Federal Court of Australia

Avant Insurance Limited v Darshn [2022] FCAFC 48

|  |  |
| --- | --- |
| Appeal from: | *Darshn v Avant Insurance Limited* [2021] FCA 232; *Darshn v Avant Insurance Limited* [2021] FCA 706; *Darshn v Avant Insurance Limited* (No 3) [2021] FCA 1035 |
|  |  |
| File number(s): |  |
|  |  |
| Judgment of: | **JAGOT, DERRINGTON AND COLVIN JJ** |
|  |  |
| Date of judgment: | 29 March 2022 |
|  |  |
| Catchwords: | **INSURANCE** — whether lawyers retained by insurer to act for insured had authority to give notice of facts that might give rise to claim on behalf of insured — whether lawyers retained by insurer for insured did give notice of facts that might give rise to claim against insured to insurer — whether insurer’s reliance on insured not having given notice of facts that might give rise to claim against insured contravened insurer’s duty of utmost good faith — whether primary judge erred with respect to scope of declaratory order made — appeal dismissed — part of cross-appeal upheld |
|  |  |
| Legislation: | *Insurance Contracts Act 1984* (Cth) ss 13, 40(3)  *Civil Procedure Act 2005* (NSW), Pt 10 |
|  |  |
| Cases cited: | *Antico v CE Heath Casualty & General Insurance Ltd* (1996) 38 NSWLR 681  *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1  *Darshn v Avant Insurance Limited* [2021] FCA 706  *Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd (No 2)* [2020] NSWSC 359; (2020) 353 FLR 1  *House v R* (1936) 55 CLR 499  *IVI P/L v Baycrown P/L* [2005] QCA 205  *Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray* [2004] NSWCA 151; (2004) ANZ Ins Cas ¶61–612  *Newcastle City Council v GIO General Ltd* [1997] HCA 53; (1997) 191 CLR 85  *Rickhuss v The Cosmetic Institute Pty Ltd* [2018] NSWSC 1848 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Number of paragraphs: | 66 |
|  |  |
| Date of hearing: | 17-18 February 2022 |
|  |  |
| Counsel for the Appellant: | Mr MT McCulloch SC with Ms T Berberian |
|  |  |
| Solicitor for the Appellant: | Carter Newell Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr S Habib SC with Ms K Morris |
|  |  |
| Solicitor for the First Respondent: | William Roberts Lawyers |
|  |  |
| Counsel for the Second Respondent: | Second Respondent submitted to the orders of the Court, save as to costs |
|  |  |
| Counsel for the Cross-Appellant: | Mr S Habib SC with Ms K Morris |
|  |  |
| Solicitor for the Cross-Appellant: | William Roberts Lawyers |
|  |  |
| Counsel for the Cross-Respondent: | Mr MT McCulloch SC with Ms T Berberian |
|  |  |
| Solicitor for the Cross-Respondent: | Carter Newell Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 909 of 2021 |
|  | | |
| BETWEEN: | AVANT INSURANCE LIMITED  Appellant | |
| AND: | SRI BALAKRISHNAN DARSHN  First Respondent  MEDICAL INSURANCE AUSTRALIA PTY LIMITED  Second Respondent | |
|  |  | |
| AND BETWEEN: | SRI BALAKRISHNAN DARSHN  Cross-Appellant | |
| AND: | AVANT INSURANCE LIMITED  Cross-Respondent | |

|  |  |
| --- | --- |
| order made by: | JAGOT, DERRINGTON AND COLVIN JJ |
| DATE OF ORDER: | 29 MARCH 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The cross-appeal be allowed.
3. The declaration made on 23 August 2021 be set aside and in lieu thereof it be declared that:

*Upon the proper construction of Practitioner Indemnity Insurance Policy Nos. API.16F.3130312 (for period ending 30 June 2017), API.17F.3463741 (for period ending 30 June 2018) and/or API.18F.4062320 (for period ending 30 June 2019) issued by Avant Insurance Limited (the* ***Avant Policies****) and in the circumstances that have happened, the first respondent is obliged to indemnify the applicant in respect of all sums reasonably paid and payable by him that are characterised as Civil Liability Claims, Legal Defence Costs and/or Legal Fees and Other Expenses (as defined in the Avant Policies) in respect of proceedings 279308 of 2017 in the Supreme Court of New South Wales, Equity Division.*

1. The appellant pay the first respondent’s costs of the appeal as agreed or taxed.
2. The cross-respondent pay the cross-appellant’s costs of the cross-appeal as agreed or taxed.
3. Within 7 days any party wishing to vary orders 4 or 5 may file and serve the terms of any proposed varied order accompanied by a submission in writing in support not exceeding two pages and, if necessary, any affidavit in support.
4. Any party served under order 6 may file and serve a submission in writing not exceeding two pages and, if necessary, any affidavit identifying their position in respect of the proposed varied order.
5. Any costs issue will be determined thereafter without further oral hearing unless, in complying with orders 6 or 7, the party requests an oral hearing and provides a reason in support.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

