

# Newsletter

September 2011

## Agora Asset Management and Leighton Class Action

You may have come across two matters in the news recently: Leighton's class action and Military Super & Agora Asset Management dispute. This month's newsletter will look at some of the insurance issues that may be applicable for each case, and how this might be relevant to you.

### Agora Asset Management

There was a dispute between Military Super and Agora Asset Management group stemming from an exit fee charged by Agora when Military withdrew its \$152m investment. Military Super sued Agora and accused the fund manager of capricious conduct and breaches of its duty.

The Victorian Supreme Court ruled that Agora Asset Management was fully entitled to charge Military Super the \$8m exit fee - even though Military Super cancelled its redemption request. The Judge ruled that the terms of the constitution and information memorandum specifically entitled Agora to charge the fee and to withhold its consent on the redemption reversal<sup>1</sup>.

### Insurance thoughts:

Assuming Agora had insurance in place, how would have their insurance policy responded to the claims made by Military Super? As I have no inside knowledge of this case, I'll assume there are two causes going on here:

- Dispute over the fees; and
- Dispute over the refusal to reverse the redemption

Firstly, it may come as no surprise to those of you that read my newsletters (which I'll safely assume is all of you!), that there are a wide variety of insurance policies out there and they can all respond differently.

Many Insurers have a policy exclusion in relation to fees and commissions. See example below:

---

<sup>1</sup> 'Military Super fails to outflank \$8m fee'. The Age 6<sup>th</sup> Sept 2011 by Leonie Wood

*The Insurer shall not be liable to make any payment for Loss arising out of, based upon or attributable to any Wrongful Professional Act which gives rise to a liability to a third party for fees, commissions, or other compensation for any Investment Advisory Services rendered or required to be rendered by an Insured or Fund or that portion of any settlement or award in an amount equal to such fees, commissions, or other compensation.*

In other words, the Insurer considers that a dispute over fees is a commercial matter not an insurable matter. A key set of words in this exclusion is “arising out of, based upon or attributable to..”. If your Insurer has this language then there is probably a solid argument that no cover is available for the either the fee dispute (directly relates to fees) or the refusal to reverse the redemption (arises out of the fee dispute).

Some Insurers do not have this exclusion. So, how would they respond? I spoke to a couple and they said it was ‘untested’, which means in insurance speak “we have no idea”. They don’t want to cover fee disputes but nor do they exclude it as standard in their policy.

If it’s simply an allegation that you charge too much, the Insurer may say that there is no alleged wrongful act. However, in the case of Military Super and Agora the allegation was capricious conduct and breaches of its duty, which I think might well fit within policy definitions of wrongful act. At least you would have better grounds to get your legal costs covered with this Insurer than you would with an Insurer that has the specific exclusion.

If fee disputes are a concern to you (or possibility to you) check your cover.

## **Leighton class action**

A class action has been launched against Leighton relating to the way they handled a series of profit downgrades and \$1.2 billion write-down on key projects. The allegation is that Leighton misled shareholders and breached the continuous-disclosure rules.

In an article in The Age 1st Sept 2011, by Adele Ferguson, I noted a couple of other items of interest:

*“In the past week the company has lost its chairman and chief executive and at the annual meeting there is likely to be more change at board level...”*

*“It[Leighton’s] is also believed to be embroiled in an investigation by ASIC over its continuous-disclosure practices, ...”*

## **Insurance thoughts:**

I wish to briefly look at 3 issues that are relevant for all Boards and D&O policies:

- a) Claims made against the directors vs claims made against the company itself;
- b) Claims made against retired directors and officers;
- c) Are investigations covered by D&O insurance?

## *Claim's against the company*

Standard D&O policies cover claims made against the directors and officers but not claims made against the company itself. However, many D&O claims (particularly for listed companies) are made against both the directors and officers and the company. Therefore overtime the standard D&O policy has been extended to over claims made against the company itself – known as entity cover.

**Positive:** Entity cover is valuable cover for a company to have. The majority of the large class action lawsuits against listed companies are invariably made against the company itself.

**Negative:** Many directors suddenly became aware they were sharing their limit of indemnity with the company! So suddenly you had this whole other party (the company) chewing up the limit on its own defence at the expense of the directors. There are also horrendous conflicts of interest to resolve - a director has to act in best interest of the company (which includes accessing the limit of indemnity) but this is at the expense of the same director's personal cover.

**My advice:** Entity cover is valuable cover to consider especially if you are listed. As a rule of thumb smaller listed companies are less susceptible to these types of claims, simply because there is not enough money in it for shareholders, lawyers and litigation funders. Nevertheless, it's still valuable cover worth considering, but be alert for the aggregation and conflict issues.

## *Retired directors*

Retired directors still have rights under the D&O policy. The definition of Insured Person under a policy includes any past, present and future directors. However, be careful if you fall into this category. You have access to the cover that is in place the day the claim is made not when you were necessarily a director. So, if the new Board decides to halve the limit then that's all you have access to as well. The only way to 'protect' your rights is to look at a Deed of Indemnity, which is a separate issue altogether.

