Australian
Insurance
Law Bulletin

Possible bribery in Iraq procurement — to notify or not to notify

Laina Chan *2 SELBORNE CHAMBERS*

Background

In *CIMIC Group Ltd v AIG Group Ltd*,[1] the court had to determine whether CIMIC was entitled to indemnity under its Director and Officers' Insurers for the years 2010/2011 and 2011/2012 (2010 Insurers and 2011 Insurers, respectively). Quantum was referred out to a special referee. The proceedings hinged around the significance of the "Iraq File Note" dated 23 November 2010. It records a conversation between Mr Stewart, the then CEO of Leighton Holdings Ltd (Leighton) and Mr Savage, the then Leighton COO, Managing Director of Leighton International Ltd (LIL) and Associate Director of Al Habtoor Leighton Group (AHLG). The Iraq File Note suggests bribery and is reproduced in Appendix A.

The Iraq File Note came to light in November 2011 during a document review conducted by Leighton's external solicitors in order to respond to a notice issued under s 33 of the Australian Securities and Investments Commission Act 2001 (Cth) as part of an Australian Securities and Investments Commission (ASIC) investigation concerning the April 2011 profit downgrade.[2] By then, Mr Stewart had been replaced as CEO by Mr Tyrwhitt.[3] The Leighton Board subsequently resolved to refer the Iraq File Note to the Australian Federal Police and this was done on 7 November 2011.[4]

On 23 February 2012, Leighton notified the 2011 Insurers of circumstances that may give rise to a claim. The 2012 Notification referred in part to the AFP referral made on 7 November 2011, but it did not attach a copy of the Iraq File Note.[5]

There are various categories of costs that CIMIC was seeking indemnity for under the 2011 Policy. This included AFP Investigation Costs, ASIC Investigation Costs which included Iraq Investigation Costs and Non-Iraq Investigation Costs, Class Action Defence Costs, Settlement Sums paid in the Inabu Class Action, Inabu Class Action Defence Costs and Gregg Prosecution Costs.[6] In relation to the 2010 Policy, CIMIC sought a declaration to the effect that there were notifiable circumstances during the 2010 policy period.

Key issues

It is beyond the ambit of this note to address every issue the court had to determine given that the judgment is about 200 pages in length. Instead, this note will only highlight the key issues in the case.

Regarding the 2011 Insurance Policy

Should Leighton have disclosed the Iraq File Note before 30 June 2011, the inception of the 2011 Policy?

On a proper construction of the 2011 Policy, the court found that the 2011 Insurers had preserved their rights in relation to pre-inception misrepresentation or non-disclosure.[7] The court therefore had to determine whether the Iraq File Note ought to have been disclosed to the 2011 Insurers.

An important consideration is whether a subjective or an objective awareness of notifiable circumstances is necessary. The relevant clause of the 2010 and 2011 Policies provided:

> Any *Insured* may, during the *Policy* Period or applicable *Discovery* Period, notify the Insurer of any circumstance reasonably expected to give rise to a Claim. The notice must include the reasons for anticipating that Claim, and full relevant particulars with respect to dates, the Wrongful Act (if applicable) and the potential Insured and claimant concerned [emphasis added].[8]

The court accepted the submission of CIMIC that "'reasonably expect' is an objective test focusing on the objective potential of a claim, and the purpose of the phrase is to facilitate cover".[9]

Had Leighton breached its duty of disclosure?

It was accepted that to determine whether CIMIC had failed to comply with its duty of disclosure pursuant to s 21 of the Insurance Contracts Act 1984 (Cth) (the Act), it was necessary for the 2011 Insurers to demonstrate:

- particular facts were known by Leighton and
- a reasonable person in the position of Leighton "could be expected to know" that the facts as found were "relevant to the decision of the insurer to accept the risk and, if so, on what terms" for the purposes of s 21(1)(b) of the Act

The court found that the relevant knowledge of Leighton for pre-inception disclosure was at least that of Mr Stewart. By the deadline for Leighton to make

disclosure before the commencement of the 2011 Policy, both Mr Savage and Mr Wild were no longer in the employ of Leighton. However, their knowledge during the 2010 Policy period could be imputed to Leighton. This is because knowledge imputed to a company should not be treated as capable of simply being forgotten or lost at the death of a director. A corporation cannot cause itself to shed knowledge by shedding people.[10]