## The issues

1. Although the primary judge is said to have erred on 14 grounds in the appellant’s notice of appeal and five grounds in the first respondent’s notice of cross-appeal, there are only four principal issues in this matter. They are:
2. the authority of Makinson d’Apice Lawyers (**MDL**) to give notice in writing to the appellant, **Avant** Insurance Limited, for the first respondent, Dr Darshn, of facts which might give rise to a claim under s 40(3) of the *Insurance Contracts Act 1984* (Cth);
3. if MDL had such authority, whether MDL in fact gave Avant such notice as required by s 40(3) of the Insurance Contracts Act;
4. if MDL did not have authority, whether Avant’s reliance on Dr Darshn not having given Avant such notice as required by s 40(3) of the Insurance Contracts Act contravened Avant’s duty of the utmost good faith under s 13 of that Act; and
5. whether the primary judge erred by confining the declaration he made to Avant’s liability to indemnify Dr Darshn’s legal defence costs and civil liability in relation to claims brought only by a Ms Sanchez in the so-called “TCI proceeding” rather than making a declaration in relation to all so-called “Darshn sub-group” members in that proceeding.
6. For the reasons which follow, the appeal (issues (1)-(3) above) should be dismissed with costs and the one ground ultimately pressed in the cross-appeal (issue (4) above) should be allowed.

## The policies

1. The relevant policies of insurance issued by Avant to Dr Darshn related to the 2016-17, 2017‑18 and 2018-19 years (each policy commencing on 1 July of one year and concluding on 30 June of the following year). The policies were taken to be in the same terms.
2. The policies are styled “Avant Practitioner Indemnity Insurance Policy”. The three categories of cover provided are civil liability (Part A of the policy), disciplinary and other matters (Part B of the policy), and communicable disease cover and away from work costs (Part C of the policy).
3. Section 2 of the 2018-19 policy is headed “What we cover”. Section 2 includes cl 2 which provides that:

**Healthcare in private practice**

If you have declared private billings, then we will cover you for amounts which you become legally liable to pay as compensation for civil liability, in addition to legal defence costs, in respect of claims made against you in the policy period in relation to healthcare in private practice.

If you have declared private billings as part of your application, cover for healthcare in private practice has been added to your policy.

1. Dr Darshn had declared private billings.
2. The word “claim” is defined in the definitions section of the policy as a demand for compensation or damages in relation to healthcare which is first made against the insured during the policy period, and which the insured tells the insurer about in writing during the policy period. “Healthcare” is also defined. There is no dispute that by being joined to the TCI proceeding Dr Darshn was subject to a claim for healthcare.
3. Clause 14.1 of the policy contains an exclusion in these terms:

14.1 **Prior or pending claim or circumstances**

[The insurer will not cover the insured in connection with:]

any claim or circumstances which might give rise to a claim or request for indemnity, which:

a) you knew about or a person in your position ought reasonably have known about and thought might result in a claim or allegation being made against you;

b) you notified us, or failed to notify us, of before the policy period commenced; or

c) you notified, or ought reasonably to have notified to another insurer before the policy period commenced.

1. Section 3, headed “How claims work”, includes this:

**Claims made and notified policy**

This policy operates on a claims made and notified basis. It covers you for claims (including legal defence costs) made by patients and other third parties against you and which you notify to us within the policy period when the healthcare giving rise to the claim occurred after the retroactive date.

Every claims made and notified policy has a retroactive date. For a claim to be covered under Part A of the policy, the healthcare you provided which lead to the claim must have occurred after the retroactive date. The retroactive date is a date in the past and could be before the inception of this policy. The retroactive date that you have agreed with us can be found on your policy schedule.

Part B of the policy provides legal fees and other expenses for disciplinary and other matters, tax audit cover and cover for a loss of documents. The clauses require that the matter or proceedings are commenced and notified to us in the policy period.

This policy does not provide cover in relation to:

* claims against you arising from healthcare that occurred prior to the retroactive date;
* claims against you, or facts that may result in claims against you, notified to us after the end of the policy period;
* claims made, threatened or intimated against you prior to the policy period; or
* facts or circumstances of which you first became aware prior to the policy period, and which you knew or ought reasonably to have known had the potential to give rise to a claim or request for indemnity under this policy.

…

**Continuous cover**

If you, before the policy period, first become aware of facts or circumstances that might give rise to a claim or request for indemnity and you decide not to notify us of these facts or circumstances, then, notwithstanding clause 14.1, we will cover you where:

a) we continued without interruption to be your professional indemnity insurer from the time you knew or ought reasonably to have known of the facts or circumstances that might give rise to a claim or request for indemnity to the date you actually notified us;

b) had you decided to notify us when you first became aware of the facts or circumstances, you would have been covered under the policy in force at that time; and

c) your decision not to notify us when you first became aware of the facts or circumstances was not fraudulent non-disclosure or fraudulent misrepresentation.

