

TANEVSKI v TRENWICK INTERNATIONAL LTD

This recent decision of the New South Wales Court of Appeal highlights the relationship of insurer and agent. The issue was whether Samac Pty Limited (“**Samac**”) the insured, was protected by an insurance policy at the time of the assault and if so who was the insurer. The relationship between the insured and their insurer became complicated due to the activities of the insured’s broker with other brokers and ultimately the insurer. This will become apparent on consideration of the events leading up to the court proceedings.

FACTS

Proceedings were originally initiated with respect to an assault at the Grand Hotel Wyong (“**the hotel**”). Vincent Komene, was assaulted on the premises of the hotel by another patron on 3 July 1998. In 2000, he sued the first appellant, Mr David Dusko Tanevski (“**Mr Tanevski**”) the licensee of the hotel and the second appellant Samac for damages. The trial Judge found in Mr Komene’s favour and awarded damages of \$516,435.05 against Mr Tanevski and Samac. Samac had only recently completed the purchase of the hotel from Daravel Pty Limited (“**Daravel**”) on 23 April 1998. As a consequence of assault charges four cross claims were initiated, the majority concerning the public liability insurance cover for the hotel at the time of the assault. Samac cross-claimed against I&S Insurance Broking Group Pty Limited (“**I&S**”), Australian Insurance Brokers Metalworth Pty Limited (In Liquidation) (“**Citilink**”) and Trenwick International (“**Trenwick**”) who had taken over the affairs of Specialist Risks Underwriters Limited (“**Sorema**”). The fourth cross-claim was brought by Mr Tanevski and Samac against Mr TR Williams, the patron who assaulted Mr Komene but this was never served.

To obtain an understanding of how Samac came to be in the position that their insurance cover was disputed consideration must be had to the events leading up to their purchase of the hotel and the activities of the brokers that were organising the insurance cover. Throughout 1997 negotiations were taking place between Citilink and TL Dallas (London) Ltd (“**Dallas**”) concerning an association whereby Citilink in Australia could take advantage of Dallas’ agencies. Dallas were insurance brokers and were agents for both Lloyd’s and Sorema. Pursuant to these negotiations, Dallas issued Citilink a cover note authorising them to provide public and products liability cover. A short time later, A New Zealand Broker, International Underwriting Agencies Ltd (“**IUA**”) came into the arrangement. IUA was also associated with Wilkinson Insurance Brokers Ltd (“**Wilkinson**”). The principal of both firms was Mr Tim Haynes and both firms were carried on in the same

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premises, one as an underwriting agency and the other as a broker. On 7 January 1998, a new cover note authorised Citilink and IUA to write public and products liability cover to a maximum of \$10,000,000. Sorema was to be the insurer of 100 per cent of the cover written under authority of the public liability cover note.

Daravel the previous owners of the hotel, had previously arranged property cover through Citilink. The policy was for the period 19 January 1998 to 19 January 1999. Daravel had also requested public liability cover in the amount of \$5 million but Citilink neglected to make such an arrangement. The omission was brought to Citilink's attention in April 1998 when the hotel was being sold to Samac. A certificate was then issued, pursuant to the authority, to Daravel for both the public and property cover for the period 19 January 1998 to 19 January 1999. The cover was to be provided by Sorema but the certificate incorrectly stated that the insurer was Lloyd's for both policies when in fact Lloyd's cover was only with respect to a property policy. The public liability cover was placed with Sorema.

Samac sought quotations concerning insurance for the hotel prior to purchase from a number of sources, including I&S. I&S carried on business as an insurance broker in Australia. Apparently, I&S was not familiar with hotel insurance and through QBE Insurance Ltd and the insurance brokers Blundell & Associates came to contact Citilink. A representative from I&S set out the details of the cover required to Citilink in a facsimile and Citilink's representative replied with a facsimile setting out the premium. Citilink also informed I&S in a telephone conversation that the insurer would be Lloyd's and that the claims would be dealt with in Australia by GAB Robin. This information was endorsed upon the facsimile received by I&S. I&S then informed Samac of this arrangement. Samac then instructed I&S to arrange the public liability cover for \$10,000,000.

