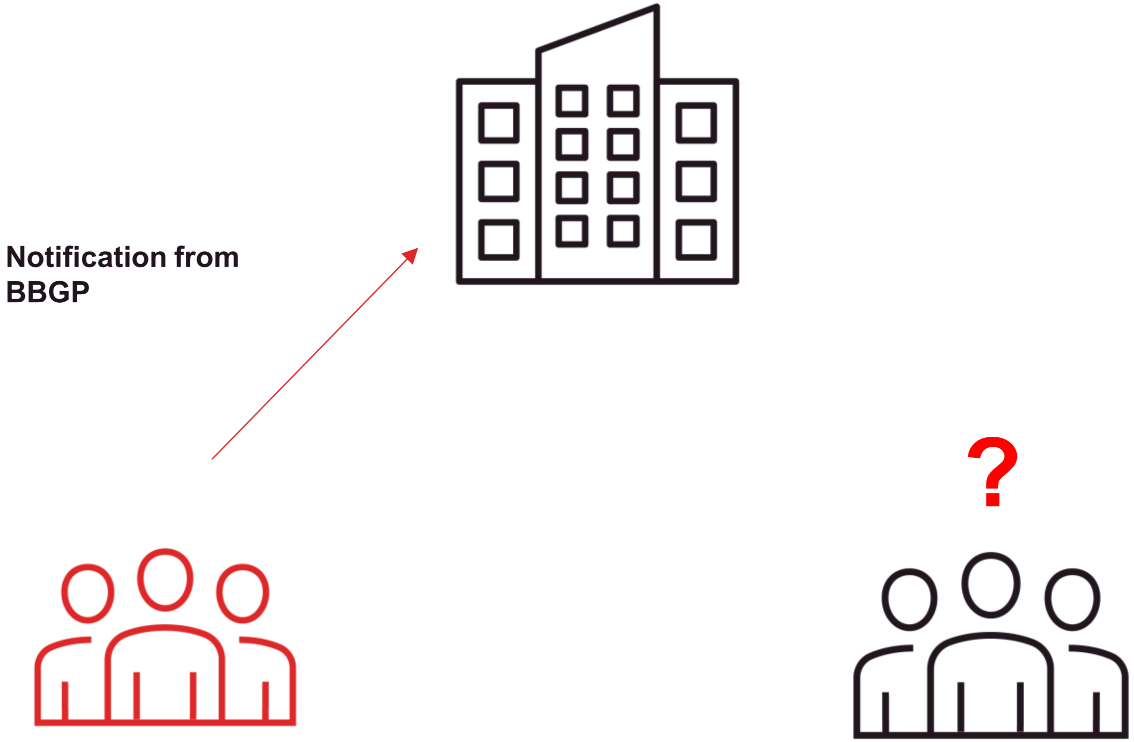
Dr Darshn is joined to the class action.

Darshn v Avant Insurance Ltd [2021] FCA 706

- Correspondence between insurer's panel lawyer and the insurer
- Avant did not tell Dr Darshn that notifications had to be in writing
- Avant conceded that if subpoena was provided, would have constituted sufficient notice
- Breach of duty of utmost good faith?



DIF III – Global Co-Investment Fund LP v DIF Capital Partners Ltd [2020] NSWCA 124



DIF III – Global Co-Investment Fund LP v DIF Capital Partners Ltd [2020] NSWCA 124

Section 54 – *Insurance Contracts Act 1984* (Cth)

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, **the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.**

Late notification under a policy's deeming clause: *FAI General Insurance v Australian Hospital Care* [2001] HCA 38

But not under section 40: *Gosford City Council v GIO General Limited* (2003) 54 NSWLR 542

MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd [2023] FCA 581

Attached is a notification of circumstances that may result in a claim under LU Simons Policy. We have prepared this statement on facts know[n] to date on the Insured's behalf[.]

Really most of the noise is around the press release really.

We bring this to your attention in terms of the policy. No formal claim has been made against LUS at this point in time.

-- Notification on 5 May 2015

MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd [2023] FCA 581

National Victoria

This was published 11 years ago

Docklands apartment tower fire fuelled by material in building's walls, says MFB

By Nick Toscano and Rania Spooner
Updated April 28, 2015 — 8:27am, first published April 27, 2015 — 6:28pm

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The rapid spread of a fire through a Docklands apartment tower was caused in part by combustible construction materials, a review has found, sparking an investigation into building practices and paving the way for an expensive class action.

The Victorian Building Authority has launched an investigation into LU Simon Builders after the MFB revealed on Monday that the external cladding of the 23-

"

Attached please find a copy of the design and construct contract which is an Australian standard (AS4300) which was the basis of Lacrosse and sets out our insured's obligations.

Also attached for your interest is a copy of the Melbourne Fire Brigade (MFB) [*sic*] report which may also be of interest for insurers. Page 24 is of particular interest and generally the report is critical of many contributing factors in regards to this incident.

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-- Notification on 5 May 2015

MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd [2023] FCA 581

“Post Incident Analysis Report” in relation to Lacrosse Dockland

Case Study

Allianz Australia Insurance Limited v Uniting Church in Australia Property Trust [2025] FCAFC 8

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Allianz Australia Insurance Limited v Uniting Church in Australia Property Trust [2025] FCAFC 8

31 March 1999 – 31 March 2011

Uniting Church Property Trust (UCPT) insured with Allianz

Allegations of sexual and physical abuse perpetrated by staff

May 2004

LKA2 report given to headmaster. Discussed past conduct and risks to students rated as 'extreme'

2009-2011

UCPT makes 'bulk notifications' in 2009, 2010 and 2011

February 2011

UCPT makes the 'alleged perpetrator' notification

<- Allianz pays claims ->

Last claim accepted by Allianz on 26 September 2012, continues to pay claims already notified up until May 2014

19 May 2014

Allianz decides to either deny claims or reserve its rights in relation to claims-*Late notification, known circumstances & breaches of duty of disclosure (ultimately not pressed)*

Exclusion clause 7(c) - Prior known circumstances

This policy does not cover any liability for or arising directly or indirectly from:

…

7. Prior Claims & Circumstances

any Claim, fact, circumstance or occurrence:

a. in respect of which notice has been given to the Company or any other insurer under a previous insurance policy, or

b. disclosed or communicated to the Company in the proposal or declaration or otherwise before the commencement of the Period of Insurance, or

c. of which the Insured is aware before the commencement of the Period of Insurance, which may give rise to a claim.

This exclusion is independent of and shall not affect the Company's other rights regarding misrepresentation and non-disclosure.

Sections 33 and 52 of the *Insurance Contracts Act 1984* (Cth)

Section 33 - No other remedies

The provisions of this Division are exclusive of any right that the insurer has otherwise than under this Act in respect of a failure by the insured to disclose a matter to the insurer before the contract was entered into and in respect of a misrepresentation or incorrect statement.

Section 52 - “Contracting out" prohibited

(1) Where a provision of a contract of insurance (including a provision that is not set out in the contract but is incorporated in the contract by another provision of the contract) purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void.

(2) Subsection (1) does not apply to or in relation to a provision the inclusion of which in the contract is expressly authorized by this Act.

Questions

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