Our liability to indemnify you is limited to the extent we would have been obliged to indemnify you under the terms and conditions of the policy in effect at the time you knew or ought reasonably to have known of the facts or circumstances that might give rise to a claim or request for indemnity.

If we are obliged to indemnify you pursuant to this clause, we may reduce our liability to you by the amount of any prejudice we suffer as a result of your decision not to notify us at the time you knew or ought reasonably to have known of the facts or circumstances that might give rise to a claim or request for indemnity.

**How much we will pay**

…

**You must notify us of a claim**

You must notify us in writing as soon as practicable of any claim. If you do not notify us of a claim as soon as practicable, you may not be covered under this policy and your right to indemnity may be prejudiced.

…

**Conduct of claims or requests for indemnity**

You agree that we have the conduct of a claim or request for indemnity covered under this policy including its investigation, pursuit, defence, avoidance, reduction or settlement and we may do so in your name.

We may defend or settle a claim, complaint or matter as we think fit. You may defend any claim or request for indemnity which we believe should be settled but we will not pay any more in relation to that claim or request for indemnity than we would have been required to pay if it had been settled or resolved as we believed it could or should have been.

**We will appoint the lawyer or other person**

We will appoint the lawyer or other person to provide services to us for the benefit of you. When we appoint the lawyer or other person, we do so in our own capacity and not as an agent for you.

The lawyer or other person appointed by us supplies services to us and not to you for the purposes of the Goods and Services Tax (GST). We are entitled to claim a GST input tax credit on services supplied by the lawyer or other person.

**We do not accept responsibility for the lawyer or other person**

We do not accept any responsibility for anything done or not done by the lawyer or other person. He or she is not our agent or employee. We make no representation of any kind about the lawyer’s or other person’s ability.

**You must cooperate**

You must cooperate with the lawyer or other person in resolving the claim or request for indemnity in a satisfactory, timely and cost-effective way. In particular, you must:

a) give us and the lawyer a full and truthful account of the relevant facts;

b) give us and the lawyer any relevant information or documents in your possession that he or she asks for;

c) obtain any other relevant information or documents that you can;

d) execute any documents we or the lawyer reasonably ask you to; and

e) attend any meetings we or the lawyer reasonably ask you to.

You agree at your expense to give us, the lawyer or other person all information, documents and assistance we reasonably require and cooperate fully with us, the lawyer or other person.

You further agree to waive any claim for legal professional privilege or confidentiality to the extent only that the privilege or confidentiality would otherwise prevent the lawyer from disclosing information to us. The lawyer will keep us properly informed on all relevant matters.

## Primary facts

1. The primary facts are not in dispute. They are disclosed in the primary judge’s reasons for judgment in *Darshn v Avant Insurance Limited* [2021] FCA 706.
2. Dr Darshn is a registered medical practitioner practising as a cosmetic surgeon. Between January 2015 and January 2018 he performed breast augmentation surgery (**BAS**) at premises owned or occupied by The Cosmetic Institute Pty Ltd (**TCI**) or one of its subsidiaries. He held professional indemnity insurance with Avant from 27 September 2011 to 30 June 2019 and with another insurer for the years ended 30 June 2020 and 30 June 2021.
3. In June 2020, Dr Darshn was joined as a defendant to a representative proceeding in the Supreme Court of New South Wales brought against TCI and other defendants (the **TCI proceeding**). The TCI proceeding had been commenced in 2017. When he was joined as a defendant to the TCI proceeding in June 2020, Dr Darshn sought indemnity from Avant, which refused on the basis that no claims had been made against him during the period of cover by Avant (the Avant policy being a “claims made and notified” policy).
4. In June 2017 Avant had accepted a claim for indemnity by Dr Darshn in respect of a complaint made by a former patient for BAS performed by him at TCI premises. The complaint was resolved in Dr Darshn’s favour. The complainant is a group member in the TCI proceeding.
5. In March 2018 Avant accepted a claim for indemnity by Dr Darshn in respect of a proceeding against him brought by a Ms Scotford in the District Court of New South Wales (the **Scotford proceeding**). Avant appointed MDL in respect of the Scotford proceeding. Ms Scotford was a group member in the TCI proceeding but later opted out of the TCI proceeding.
6. On 23 March 2018 Avant sent a letter to Dr Darshn in relation to the Scotford proceeding which said:

…

I have also instructed Makinson d’Apice Lawyers to act on your behalf in this matter and a solicitor will be in contact with you shortly to discuss the claim further …

Avant will conduct the claim on your behalf. You will be consulted and kept informed at all appropriate stages and whilst your views will be taken into account, Avant is responsible for the management of the claim.

1. Mr Nicholas Regener, a partner of MDL, then wrote to Dr Darshn on 23 March 2018 in relation to the Scotford proceeding saying:

I have been appointed by Avant to represent you in … these proceedings.

