Article Information

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Federal Court of Australia orders Respondent in shareholder class action to hand over insurance information

Virgin Australia, which has been sued by investors who purchased unsecured notes in the airline based on statements in a 2019 prospectus for a capital raising, has been ordered to advise the lead applicant in the class action whether its has made a claim against its insurer for its costs and any liability in the class action, and whether its insurer has agreed to grant indemnity. It has also been ordered to produce copies of any insurance policies which might respond to the claims made in the class action[i].

The orders made are in contrast to a 2020 decision of the Court[ii], which found that the case management powers of the Court did not empower it to order the disclosure of the respondent's insurance policies in class actions. In that case, very similar orders were sought, namely for production of policies and for communications regarding the insurer's position on the grant of indemnity. The applicant in that case relied upon a 2019 Federal Court authority, *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals**[iii]*** , which had resulted in orders for the production of insurance information, to argue that the documents were relevant to inform the applicant whether further prosecution of the proceedings was commercially viable and whether mediation was appropriate and, if so, what the appropriate quantum of settlement might be. The applicant also argued that the documents were relevant to the approval of the settlement and to determine whether action against the insurer may be needed to obtain a declaration of indemnity. The judge disagreed, taking the conventional position that insurance information is not relevant to the proof of a cause of action in the proceedings and is therefore not discoverable, and noting that the case management powers of the Court were not designed to "confer an asymmetric commercial advantage in favour of one party at the expense of another" in mediations. Beach J also rejected the suggestion that the documents were needed for any settlement approval, and distinguished the position in *Simpson* where leave had been granted to bring a claim against the insurer.

The orders are also in contrast to a decision of another Federal Court judge, who declined an application by a shareholder to access insurance policies under a discretionary power which may allow shareholders access to the books and records of the company, if the application is made in good faith and for a proper purpose[iv]. That decision was based upon a finding by the judge that the claims made by the class members did not arise from their rights and entitlements as shareholders but rather as potential investors, and that therefore the application was not brought for a proper purpose.

The orders in *Virgin Australia* were made in the context of a Deed of Company Arrangement and the need to consider which claims against the company were covered by insurance. That made the insurance position relevant, and distinguishes it from the decision in *Evans*. However, the decision does show that accessing insurance information is a matter to be considered carefully in the circumstances of the individual case. There are mechanisms available to obtain insurance information, which is obviously valuable in considering the recoverability of any funded claim. Early consideration should be given in each class action as to potential means to obtain this information.

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[i] *Matheson Property Group Australia Pty Ltd as Trustee for The MPG Trust v Virgin Australia Holdings Limited* NSD346/2022, order of Lee J, 28 June 2022

[ii] *Evans v Davantage* [2020] FCA 473

[iii] [2019] FCA 1229

[iv] *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302