## *Investigation*

The costs of preparing for and attending (including lawyers attending) Investigations are typically covered by D&O policies. However a few things to note:

- a) If the investigation is against Insured Persons then cover is available. However, not all policies cover costs of Insured Persons attending an investigation into the company;
- b) If ASIC alleges the company has done something wrong, then all policies cover the subsequent investigation. However, not all policies cover the costs of investigations where no wrongful act is alleged. In other words, if ASIC say 'we just want to come in and have a chat', that may not trigger the policy coverage because no wrongful act is actually alleged. Most D&O policies in the market deal with this issue appropriately but not all.

## T-RUN Contributor

With ASIC's new consultative paper out advertising, I thought this article was a timely reminder on some key issues.

### Commercial corner: misleading & deceptive

T-RUN Contributor

November 30th, 2010

The field of advertising has always been a fruitful one for attracting the laws relating to misleading and deceptive conduct. The need to capture the viewer's attention and interest has not always sat well with the need for adequate disclosure of all material product features.

While the Courts seem comfortable with allowing a degree of exaggeration in relation to the qualitative aspects of a product, they are more severe on mis-descriptions of the quantitative aspects of products - as Optus recently found out in relation to its broadband internet plans\* .

The Optus broadband plans were divided into two parts – 75GB of peak usage and 75GB of off-peak usage. Once the peak usage limit was reached, the speed of both the peak and the off-peak services reduced to less than broadband speeds. However, if the off-peak usage limit was reached the speed did not reduce but further use was deducted from the peak usage allowance (with the speed slowing once the peak limit was reached).

The Federal Court held that the Optus advertising for the plans were misleading in that they stated that consumers would receive 150GB of broadband internet for a fixed price when this was actually far from the case.

Interestingly, the Federal Court held that the relevant class of consumers were the members of the general public with a need or desire for broadband internet access – despite the fact that plans of this size were really only useful for heavy internet users. In a rather sad indictment of consumer buying habits Justice Perram found that:

"It is likely that some consumers who have no conceivable use for [150]GB of superfast broadband will part with money to do so just so that they may have such an imposing data allowance. These vulgarians\*\* are less likely to have a detailed knowledge of the intricacies of internet downloading than those who buy out of a sense of discrimination."

Consequently, the Federal Court found that the description of the size of the plan was misleading in that 150GB of broadband internet was only a theoretical maximum which required use of the off-peak allowance before the peak allowance. The Federal Court held that the ordinary person\*\*\* would consider that exceeding the peak usage would only slow down the peak usage and not the off-peak usage as well.

However, the Federal Court found that an ordinary person would know that exceeding data limits would result in speed consequences and that the slower speed (64kbps) was not a broadband speed. Accordingly, these aspects of the advertising were not misleading.

Optus had argued that the advertisements were not misleading as the customer would have any misconceptions corrected at the point of sale. However, the Federal Court held that merely inducing a customer to think about making a purchase was sufficient to constitute misleading conduct.

The case is also interesting for the manner in which the Federal Court had to consider the various means by which Optus advertised the product – by means of flyers, bill boards, newspapers, television and its website. In relation to the television advertisements, the Federal Court held that the disclaimers were not sufficiently prominent\*\*\*\* to overcome the misleading effect of the advertisement.

The Federal Court held that all of the advertisements breached sections 52 and 55A\*\*\*\*\* of the Trade Practices Act "on the basis of the failure adequately to disclose that once the peak data quota was reached no further use could be made of the off-peak allowance". Injunctions were issued against Optus prohibiting them from advertising those broadband services without "clearly and prominently" disclosing the usage restraints. The extent of the corrective advertising and pecuniary penalties to be imposed on Optus had yet to be determined as at the date of this note.

These misleading conduct rules apply to the conduct of all financial services and credit licensees\*\*\*\*\* . The applicable legislation\*\*\*\*\* for those licensees also contain specific additional requirements concerning advertising of financial products and credit facilities.

Accordingly, much care needs to be taken with the content of any form of promotional material issued by licensees to ensure that it is not misleading having regard to the relevant class of consumers, the understanding of the ordinary person, and the inducement effect of advertising.

---

\*ACCC v Singtel Optus Pty Ltd [2010] FCA 1177.

\*\*Apparently an "unrefined person, especially one with newly acquired power or wealth" – Oxford Dictionary of English

\*\*\*The Judge found that "it would only be exceptionally gifted individuals who would grasp the full import of those words on first seeing them in the advertisement".

\*\*\*\*As the Judge personally found - "only by the most astute watching of the advertisement and the frequent use of the pause button was I able to make them out at all"

\*\*\*\*\*s.52 – misleading and deceptive conduct; s.55A misleading the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

\*\*\*\*\*By virtue of sections 12DA and 12DF of the ASIC Act 2001.

\*\*\*\*\*See, for example, sections 1018A and 1018B of the Corporations Act 2001.

*The above article appeared in T-RUN. T-RUN is a monthly regulatory update service for the financial services industry, published by Holley Nethercote commercial lawyers. When you subscribe to T-RUN, each edition is tailored so you receive only information which is relevant to your business in light of your AFSL or ACL authorisations and AML/CTF needs. With practical advice and tips on how to meet your regulatory obligations, it is your way of staying on top of the ever changing regulatory landscape. T-RUN can also help you meet your AFSL, ACL and AML/CTF training requirements. For answers to your compliance questions, visit [www.complianceforum.com.au](http://www.complianceforum.com.au). The forum, facilitated by Holley Nethercote, is a place to share knowledge with other compliance professionals and colleagues.*