1. In January 2019 the plaintiffs in the TCI proceeding served a subpoena to produce documents on Dr Darshn. The primary judge described the breadth and terms of the subpoena as suggesting that the surgeons upon whom it had been served might be joined as defendants to the TCI proceeding.
2. On 4 February 2019, Mr Regener of MDL sent an email to Avant in relation to the Scotford proceeding. Mr Regener’s email forwarded an email of the same date from Yeldham Price O’Brien Lusk (**YPOL**), the firm of solicitors acting for the third defendant in the Scotford proceeding. YPOL’s email said it would be seeking an adjournment of the Scotford proceeding because of the apparent substantial overlap between it and the TCI proceeding. The email attached a judgment of Garling J in the TCI proceeding, *Rickhuss v The Cosmetic Institute Pty Ltd* [2018] NSWSC 1848, which had been delivered on 4 December 2018. MDL’s email to Avant said:

…

See also Garling J’s observations at [74], [75] and [76]. Given our man is not a party to the representative proceeding [the TCI proceeding], and the allegations are not against him in that proceeding *per se*, it would be useful to bump Scotford off to the class action. We’ll have to wait and see what the response is from her solicitors about “opting out”.

Scotford gets a “shout out” at [47].

1. On 7 February 2019, MDL sent another email to Avant in relation to the Scotford proceeding. This email said:

…

Whether Ms Scotford has (or decides to) opt out of the class action is really a matter for the plaintiff’s solicitor to advise her on. If she decides to discontinue these proceedings, there will be costs consequences and (perhaps) a need for the pleadings in the class action to be amended to join Dr Darshn (if the issue of his own surgical competence is to be pursued, though it probably would not be) … we suspect the plaintiff will decide to opt out (assuming she has not to date) and continue with these proceedings.

In that case, we can see some utility in the argument that it is appropriate to stay these proceedings to allow the class action to be heard considering the similarity of issues in dispute and to avoid the risk of inconsistent findings…

1. On 18 February 2019, Dr Darshn telephoned Avant’s Medico-Legal Advice Service and obtained advice from a Ms Pickett regarding the subpoena. Ms Pickett did not ask Dr Darshn to provide a copy of the subpoena to Avant and Dr Darshn did not do so. Ms Pickett did not ask Dr Darshn who the parties to the proceeding were.
2. On 22 March 2019, Dr Darshn telephoned Avant’s Medico-Legal Advice Service and raised with a Ms Gillman two matters: (a) he had received a letter from solicitors in relation to a proceeding against him brought by a Ms Summers-Hall (the **Summers-Hall proceeding**), and (b) the subpoena that he had received from the plaintiffs in the TCI proceeding. Avant subsequently accepted Dr Darshn’s claim for indemnity in respect of the Summers-Hall proceeding, which was subsequently settled.
3. In relation to the discussion with Dr Darshn about the subpoena: (a) Ms Gillman became aware that the proceeding in which the subpoena had been issued was the TCI proceeding, (b) Ms Gillman was already aware of the existence of the TCI proceeding and of the fact that Turner Freeman was acting for the plaintiffs, (c) Ms Gillman was already broadly aware of the allegations in the TCI class action, (d) Ms Gillman knew that Avant held copies of the subpoena served on other doctors insured by Avant, and that the subpoena was very broad and unusually long, and (e) Ms Gillman suggested that Dr Darshn send Avant a copy of the subpoena so he could be included in a list of other colleagues in case further advice was required. Dr Darshn did not send the subpoena addressed to him to Avant.
4. Also on 22 March 2019 Ms Gillman sent an email to Avant’s National Claims Acceptance team, Stephanie Penney (who worked in Avant’s Claims team) and Paul Tsaousidis (the head of Avant’s NSW legal department), who had a copy of the subpoena as served on the other doctors in the TCI proceeding. In the part of the email addressed to Mr Tsaousidis, Ms Gillman said:

Dr D also got a subpoena from Turner Freeman. He had a few invoices but sent them directly to Turner Freeman not the Court. I have asked him to send us his email / subpoena so I can send them to you and he can be added to your list. Apparently his colleagues have been very complementary (sic) of the help you have been providing them.

1. The reference in that email to a “list” was to a list of the doctors who Mr Tsaousidis was assisting in relation to the subpoena.
2. When she did not receive a copy of the subpoena from Dr Darshn, Ms Gillman sent an email to him on 28 March 2019 saying:

…

You also mentioned that you had received a subpoena from Turner Freeman, and I suggested you send through the subpoena and related correspondence so the lawyer co-ordinating these matters (Paul Tsaousidis) could provide further advice, if required.

Paul would be happy to assist with the subpoena issue if you could send through the documentation.

1. Ms Gillman agreed that at this time: (a) she knew the TCI proceeding was against Dr Darshn’s former clinic for alleged systemic issues, (b) as such, there was a possibility that Dr Darshn could become a defendant in the TCI proceeding down the track, (c) Avant’s Medico-Legal Advice Service includes providing advice about whether incidents that may lead to a claim in the future should be notified to Avant, and (d) there was no mention in the discussion of Dr Darshn sending Avant the subpoena as a form of notification of a potential claim.
2. On 26 March 2019 Avant sent a letter to Dr Darshn in respect of the Summers-Hall proceeding which said:

…

I have also instructed Makinson D’Apice Lawyers to act on your behalf in this matter and a solicitor will be in contact with you shortly to discuss the claim further…

Avant will conduct the claim on your behalf. You will be consulted and kept informed at all appropriate stages and whilst your views will be taken into account, Avant is responsible for the management of the claim.

