

SUPREME COURT OF QUEENSLAND

CITATION: *Power v Markel Capital Ltd* [2006] QSC 341

PARTIES: **DAVID LESLIE POWER**
(applicant)
v
MARKEL CAPITAL LIMITED
(respondent)

FILE NO/S: 6482 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 13 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 10 October 2006

JUDGE: Philip McMurdo J

ORDER: **Application dismissed**

CATCHWORDS: INSURANCE – GENERAL – POLICIES OF INSURANCE – CONSTRUCTION – applicant is a councillor of the Gold Coast City Council – applicant’s conduct as a councillor was investigated by the Crime and Misconduct Commission (CMC) and an inquiry was held in 2005 – applicant was required to give evidence to the inquiry – applicant was charged with breaching s 218(1) of the *Crime and Misconduct Act 2001 (Qld)* – where magistrate found no case to answer on one charge and acquitted on the other charge – construction of insurance policy – whether the provision of information to the CMC was in the course of the applicant’s duties as a councillor – whether applicant is entitled to be indemnified for legal expenses under his insurance policy

Crime and Misconduct Act 2001 (Qld), s 218(1)
Power v ACE Insurance Ltd [2005] QSC 327, cited

COUNSEL: P J Dunning SC for the applicant
R S Ashton for the respondent

SOLICITORS: Nyst Lawyers for the applicant
Ebsworth & Ebsworth for the respondent

- [1] **PHILIP McMURDO J:** The applicant is a councillor of the Gold Coast City Council. The respondent is the representative of Markel Syndicate 3000 at Lloyd's which has underwritten a policy which insures the Council, its councillors, employees and certain others. The applicant seeks a declaration that he is entitled to be indemnified for his legal expenses in successfully defending certain criminal proceedings.
- [2] In July through December 2005, the Crime and Misconduct Commission conducted an inquiry into suspected official misconduct by councillors of the Gold Coast City Council concerning the election of councillors in March 2004 and other matters. The applicant was one of those whose conduct was being investigated. He was required by the CMC to give a written statement to the inquiry and to produce documents and he gave oral evidence.
- [3] In April 2006 the applicant was charged with breaches of s 218(1) of the *Crime and Misconduct Act 2001 (Qld)* in that he gave the CMC a document containing information which he knew to be false or misleading in material particulars. The applicant engaged his own solicitors and counsel to defend the prosecution. On 22 September 2006, a magistrate found that he had no case to answer on one charge and acquitted him on the other charge. As at the hearing of this application, the magistrate had left open the question of whether the prosecution should pay his costs of defending the charges.
- [4] The applicant claims that he is entitled to be reimbursed for those costs by the respondent. That claim is disputed upon one ground, which involves a question of construction of the policy. The applicant seeks a declaration that upon its proper construction, he is entitled to be reimbursed. The respondent first argues that the application is premature, because it should await the magistrate's ruling on whether the prosecution should pay the costs. But further the respondent argues that upon its proper construction the policy does not cover these costs.
- [5] It is convenient for this question of construction to be decided now. The merits have been argued and there is no factual dispute. I go then to those terms of the policy which the arguments agree to be relevant.
- [6] Within the section headed "Directors & Officers Liability Insurance" an extension the insuring clause provides:¹
- "Investigations, Inquiries, Prosecutions (Criminal or Otherwise)**
 Insurers shall pay on behalf of the insured(s) on an ongoing basis all reasonable legal fees, costs and expenses incurred in being legally represented with respect to any legally compellable attendance at any Investigation PROVIDED THAT
 (1) the Investigation related to matters which may give rise to a Claim"
- [7] Clause 2 within that part of the policy contains these definitions:
 "Claim" means any notice received by the (Council) or by the Insured(s) alleged to have committed a Wrongful Act, of the intention of a person or entity to hold the Insured(s) responsible for the results of any Wrongful Act, including any demand received by

¹ Clause 3(b).

the Insured(s) for money or services naming the Insured(s) as defendant(s), or the institution of legal, arbitration or administrative proceedings against the Insured(s)...

“Defence Costs” means reasonable legal fees, costs and expenses incurred by or on behalf of the Insured(s) with the written consent of Insurers, such consent not to be unreasonably withheld (but shall not include wages, salaries or other remuneration of the Insured(s) or of any employee of the (Council)), which are necessary to defend or appeal a Claim covered by this policy..

