

Trade credit: Australian Courts consider the meaning of ‘recoveries’

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The Australian Courts consider the meaning of ‘recoveries’ when the insured receives money from the debtor after insurers have paid out under a trade credit policy.

QBE Insurance (Australia) Limited v The Grape House Group PTY TLD [2022] FCS 1527 concerned a trade credit insurance policy between The Grape House Group Pty Ltd ('TGH') and QBE Insurance (Australia) Ltd ('QBE'). The policy provided cover for unpaid trade debts up to a specified percentage of 90%.

TGH supplied grapes to a company, SPT, that failed to pay its invoices. TGH issued Australian court proceedings against SPT and its director, Mr Foster, and issued a caveat over Mr Forster's property. TGH made a claim under its policy with QBE in respect of 90% of the unpaid debt and QBE paid the sum of \$259,200.

TGH continued with the court proceedings. QBE reminded TGH that it was bound by its duty of good faith and clause 9 of the policy which stated that: “Any Recoveries received by the Insured or the Insurer are to be held on trust ... for their respective interests...” and it may be required to remit any recoveries back to QBE in accordance with the terms of the policy.

A settlement agreement was reached in respect of the court proceedings and TGH received AUS\$200,000. It did not apportion this sum between the unpaid debt, interest and costs. QBE claimed it was entitled to AUS\$180,000 from the settlement sums and in failing to repay the sums TGH was in breach of the policy and its duty of good faith. TGH responded that the sum was in respect of an uninsured loss and fell outside the scope of the policy.

Decision of the Australian Court

The court did not accept that the settlement was an uninsured loss and considered the definition of ‘recoveries’ to cover insured and uninsured losses. However, it did accept that the policy did not cover legal expenses incurred for the purposes of recovering an unpaid debt and TGH was entitled to retain that portion of the settlement sums.

As such, and as a first priority, TGH was entitled to the costs of the court proceedings on a standard basis. QBE was then entitled to a percentage of the remaining balance.

In respect of good faith, the court found that whilst there was a duty to act in the utmost good faith, this did not extend to the insured requiring the settlement to be apportioned between the separate elements. This was not necessary for the policy to operate properly and give each party its appropriate share, as the Judge had now done. QBE's rights and interests were therefore not compromised and there was no breach.

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