Your Insurance Policy requires you to cooperate with the solicitor and provide all documentation requested and follow the advice. The instructed solicitor will keep Avant Mutual Group Limited informed on all relevant matters…

1. On 22 May 2019 MDL sent an email to Avant in respect of the Scotford proceeding and the Summers-Hall proceeding. The email noted that Ms Scotford had not opted out of the TCI proceeding and the notice of motion to stay the Scotford proceeding was based on the issues raised before (e.g. Ms Scotford has not formally opted out, substantial commonality between questions of fact and law, risk of inconsistent judgments etc). It also noted that, as the opt out notice in the TCI proceeding had issued, Ms Summers-Hall “will either need to opt out and continue with this proceeding or opt in”.
2. Dr Darshn ceased to hold insurance with Avant on 30 June 2019.
3. On or about 30 June 2020 Dr Darshn was served with the further amended statement of claim (the **FASOC**) in the TCI proceeding in which he had been joined as a defendant, along with 10 other additional surgeons.
4. Paragraph 2 of the FASOC identified the group members as persons who, relevantly, had BAS at one of five TCI premises performed by or with the assistance of one of the fifth to sixteenth defendants. Paragraph 2A of the FASOC said that the group members consisted of at least 11 sub-groups, one of which is called the Darshn sub-group and is comprised of “group members including Ms Sanchez who suffered injury, loss and damage in consequence of undergoing BAS performed by the sixteenth defendant”. Ms Sanchez is the twelfth plaintiff in the FASOC.
5. In July and August 2020, Dr Darshn sought indemnity from Avant in respect of the claims made against him in the TCI proceeding.
6. Avant declined to cover Dr Darshn in respect of the claims made against him in the TCI proceeding by letter dated 1 September 2020.

## The authority and notice issues (issues 1 and 2)

1. Section 40(3) of the Insurance Contracts Act provides that:

Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.