“Investigation” means any investigation, inquiry, public examination, commission, hearing or prosecution, criminal or otherwise...

“Wrongful Act” means any act, error, misstatement, misleading statement, misleading conduct, omission, neglect or breach of duty made, committed, attempted or allegedly made, committed or attempted by an Insured individually or otherwise *in the course of the duties of that Insured(s) as (councillor) of the (Council)*...

I have highlighted those words in the definition of “Wrongful Act” because, according to the respective arguments, they are the critical words to be construed.

- [8] Returning to the insuring clause, the legal fees, costs and expenses must be incurred with respect to a legally compellable attendance at an Investigation. The relevant Investigation here is the criminal proceeding, not the CMC inquiry from which the criminal proceeding arose. As it happened the applicant was insured under another policy, by a different insurer, for the period in which he incurred legal costs relating to his participation in the CMC inquiry, and his claim against that insurer for those costs was upheld by Douglas J in *Power v ACE Insurance Ltd* [2005] QSC 327.
- [9] The respondent accepts that the criminal proceeding was an Investigation and that the applicant’s legal representation was with respect to a “legally compellable attendance” in those proceedings. The next question is whether the Investigation related to matters which may give rise to a “Claim”. At this point the suggested application of the policy becomes awkward. A “Claim” is defined as a “notice received by ... the Insured ... of the intention of a person or entity to hold the Insured responsible for the results of any Wrongful Act”. The subject matter of the Investigation must be “matters which *may give rise to a Claim*”. This indicates that the relevant Investigation must occur in advance of a potential Claim. But the respondent does not argue that this point provides an answer to the present application. Still, because the Court is being asked to declare the effect of this contract, it will be necessary to consider the point. Before doing that I will discuss the question which was argued.
- [10] That question is whether the conduct which was alleged against the applicant in the criminal proceedings constituted a Wrongful Act. Clearly the conduct involved an alleged misstatement or misleading statement made by the applicant. The question is whether that statement or statements, made in a document provided by the applicant to the CMC, was made in the course of the duties of the applicant as a councillor.

- [11] The applicant says that there is a clear connection between his position as a councillor and his participation in the CMC inquiry. The inquiry was investigating, amongst other things, his own conduct as a councillor. The applicant argues, correctly in my view, that it is unnecessary to show that the provision of a false statement was itself a breach of a specific duty as a councillor. The question is whether in a broader way there is a relevant and sufficient connection between his work as a councillor and the provision of information to the CMC.
- [12] The applicant seeks to find support in the judgment of Douglas J which upheld his claim for his costs of participation in the inquiry. The terms of that policy could be considered to be relevantly indistinguishable from the present policy on this point. But the context is different. In that case the relevant Investigation was the CMC inquiry, and the relevant Wrongful Act was not to do with his participation in the inquiry, but related to what he was suspected of having done as a councillor. In my view there is no significant support for the applicant's argument in that judgment.
- [13] The respondent argues that the provision of information to the CMC was not in the course of the applicant's duties as a councillor. Instead it was in the course of his participation as a witness in the CMC inquiry. To the extent that it was in the course of any duty, the respondent argues that the duty was simply that of any witness to give truthful evidence. The document provided to the CMC was provided in response to a summons. The applicant did not provide it at the Council's specific request. Nor is it the case that he was giving evidence in a cause being prosecuted or defended by the Council. Accordingly, the respondent argues, the matters alleged against him in the criminal proceedings were not a Wrongful Act as defined and he is not entitled to indemnity for his costs.
- [14] Although the respondent's argument has substance, it avoids one consideration which in my view is important. Undoubtedly the applicant was endeavouring to protect his own position as he participated in the CMC inquiry. That is why he engaged his own lawyers. But the CMC was investigating official misconduct relating to the Council, and whatever some participants in the inquiry may have thought at the time, it was in the ultimate interest of the Council that the CMC uncover the truth of the matters which were under investigation. It was surely in the Council's interest as a public authority that any official misconduct be uncovered, or the absence of it be the subject of a public finding. In turn, whether or not the applicant adverted to this at the time, his participation in the inquiry was somewhat different from someone who was not in any respect serving the Council. This is not to say that he was duty bound to give evidence (had he not been compelled to do so by the CMC's summons) or that any relevant privilege was qualified or abrogated. But just as it was in the Council's interest that the CMC discover the truth, so it was related to the applicant's duties as a councillor that the information he provided to the CMC was truthful. The point is not so much that he owed a particular duty as a councillor to provide truthful evidence; rather it is that the Council's interest in the CMC's successful discovery of the truth made his participation more closely related to his duties as a councillor than the respondent's argument would suggest.
- [15] His provision of a statement to the CMC, for its investigation of the propriety of his performance as a councillor, was in consequence of what he had done or was suspected of having done in the course of his work at the Council. And the process in which he was then participating was one which was for the ultimate benefit of the Council as well as being in the wider public interest. In my conclusion the

