



Hall & Wilcox
Lawyers

insurable interest

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Phone +61 3 9603 3555 Fax +61 3 9670 9632 Email information@hallandwilcox.com.au

Porthouse advice, Part II

In our June 2008 edition of *Insurable Interest* we reported on a NSW Court of Appeal decision upholding a barrister's claim for indemnity from his professional indemnity insurer.

The barrister provided advice regarding a client's prospects for a personal injury claim. That claim was not filed until after tort reforms relating to personal injury thresholds came into force. As a result of the reforms the client's claim was unsuccessful.

Shortly before the client made a claim against the barrister he completed a professional indemnity policy proposal in which he was asked if he was aware of 'any circumstances, which could result in any claim or disciplinary proceedings being made' against him. He responded in the negative. A claim was made by the client and the insurer denied indemnity on the basis of its 'known circumstances' exclusion.

In coming to its decision that the exclusion did not apply, the NSW Court of Appeal relied heavily on the barrister's evidence that *he did not believe* he had done anything wrong in the conduct of the matter and did not believe that the client would make a claim against him. The Court had to decide whether a 'reasonable person in the insured's professional position' would have thought the circumstances might result in a claim. In order to do that the Court of Appeal looked at whether the barrister's *actual state of mind* was unreasonable and found that it wasn't.

The insurer appealed to the High Court on the basis that the proper interpretation of a 'reasonable person in the insured's professional position' required the Court to take into account the insured's experience and knowledge and *not* the insured's state of mind.

The High Court upheld the insurer's appeal, finding that the lower Court had incorrectly applied the exclusion. The Court said it was not wrong to take into account what an insured thought, however the standard of a 'reasonable person in the insured's professional position' was an *objective* one. That means that it is a question which must be determined independently of the insured's state of mind: *CGU Insurance v Porthouse*.

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Kimberley Nash
Lawyer
+61 3 9603 3450
kimberley.nash@hallandwilcox.com.au

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