1. Section 40(3) alters the operation of the policies of insurance. Dr Darshn contended that the communications from MDL to Avant about the Scotford and Summers-Hall proceedings between March 2018 and May 2019 (before the policy for the 2018-19 years expired) satisfied the terms of s 40(3).
2. In *Newcastle City Council v GIO General Ltd* [1997] HCA 53; (1997) 191 CLR 85 at 102-103 s 40 was described as involving “remedial measures passed for the protection of those dealing with insurers” which should not be “construed narrowly or with undue technicality”.
3. In *Antico v CE Heath Casualty & General Insurance Ltd* (1996) 38 NSWLR 681 Kirby P, in dissent in the result, said at 698 that there was no justification to place a gloss on s 40(3) that the insured give notice intending to do so, either objectively or subjectively. The requirement is only that the insured in fact give the notice.
4. In *Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd (No 2)* [2020] NSWSC 359; (2020) 353 FLR 1 at [534] Slattery J rejected a contention that notice within the meaning of s 40(3) had been given because the required notice is of “facts” that might give rise to a claim, and no facts had been identified in the purported notice. Slattery J also said that “there must be a recognisable correspondence between ‘facts that might give rise to *a claim*’ given in writing to the insurer within the insurance period and ‘*the claim*, when made’”. At [536] Slattery J said that the “facts that are notified must at least point towards ‘a claim’, not mere ‘bare possibilities’”.
5. Avant’s argument is that MDL was not authorised to give Avant notice under s 40(3) as agent for Dr Darshn because, as was variously put for Avant: (a) MDL’s retainer was “limited to acting for Dr Darshn in respect of the proceedings brought by Ms Summers-Hall and Ms Scotford”, (b) MDL “was engaged expressly on Avant’s behalf and **not** as agent for Dr Darshn in his dealings with Avant”, (c) MDL was appointed “solely for Avant”, (d) “pursuant to the terms of the insurance policy, it was expressly agreed between Dr Darshn and Avant that any lawyer appointed was appointed by Avant in its ‘own capacity’ and ‘not as agent for [Dr Darshn]’”, and (e) alternatively, the “retainer of MDL was not for Dr Darshn generally and was not sufficient to authorise MDL to provide any services to Dr Darshn and in particular, did not authorise the giving of a notice to Avant on behalf of Dr Darshn in respect of matters within the purview of section 40(3)”.
6. These arguments are unsustainable.
7. The policy provides that if a claim is made Avant will appoint a lawyer to provide “services to us [Avant] for the benefit of you [Dr Darshn]” and that, in so doing, Avant does so in its own capacity and “not as agent for you”. That is, the policy does not say that the lawyer will not be acting as an agent for Dr Darshn. It says only that in appointing the lawyer Avant is not the agent of Dr Darshn. The fact that the policy says that Avant appoints the lawyer to provide it (Avant) with services may be accepted. But it must also be accepted that the policy acknowledges that such services are provided for the benefit of Dr Darshn. The policy is otherwise silent about the nature of the legal relationship between the lawyer and Dr Darshn.
8. Avant informed Dr Darshn on 23 March 2018 that it had instructed MDL to act on Dr Darshn’s behalf in the Scotford proceeding. MDL informed Dr Darshn on the same day that Avant had appointed it to “represent you in … these proceedings”. Similarly, in respect of the Summers-Hall proceeding Avant informed Dr Darshn on 26 March 2019 that it had appointed MDL to act on Dr Darshn’s behalf in the Summers-Hall proceeding. MDL entered an appearance and was listed as the solicitor on the record for Dr Darshn in the Scotford proceeding and Summers-Hall proceeding. The idea that MDL was not acting as the legal representative for Dr Darshn in both proceedings is untenable. This is so irrespective of the separate legal relationships between Dr Darshn and Avant (on the one hand) and Avant and MDL (on the other hand).
9. Further, it is not apparent why Avant maintains, in the alternative, that if MDL acted for Dr Darshn then in the course of so acting MDL did not have authority to give Avant, on behalf of Dr Darshn, notice of another potential claim within the scope of s 40(3). The arguments of Avant to that effect are mere assertions that assume the existence of some limit on the scope of MDL’s authority to represent Dr Darshn in the Scotford proceeding and Summers-Hall proceeding. The mere fact that MDL’s authority was to act as Dr Darshn’s lawyer in the Scotford proceeding and Summers-Hall proceeding does not support the implication of any confining term to the effect which Avant proposes. No principled reason has been identified by Avant which would have the effect of placing the communications from MDL to Avant outside the potential scope of s 40(3). To the contrary, it would be an expected incident of the legal relationship between Dr Darshn and Avant (on the one hand) and Avant and MDL (on the other hand) that MDL, as agent for Dr Darshn (even if also as agent for Avant), would inform Avant of facts that might give rise to a claim against Dr Darshn under the policy if MDL came into possession of those facts in the course of acting for Dr Darshn in the Scotford proceeding and Summers-Hall proceeding.
10. This is not to say that Dr Darshn had to intend that MDL give notice to Avant in accordance with s 40(3). Nor is it to say that MDL itself intended to give such notice. As the authorities disclose, intention is irrelevant. The issue is simply whether the insured in fact gave the required notice. If MDL’s communications with Avant were part of or an incident to MDL’s lawyer-client relationship with Dr Darshn, then those are communications to Avant by Dr Darshn for the purposes of s 40(3). This is so whether or not MDL’s communications with Avant were also part of or an incident to MDL’s lawyer-client relationship with Avant.
11. The principal problem with Avant’s arguments is that they assume that Avant’s rights of subrogation operated to exclude the possibility of any legal relationship between MDL and Dr Darshn. Avant has not identified any principle in respect of the doctrine of subrogation which would have that effect. While the doctrine operated so that Dr Darshn had to permit Avant to appoint a lawyer to represent him as the defendant in the Scotford proceeding and Summers-Hall proceeding, it is not apparent why the doctrine would also operate to exclude a lawyer-client relationship also arising as between MDL and Dr Darshn. Authority is to the contrary. In *Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray* [2004] NSWCA 151; (2004) ANZ Ins Cas ¶61–612 the New South Wales Court of Appeal considered the status of an investigative report commissioned by an insurer and provided to the insurer and insured before the insurer declined indemnity. While the factual context is different from the present case, Mason P (with whom Handley JA and Brownie AJA agreed) identified general principles of relevance as follows:

43 An insured and insurer may have a shared or similar interest in advancing a claim on behalf of the insured or in defeating a claim against the insured and this may give rise to a shared or common interest privilege (*Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operations Pty Ltd* (1988) 13 NSWLR 689, *Farrow Mortgage Services* [*Farrow Mortgage Services Pty Ltd (in liq) v Webb* [1996] NSWSC 259; (1996) 39 NSWLR 601] at 608F).

44 But it does not follow that insurer and insured are incapable of jointly retaining a lawyer in circumstances giving rise to a joint privilege. Whether they have done so, or whether the acts of one should merely be seen as in its own interests or merely as agent for the other, depend on the particular facts. These will include the terms of the insurance policy, in particular the terms of any clause dealing with the insured’s duty to assist the insurer.

45 Several cases have considered the question of identifying the client when an insurer appoints a solicitor to defend a claim by a third party against the insured. Many of them were reviewed in *Nicholson & Ors v Icepak Coolstores Ltd* [1999] 3 NZLR 475 (High Court of New Zealand, Penlington J), a decision that illustrates the overlapping of issues of privilege and fiduciary duty that lies at the heart of the respondent’s case on appeal…

50 The cases support the view that the insurer-retained lawyer assumes a lawyer-client relationship with the insured, but not necessarily to the exclusion of a similar relationship with the insurer (*Groom v Crocker* [1939] 1 KB 194 at 202-3, 226-7, Brown v Guardian Royal Exchange Assurance plc [1994] 2 Lloyd’s Rep 325 (CA) at 330, *State Government Insurance Commission (SA) v Paneros* (1988) 48 SASR 349).

