

# Joining insurers

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Plaintiff lawyers are occasionally met with an insurer which denies liability to indemnify the defendant although the defendant has in place a relevant policy of insurance. In such circumstances, the plaintiff almost invariably will have no right of action against the insurer, firstly, for the recovery of the loss which the plaintiff has sustained in consequence of the defendant's wrongs, or secondly, for the amount of the judgment the plaintiff might obtain against the defendant: see generally, *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

In such circumstances, the plaintiff should examine the possibility of joining the insurer as defendant to a claim for declaratory orders that the insurer is obliged to indemnify the defendant in respect of any judgement in favour of the plaintiff arising out of any wrongful act within the terms of the policy. A particular application of the principles can be found in *JN Taylor Holdings Ltd (in Liq) v Alan Bond* 1993 55 SASR 432 distinguished in *Beneficial Finance Corporation Ltd v Price Waterhouse* (unreported, Full Court of the Supreme Court of South Australia, 23 December 1996).

If the plaintiff can determine the insurer's liability to indemnify the defendant under the relevant policy concurrently with the determination of the defendant's liability to the plaintiff, then the plaintiff can minimise if not avoid the costs of further proceedings.

Relevant factors going to the grant of the application for joinder of the insurer as defendant would appear to include:-

1. There must be a denial of liability on the part of the insurer to indemnify the defendant under the relevant policy; viz, the question for determination must be real and not a theoretical question: *Beneficial Finance Corporation Limited v Price Waterhouse* noted by Deborah Lane in *Australian Law Insurance Bulletin*, Vol 12, No 5, April 1997. See generally *R v Lambert; Ex parte Plumber* (1980) 146 CLR 447 per Gibbs at 454-5, Barwick CJ and Wilson J agreeing; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2;
2. The plaintiff must have no reasonable prospects of satisfaction of judgement out of the defendant's assets: viz, the plaintiff must have a real "interest" to raise the question:

*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530-1 per Gibbs CJ, Mason agreeing;

3. The facts relevant to the grounds of denial of liability on the part of the insurer must be the same or substantially the same as the factual inquiry vis-a-vis plaintiff and defendant.
4. The plaintiff's claim for declaratory relief must be within the Court's jurisdiction.
5. In complex litigation, the joinder will advance "interests of judicial economy" or case management considerations; *Pyramid Building Society (in Liq) v Day Neilson Jenkins and Johns* (unreported, Supreme Court of Victoria, 12 April 1996).
6. The joinder must not prejudice the conduct of the litigation by other parties; *Bazza Investments Pty Ltd v Innovation Pty Ltd* (unreported, Federal Court of Australia, 13 October 1995), application for joinder at trial refused. ■

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