In identifying the particular facts known to Leighton, the court accepted that the Iraq File Note is a business record. This however did not mean that the court had to accept that the representations in the Iraq File Note are true. Instead, there had to be a weighing of all the evidence.[11]

A survey of the evidence in the case led the court to conclude that had there been disclosure of the information concerning the Iraq File Note, the 2011 Insurers would not have entered into the 2011 Policies on the same terms, without including liability exclusions for losses attributable to the Iraq File Note. The court declined to opine upon the precise form of those exclusions but was satisfied that "some sort of action would have been taken in response to the notification".[12]

Had there been pre-inception misrepresentation?

The court found that there had been pre-inception misrepresentation because no reference was made to the Iraq File Note facts in the 2011 Proposal or signed Declaration. The Proposal and the signed Declaration amounted to a representation by Leighton that, after having made enquiries of all appropriate staff, it was not aware of any facts which might give rise to a claim against any of its directors or officers, apart from facts which were included.[13]

What was the effect of Leighton's breach of the duty of disclosure and misrepresentation?

The 2011 Insurers had each relied upon evidence from their underwriters that had they been notified, they would not have entered into the 2011 Policy on the same terms, without excluding possible claims attributable to the Iraq File Note facts. For that reason, the 2011 Insurers submitted that their liability for Company Securities claims[14] should be reduced to nil.[15] This submission was accepted in relation to each of the 2011 insurers.[16]

Regarding the 2010 Insurance Policy

Were there notifiable circumstances during the 2010 Insurance Policy Period?

The court found that Leighton could have notified the Iraq File Note because through Mr Stewart, Leighton knew of the facts asserted in the Iraq File Note and could have reasonably expected such facts would give rise to a claim.[17]

Had CIMIC lost its entitlement to claim under the 2010 Policy by way of election or waiver?

The court found that CIMIC had not lost its entitlement to claim under the 2010 Policy. There had been no election in proceeding against the 2011 Insurers.[18] The court was not persuaded that CIMIC's rights against the 2010 and 2011 Insurers are properly characterised as alternative, mutually exclusive and inconsistent with each other, such that CIMIC made a choice between those rights.[19]

Equitable contribution

AIG, a 2011 Insurer, also sought equitable contribution from some of the 2010 Insurers. The court found that the steps taken by Leighton to enforce its indemnity under one policy and not the other are subsequent events which do not affect the existing right of an insurer to seek contribution from the other. AIG incurred the liability to indemnify Leighton at the time of the 2012 Notification. If Leighton had notified its 2010 Insurers of the circumstances of the Iraq File Note, then the 2010 Insurers *could* have been liable for the losses later incurred by CIMIC.[20] The choice that Leighton had to seek indemnity under either the 2010 or the 2011 Policies "informs the availability of the equitable right of contribution".[21] This is not controversial.

However, the court found that:

> . . . if necessary, AIG is entitled to equitable contribution of 50% from Berkley and Swiss Re. Berkley is liable to contribute up to its limit of liability under the 2010 Third Excess Policy and Swiss re is liable to contribute the balance. Quantum will be determined at the Separate Hearing.[22]

Bearing in mind the principle that surety A only has the right to call on a co-surety B for contribution where co-surety B could have been liable to pay the amount surety A paid,[23] the finding of equitable contribution in the order of 50% is curious given that quantum has not been determined in the proceedings.

A declaration is made

Over the objection of the 2010 Insurers that any declaration would be hypothetical, the court was prepared to make the following declaration as against the 2010 Insurers that:

> . . . in the events which have happened, the plaintiff was, during the period 30 June 2010 to 30 June 2011, aware of circumstances reasonably expected to give rise to a Claim within the meaning of cl 5.1 of the excess policy entered into by that defendant for that period.[24]

Conclusion

While the case is primarily about notifiable circumstances, the Act and the consequences of a failure to notify, the case also provides a useful summary of the principles in relation to:

- construction of policies of insurance[25]
- proving the reasonableness of settlements[26]
- rectification of insurance contracts[27]
- election[28] and
- declaratory relief[29]