51 In the present case, there is nothing in the policy to exclude a solicitor-client relationship as between the insured and the solicitor retained at the request of the insurer…

53 In *Nicholson*, Penlington J held that a solicitor-client relationship existed (between the insured and the lawyer) because the insurer instructed the lawyer to represent the insured in the plaintiff’s proceedings…

54 This reasoning did not deny that a solicitor-client relationship existed as between the insurer and the lawyer in *Nicholson*. Indeed, the Australian case law generally accepts that the insurance defence lawyer may have two clients, although this may not be the case in situations where statutory policies under compulsory third party legislation are involved (*Chapman & Mallon*, op cit [Chris Chapman and Jillian Mallon, “Conflicts of Interest Faced by Solicitors Instructed by Insurers to Conduct Litigation on Behalf of Insureds” (1996) 26 VUWLR 679]; Geraldine Gray “Conflicts and Waiver of Privilege in the Insurance Relationship” (1988) 10 Ins LJ 75 at pp 76-78). Cases recognizing that solicitors retained by the insurer may have both insured and insurer as client (at least until a situation of conflict arises) include *Verson Cleaning International v Ward* (1996) 9 ANZ Ins Cas ¶61-352 (FCSA) at 76,905-6, *Kennedy v Cynstock Pty Ltd* (1993) 3 NTLR 108, *C I & D Industries Pty Ltd v Keeling*, NSWSC, unreported, Abadee J, 26 March 1997 and *Garry F S Boyce t/as Hunt and Hunt Lawyers v Goodyear Australia Ltd*, NSWCA unreported, 16 September 1996. Generally, see [Sutton, Insurance Law in Australia 3rd ed (1999)] op cit at §15.101.

1. Contrary to Avant’s submissions, no provision of the policy excludes the existence of a lawyer-client relationship as between MDL and Dr Darshn in respect of the Scotford proceeding and Summers-Hall proceeding. And nothing indicates that it was not an ordinary incident of MDL’s authority as a result to act on Dr Darshn’s behalf in communicating information to Avant objectively capable of satisfying the requirements of s 40(3).
2. Avant’s submission that there was no legal right of Dr Darshn capable of being affected by judgments in the Scotford proceeding and Summers-Hall proceeding, so that there was no lawyer-client relationship between MDL and Dr Darshn, takes an unduly narrow view of Dr Darshn’s interests in those proceedings and, in any event, involves a non-sequitur. Dr Darshn plainly had interests in both proceedings. There is no reason to conclude that in representing Dr Darshn in those proceedings MDL did not owe him the fiduciary and other obligations which attach to the lawyer-client relationship.
3. The reasoning in *IVI P/L v Baycrown P/L* [2005] QCA 205 at [33]-[38] does not support Avant’s position. That case concerned the implied authority of a lawyer identified as the solicitor for the purchaser in a proposed contract for sale, the terms of which were being negotiated directly between the prospective parties to the contract. In that context, it was held that the nominated lawyer had no authority to receive a notice from the other party. This context, which is transactional, bears no relationship to the circumstances of the present case, which involve litigation. As noted, given the context in the present case, it would be expected that MDL would keep Avant informed of matters relevant to its potential liability under its policies with Dr Darshn in respect of not only the Scotford proceeding and Summers-Hall proceeding, but also the TCI proceeding given the substantial overlap between these proceedings. In so doing, there is no reason to infer that MDL was acting only on Avant’s behalf and not also on Dr Darshn’s behalf.
4. For these reasons, the primary judge did not err in deciding the authority issue against Avant. Those communications satisfied the condition in s 40(3) “[w]here the insured gave notice in writing”. The communications from MDL were communications by Dr Darshn to Avant.
5. It follows that the primary judge also did not err in permitting Dr Darshn to inspect certain communications from MDL to Avant, as privilege in those communications was a joint or common right of both Avant and MDL as the primary judge found. In any event, it is also apparent from the transcript that senior counsel for Avant withdrew the objection to the admissibility of these documents. It is not possible to construe the relevant part of the transcript as nothing more than recording Avant’s acceptance of the primary judge’s ruling against Avant on the privilege issue.
6. Avant’s challenge to the primary judge’s conclusion that MDL’s communications involved notice “of facts that might give rise to a claim against the insured” is untenable. The MDL communications informed Avant that: (a) the plaintiffs in the Scotford and Summers-Hall proceedings were group members in the TCI proceeding unless and until they opted out of the TCI proceeding, (b) there was a substantial overlap between the Scotford and Summers-Hall proceedings and the TCI proceeding, and (c) the overlap of the causes of action was such that the plaintiffs in the Scotford and Summers-Hall proceedings had to choose whether to continue their proceedings (and opt out of the TCI proceeding) or discontinue their proceedings (and opt in to the TCI proceeding). That is effective notice of facts that might give rise to a claim against Dr Darshn, and those facts correspond to the claim ultimately made when Dr Darshn was joined as a defendant in the TCI proceeding. In no sense was the notice merely incidental. To the contrary, it was obvious from the MDL communications that Dr Darshn was a potential, even a likely, future defendant in the TCI proceeding not only if the plaintiffs in the Scotford and Summers-Hall proceedings did not discontinue their proceedings and opt in to the TCI proceeding, but more generally in respect of BAS performed by Dr Darshn in TCI premises in the manner alleged in the TCI proceeding.
7. Avant’s submission that there was no “claim” to which the facts said to have been communicated by MDL could relate, as the communications referred to were in relation to the existing claims of the plaintiffs in the Scotford and Summers-Hall proceedings, suffers from the same approach which undermines Avant’s submissions about the authority issue. It may be accepted that there was no claim in the TCI proceeding against Dr Darshn when MDL sent its communications to Avant. That does not mean that in the course of informing Avant about matters relevant to the Scotford and Summers-Hall proceedings MDL could not give Avant notice of potential other claims against Dr Darshn. Section 40(3) only operates if and when there is “the claim … made”. If the insured has given the insurer notice in writing “of facts that might give rise to a claim against the insured” as required, and those are the facts giving rise to the claim made, then s 40(3) operates. Unless and until the claim is made, “a claim”, as referred to in s 40(3), by definition is unmade and inchoate.
8. It is immaterial that the communications from MDL did not say they involved Dr Darshn giving notice under s 40(3) of the Insurance Contracts Act. Nor is it necessary for the “notice in writing” to be styled as a notice or to use the words “potential claim”. All that is required is that the insured give the insurer notice in writing of facts that might give rise to a claim as soon as was reasonably practicable after the insured became aware of those facts and for “the claim” to be made. In the present case it could hardly be doubted that MDL’s communications put Avant squarely on notice that Dr Darshn was a potential, even likely, future defendant in the TCI proceeding.
9. For these reasons the primary judge did not err in concluding that MDL’s communication gave Avant notice of facts that might give rise to a claim against Dr Darshn so as to engage the operation of s 40(3).

