

Question — double insurance claim within the Federal Court jurisdiction? *Epsilon v Liberty*

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In *Epsilon Insurance Broking Services Pty Ltd v Liberty Managing Agency Ltd*,¹ Allsop CJ determined the preliminary issue of whether the Federal Court had jurisdiction to hear Epsilon’s claim for equitable contribution from the respondent insurers. The basis of the claim was double insurance.

The case involves the construction of two policies of insurance and the potential application of s 54 of the Insurance Contracts Act 1984 (Cth) to determine whether there had been dual insurance. The first policy was a combined business liability insurance policy (Epsilon Policy). The second policy was a management liability insurance policy (DUAL Policy). The insured was Ditchfield. On 3 September 2016, there had been a diesel spill at a waste management centre where Ditchfield had been carrying out works. Mitigation works had been carried out.

The Epsilon Policy covered the mitigation costs. The DUAL Policy allegedly did not cover the mitigation costs because Ditchfield had failed to notify DUAL of an investigation within the meaning of the DUAL Policy. However, Epsilon said that the failure to notify was cured by s 54 of the Insurance Contracts Act.

Epsilon had to satisfy the Federal Court that there was a matter “arising under federal law” to invoke the court’s jurisdiction by showing either:

- the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement, whether or not the determination of the controversy involves the interpre-

tation (or validity) of the law: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett v Opitz*,² or

- the defence raised a matter “arising under” federal law if the source of a defence is a title, or right is given by or depends upon a Commonwealth law: *Felton v Mulligan*.³

Allsop CJ was satisfied that s 54 was the source of Ditchfield’s rights under the DUAL Policy which is determinative in part upon whether Epsilon was entitled to equitable contribution from the respondents, and that the Federal Court had jurisdiction to hear the case. This finding would come as no surprise but provides certainty to insurance practitioners.



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Footnotes

1. *Epsilon Insurance Broking Services Pty Ltd v Liberty Managing Agency Ltd* [2019] FCA 990; BC201905349.
2. *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett v Opitz* (1945) 70 CLR 141 at 154 per Latham CJ.
3. *Felton v Mulligan* (1987) 124 CLR 367 at 374–5, 388, 403 and 408.