After these negotiations had taken place and the hotel had passed hands to Samac, Citilink arranged for the property cover of Daravel to be assigned to Samac and a certificate was issued particularising such on 24 April 1998. Samac's particulars had been forwarded to Dallas by Wilkinson and Dallas had approved the assignment. Therefore, Wilkinson treated the property policy as being amended so as to substitute Samac in the place of Daravel on the existing property policy with Lloyd's over the hotel. The premium payments passed from I&S to Citilink to IUA and Wilkinson and through to Dallas. The position with respect to the public liability policy was unclear as the Judge noted that "the position in relation to the public liability policy is not so clear for Citilink was incompetent as well as being dishonest" (at paragraph 32). As was previously discussed, Citilink had failed to provide cover for public liability to Daravel as had been represented and this was not discovered until Citilink learned that the hotel was for sale. A certificate of insurance was then issued under the authority conferred by the earlier

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cover note to cover Daravel. The cover was provided by Sorema not Lloyd's as had been represented.

I&S mistook the original endorsement and issued certificate to include the public liability cover for \$10,000,000 that they had earlier requested. I&S also believed that this cover was being provided by Lloyd's as Citilink had represented when they requested their assistance in formulating cover for Samac over there new purchase. In fact, later after they had realised their mistake Citilink issued a certificate of insurance on 25 April 1998 with the names of the new owners with cover to \$10,000,000.

THE DECISION

The Judge questioned whether Citilink acted under the authority it had by the cover note of 7 January 1998 to bind Sorema to provide public liability insurance for Samac. He further noted that Sorema was bound by the actions of its agent, whether the agent does its work efficiently or effectively. The issue was therefore, whether Citilink acted under its authority and undertook, on behalf of Sorema, to provide public liability cover for Samac. The Judge came to the conclusion that the facts convincingly showed that Citilink did bind itself and Sorema to that cover. He also noted that the fact that Citilink represented it was Lloyd's cover did not diminish the fact that Citilink had been asked to provide cover and it acted under the authority to provide that cover from Sorema. There was no available evidence indicating that Citilink had sought to or had authority to bind Lloyd's and so the Judge had no difficulty in establishing that there was no Lloyd's cover.

Counsel for Sorema submitted that as Citilink represented that it was providing Lloyd's cover and as the insured understood that they were obtaining Lloyd's cover, then no contract could have come into existence between Sorema and Samac. However, Citilink was the agent of Sorema and it wrote cover on Sorema in favour of Samac. This constituted a contract between Sorema and Samac. Samac were entitled to repudiate the contract for fraud because they had been misled by Citilink concerning the identity of the insurer but they did not do so. Therefore, they were entitled to enforce the contract.

Judge Davies considered the relationship of a person seeking insurance through a broker:

“In my opinion, when a party seeks insurance from a broker and that broker, having the authority of an insurer, binds the insurer in favour of the party seeking insurance, a

contract between the insurer and the insured will ordinarily come into force, notwithstanding that the broker may have breached the instructions which the insured party gave. Here, there was an insurance contract and consideration given by the insured to the insurer.” (at paragraph 59)

IMPLICATIONS

This decision may have effect on the way the agency agreement between insurers and insurance brokers operates. The insurer may have to take a more hands on approach with insurance brokers who act as their agents, because the insurance company may be bound to cover the insured even though their agent issues a certificate naming a different insurer. Notwithstanding the fact that this decision turned largely on its complicated facts, it is possible that the decision will have far reaching effects.

Quinlan, Miller and Treston Lawyers' insurance team is able to assist with any enquiries concerning insurance brokers and their principals and insurance matters generally. For further information please contact:

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