applicant's argument should be accepted on this particular question. I return then to the question of whether the criminal proceeding was not only an Investigation but one which related to "matters which may give rise to a Claim".

- [16] This part of the policy, which is headed "Directors & Officers Liability Insurance", insures councillors and Council employees against their liabilities which are the subject of Claims. Clause 1(a) provides:

"Insurers shall pay on behalf of the Insured(s) all Loss which they are legally obligated to pay, and/or shall pay on behalf of the Company all Loss which the Company is legally required or permitted to pay the Insured(s) as advancements or indemnity under applicable company indemnity laws or agreements, for any Claim against the Insured(s) for a Wrongful Act, provided the Claim is first made against the Insured(s) during the Policy Period."

So the primary cover is for an insured's legal liability to pay any "Loss" which is defined to mean:

"...any damages, compensation, interest and costs (where determined by judgments or by settlements) and Defence Costs. Loss shall not include punitive or exemplary damages or fines or penalties imposed by law which are deemed uninsurable under the law."

The term "Defence Costs" is defined to mean:

"...reasonable legal fees, costs and expenses incurred by or on behalf of the Insured(s) with the written consent of Insurers, such consent not to be unreasonably withheld...which are necessary to defend or appeal a Claim covered by this Policy."

- [17] I have already set out the definition of "Claim". Within that definition there is no express reference to a Loss. But the connection between a Claim and Loss is clear enough from the insuring clause 1(a). A Claim is some process by which a person seeks from the Insured some money of the kind which is a Loss. The primary insurance is an indemnity against the insured's legal liability to pay that money. It follows that the process by which a criminal prosecution against an Insured is commenced is not a Claim as defined. That is probably why the applicant does not argue that the costs of defending that prosecution are Defence Costs as defined, because they are not costs in defending a Claim.

- [18] Nor does the applicant rely upon clause 1(c) which provides as follows:

"Insurers shall indemnify the Insured(s) for all such reasonable legal fees, costs and expenses incurred and paid by the Insured(s) in the defence of or investigation of any demand, Claim, suit or legal proceeding with respect to which the Insured(s) established that the act or acts which were committed would entitle the Insured(s) to recovery under this Section if any Loss resulted therefrom. Such indemnity shall be in addition to the Limits of Liability specified in the Schedule."

This clause does not assist the applicant. The costs are not "in the defence of or investigation of any Claim". They are costs in the defence of a legal proceeding, but not one for which the alleged acts of the insured would entitle him to "recovery

under this Section if any Loss resulted therefrom”, because there was no prospect of any liability for any Loss from the conduct alleged by the prosecution, had that conduct been proved.

- [19] It is no doubt with those difficulties in mind that the applicant seeks indemnity not under the primary insuring clauses but under the specific extension in relation to the costs of legal representation at an Investigation. Returning then to that provision, the difficulty for him is that the investigation constituted by the criminal proceedings did not relate to matters which had the potential to give rise to a Claim. Counsel for the applicant was unable to explain what might constitute a Claim which could arise from the conduct the subject of the criminal proceedings. The evident purpose of limiting the cover for legal costs of an Investigation to a context where there could be a Claim is that, in essence, this is insurance against liability for a loss which is the subject of a Claim. It is possible to conceive of circumstances where a criminal prosecution would investigate matters which have a potential for a Claim; for example a prosecution for dangerous driving causing bodily harm. In the present case, the matters to which the criminal proceedings related did not have the potential to give rise to a Claim. It follows that this was not an Investigation of the relevant kind for the extension and the applicant is not entitled to be reimbursed for these costs. I add that the applicant’s policy which Douglas J considered appears to have been worded differently, in that it did not limit the relevant Investigation to matters which may give rise to a Claim.
- [20] The application will be dismissed. I will hear the parties as to costs.