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# A claims made and notified policy is not a chameleon: a case note on Avant Insurance Ltd v Burnie

***Laina Chan*** *2 SELBORNE CHAMBERS*

In *Avant Insurance Ltd v Burnie*, the court made it clear that the combined effect of ss 40 and 54 of the Insurance Contracts Act 1984 (Cth) (the Act) does not operate to convert a claims made and notified policy into a discovery policy.[1]

## Facts

Avant Insurance Ltd (Avant) had appealed from a decision of the District Court granting leave pursuant to s 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) (Third Party Claims Act) to join Avant to professional negligence proceedings for damages for personal injury between Burnie and her plastic surgeon. The plastic surgeon was no longer registered as a medical practitioner. However, he held two consecutive professional indemnity policies with Avant (the Policy).

## The proposition

One of the elements that the respondent had to establish in her application for leave under s 5 of the Third Party Claims Act was whether any liability of the plastic surgeon would be covered by the Policy in circumstances where no claim had been made or notified during the Policy period.[2] The plastic surgeon also had not notified Avant of any facts that might give rise to a claim during the Policy period. However, the respondent said that this omission was cured by the combined effect of the Product Disclosure Statement (PDS) for the Policy, certain terms of the Policy and ss 40 and 54 of the Act. In a nutshell, the respondent said that:

- section 40 of the Act gave rise to a contractual obligation to give notice of facts that might give rise to a claim and
- section 54 of the Act cured the failure to give notice of facts

The PDS relevantly provided:

> **Notification of a Claim**
> You must notify Us in writing as soon as practicable of any Claim against You.
> Section 40(3) of the Insurance Contracts Act 1984 (Cth) provides that where You give notice to Us of facts that might give rise to a Claim as soon as was reasonably practicable after You become aware of those facts but before the Policy Period expires, You are covered for any Claim made against You arising from those facts even if it is not made against You until after the Policy Period has expired [(Notification Provision)].[3]

The Notification Provision explained the effect of cl 17 of the Conduct of Claims and Requests for Indemnity of the Policy which relevantly provided:

> 17.2 You must notify Us of a Claim
> 17.2.1 You must notify Us in writing as soon as practicable of any Claim.
> 17.2.2 If You do not notify Us of a Claim as soon as practicable, You may not be covered under this Policy and Your right to indemnity may be prejudiced.
> . . .
> 17.3.1 You must notify Us in writing as soon as practicable of any civil or criminal action, prosecution, enquiry, inquest, investigation or Complaint, judgment, appeal or tax audit . . . directly relating Your practice as a Healthcare Professional.[4]

Clauses 17.2 and 17.3 were qualified by cl 17.4 of the Continuous Cover of the Policy, which cures the failure to notify Avant of facts or circumstances that might give rise to a claim if the insured has continuous cover, and the claim was made during the period of insurance.[5]

## The Notification Provision does not give rise to a contractual obligation

In rejecting the proposition advanced by the respondent, McCallum JA and Simpson AJA said that the clear

purpose of s 40 of the Act is to extend the cover of a certain kind of policy if the insured had given notice, during the period of cover, of facts that might give rise to a claim (in lieu of giving notice of a claim not yet made). However, s 40 does not impose a contractual obligation to give such notice. Section 40 merely:

> . . . provides an additional benefit or extension of indemnity to a person who does so. The inclusion in the PDS of an explanation of the effect of that provision does not thereby impose an additional contractual obligation.[6]

Emmett AJA agreed with this. While the first part of the Notification Provision uses mandatory language, the second part:

> . . . merely states the effect of s 40(3) by reference to the parties to the contract of insurance. It is not worded so as to indicate the creation of a further contractual right. Further . . . its language suggests only that the insured is able to receive cover in accordance with the terms of s 40(3).[7]

## Section 54 has no work to do

In the absence of the contractual obligation, s 54 was not triggered.[8] Emmett AJA looked at the genesis of s 54 and said that:

> . . . s 54 was aimed at ameliorating the consequences for an insured of an act or omission by the insured in breach of a promissory warranty included in the contract to protect the interests of the insurer. ... it was not intended to have the effect of permitting an "omission" to make or notify a claim or to notify circumstances within the Policy Period to be excused. That would have the effect of altering the essential character of the cover provided under a "claims made and notified" contract of insurance such as the Policies. Section 54 does not contemplate an act or omission that would entail the failure to abide by the essential character and nature of the relevant contract of insurance.[9]

Emmett AJA emphasised what the High Court had said in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*[10] that s 54 only applies where the effect of the contract of insurance according to its terms would be that the insurer may refuse to pay a claim.[11]

## Conclusion

The conclusion reached by the Court of Appeal is not controversial. It is consonant with literal construction of the Notification Provision and ss 40 and 54 of the Act. It is consistent with the fact that claims made and notified policies sold in the Australian market no longer include a contractual obligation to notify circumstances to avoid the outcome that the respondent had advocated for. This has been the case for at least the last 15 years and was done to avoid the very outcome that the respondent advocated for in this case. Nevertheless, it is helpful to have a decision which hopefully puts this issue to bed.

***Laina Chan***
*Barrister*
*2 Selborne Chambers*
*laina.chan@selbornechambers.com.au*
*www.2selborne.com.au*

## Footnotes

1. *Avant Insurance Ltd v Burnie* [2021] NSWCA 272; BC202110768 at [85] and [103].
2. Above, at [62].
3. Above n 1, at [21].
4. Above n 1, at [22].
5. Above n 1, at [88] per Emmett AJA. See above n 1, at [24] for the Continuous Cover clause.
6. Above n 1, at [33].
7. Above n 1, at [82].
8. Above n 1, at [36] per McCallum JA and Simpson AJA and at [102] per Emmett AJA.
9. Above n 1, at [96].
10. *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; 180 ALR 374; [2001] HCA 38 at [20]; BC200103370.
11. Above n 1, at [102].