Iraq Project Discussion File Note 23/11/10 Meet DG Savage Advised me that he has an opportunity to negotiate a US$500 extension/variation to the current contract in Iraq but it will require a payment to a 3rd Party N.S.C. [nominated sub contractor] who will do all onshore works. The payment for the N.S.C [nominated sub contractor] for onshore work is $50-$60 Mill. D. Stewart asked what is the real value of the work & he said <50% of the payment. I asked him how we won the current $720 contract & he says it was won by a $87 Mill payment to a N.S.C [nominated sub contractor] on the same terms. I asked did WMK [Mr King] approve this & he said yes. I said I will talk to WMK & he said that WMK will now deny it or have 'forgotten it'. I said I understand the concept & it is exactly what got the AWB [Australian Wheat Board] into trouble with their trucking contract at 2–3x Market Rate. I asked what Foster Wheeler think about it? I asked who negotiated it? He said Russell Waugh. I said I will talk to Wal [Mr King] and he said No. I said I will think about it & that I am not comfortable but understand the plan. I asked how we pay & he said proportional to our payments.
Thought about it, talked to WJW [Mr Wild] & we agreed to tell David [Savage] we do not agree & if we can't win without this, we don't want the job. Tried to call @ 6.05. Left a message to call me about Iraq. Call again @ 6.25pm. Spoke to DGS [Mr Savage] and made it clear that I was not comfortable with the arrangements & that if he can't win without this, then we don't want the work. WMK [Mr King] is still the CEO & if he is O.K. with it, then go for it, but be aware I will not support it. I told him I fully understand the concept & the fact we have been introduced to this 'N.S.C' [nominated sub contractor] by the client but it is too much money & a clear lack of value of money & we should not do it.
D.G.S. [Savage] said that R.W. [Russell Waugh] was in Bagdad now and meeting with the Minister PTO to try to negotiate this job. DGS [Savage] says he will ring Russell [Waugh] & talk to him. D Stewart says that WMK [King] is still CEO & if he is O.K. with it go for it but he has to approve it & I will not ask Wal [King] about the current job.

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

Footnotes

1. *CIMIC Group Ltd v AIG Group Ltd* [2022] NSWSC 999; BC202207082.
2. Above, at [66].
3. Above n 1, at [65].
4. Above n 1, at [70].
5. Above n 1, at [78].
6. See above n 1, at [367]–[439] for findings in relation to whether each of these categories amount to loss within the meaning of cl 4.21 of the 2911 Policies. See also the finding that a settlement sum has to be reasonable, who bears the onus of proving reasonableness, the applicable principles of determining reasonableness (at [420]), the consideration of whether the settlements in the Inabu Class Action were reasonable and the ultimate finding that the sums were reasonable: above n 1, at [415]–[432].
7. Above n 1, at [141] and [157].
8. Above n 1, at Appendix cl 686.

9. Above n 1, at [168] and [170].
10. Above n 1, at [187] citing *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473; [1999] NSWCA 323; BC9905745 at [244] for the principle.
11. Above n 1, at [190].
12. Above n 1, at [365].
13. Above n 1, at [328].
14. Securities was defined to mean any security representing debt of or equity interest in a Company: above n 1, at [679]. A Securities Claim included any written demand or civil, criminal or arbitration proceedings alleging a violation of any laws (statutory or common), rules or regulations regulating Securities, the purchase or sale or offer or solicitation of an offer to purchase or sell Securities or any registration relating to such Securities: above n 1, at [678].
15. Above n 1, at [330].
16. Above n 1, at [365]. See also [347] in relation to AIG, [351] in relation to Chubb, at [353] and [359] in relation the Catlin (an excess insurer) and at [364] in relation to Liberty.
17. Above n 1, at [535].
18. Above n 1, at [590].
19. Above n 1, at [590]–[604].
20. Above n 1, at [552].
21. Above n 1, at [553].
22. Above n 1, at [563].
23. *Dering v Earl of Winchelsea* 1 W & TLC 5th Ed p 106.
24. See above n 1, at [613] and [649].
25. Above n 1, at [122].
26. Above n 1, at [419]–[420].
27. Above n 1, at [528].
28. Above n 1, at [586].
29. Above n 1, at [624]–[637].