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COURT OF APPEAL UPHOLDS POLICYHOLDER'S RIGHT TO RECOVER COSTS OF 'VOLUNTARY' REMEDIATION WORKS

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Legal Briefings – By **Mark Darwin, Guy Narburgh and Brendan Donohue**

The NSW Court of Appeal has recently confirmed that a policyholder is entitled to recover under its liability policy the costs of 'voluntarily' remediating accidental damage in compliance with statutory obligations, even where there had been no prosecution or third party claim against the policyholder.

This decision encourages policyholders to proactively address incidents rather than await a formal claim. Care should however be taken in classifying and recording remedial costs to ensure proper recoveries can be made under insurance policies.

THE FACTS

Petrol had leaked from a service station operated by the policyholder, causing an explosion in a nearby water sewer and contamination in other underground services. The policyholder responded quickly and 'voluntarily' undertook works to rectify the damaged sewer, addressing both its statutory obligations and its civil liability to the sewer main's owner in the process.

The liability insurer declined the claim for the remediation costs, alleging that the costs of compliance with statutory obligations were not covered. At first instance, the policyholder successfully recovered the costs of remedying the damage (but not the cost of works to prevent future leakages) on the basis that the policy covered liability arising out of damage resulting from pollution (which expressly included 'nuisance', despite the fact that the policyholder also had a statutory obligation to remediate the damage). The insurer appealed.

THE DECISION

The policyholder succeeded on appeal. The Court of Appeal dismissed the following main arguments raised by the insurer:

1. **Did the policyholder breach a duty of disclosure to the insurer?**

   The insurer argued that the policyholder failed to disclose two technical reports regarding contamination at the service station. The insurer alleged that, if those reports had been disclosed, it would not have taken on the risk at all, so alleged it had been prejudiced by the non-disclosure. The Court concluded that a reasonable person in the policyholder’s position could not be expected to know that the reports would be relevant to the insurer's underwriting decision. Those reports supported an ongoing belief that (1) contamination at the policyholder’s premises was the result of historical leaks and spills which was not out of the ordinary having regard to the earlier use of the site and (2) other factors (such as a climatic or geological change) were unlikely to shift the onsite contamination to neighbouring properties.

2. **What was the relevant damage?**

   The insurer also argued there was no ‘Damage’ that was covered by the insured’s policy, but the Court held that the presence of petrol in a sewer was capable of constituting an actionable nuisance to the sewer main’s owner, which was within the policy definition of ‘Damage’. Such a nuisance occurred when the sewer main’s owner became aware of the risk associated with the presence of contaminants in the relevant sewer – which enabled the occurrence of ‘Damage’ within the policy period.

The policyholder failed in a cross-appeal seeking recovery of the costs of works to prevent future petrol leakages, on the basis (as held below) that the preventative works were not performed to prevent an ‘existing nuisance’.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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