## The good faith issue

1. Given our conclusions about s 40(3) it is unnecessary to resolve this issue so our observations are brief.
2. Avant’s position in this matter seems disconnected from the relevant circumstances. Avant accepts that if Dr Darshn had provided it with a copy of the subpoena addressed to him (as other doctors did) then it could not have contended that s 40(3) was not satisfied. But Avant knew that Dr Darshn had been served with the same subpoena as other doctors whom Avant had granted indemnity. It is not a matter of Avant being expected to aggregate disparate sources of knowledge. It is that Avant’s insistence that Dr Darshn had to provide it with a copy of the subpoena addressed to him to obtain the benefit of s 40(3), in all of the circumstances, does not accord with commercial standards of decency and fairness, with due regard to the interests of the insured: *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1 at [15].
3. The relevant circumstances are those which the primary judge identified at [219]-[225], being that Avant was aware of the nature of the TCI proceeding, and of the terms and breadth of the subpoena in the TCI proceeding, but did not tell Dr Darshn that he had to provide Avant with a copy of the subpoena, which it knew Dr Darshn had received, in order to obtain the benefit of s 40(3) of the Insurance Contracts Act despite:
4. holding out its Medico-Legal Advice Service as providing advice, not only in relation to claims that may need to be notified, but also facts that might give rise to a claim; and
5. being aware at that time of the possibility, if not the likelihood, that the TCI surgeons served with the subpoena might be joined as defendants to the TCI proceeding;
6. holding a copy of a subpoena in substantially the same terms as the subpoena received by Dr Darshn where its terms conveyed the possibility, if not the likelihood, of the TCI surgeons being joined as defendants to the TCI proceeding; and
7. having adopted a position that doctors who provided it with a copy of the subpoena would be treated by Avant as having given notice as required by s 40(3) of the Insurance Contracts Act.
8. Accordingly, there is no error in the primary judge’s conclusions that Avant also failed to act with the utmost good faith in respect of Dr Darshn as required by s 13 of the Insurance Contracts Act.

## The declaration issue

1. Dr Darshn contended that the primary judge erred in confining the declaration of Avant’s liability to indemnify Dr Darshn to legal defence costs and civil liability in relation to claims brought only by Ms Sanchez (the twelfth plaintiff) in the TCI proceeding. After resolving the s 40(3) issues in Dr Darshn’s favour, the primary judge said this (at [172]-[173] of *Darshn v Avant Insurance Limited* [2021] FCA 706):

For the above reasons, I conclude that s 40(3) operates in the present case, with the effect that the insurer (Avant) is not relieved of liability under the 2018-19 Avant policy in respect of Ms Sanchez’s claim against Dr Darshn in the TCI Proceeding, by reason only that it was made after the expiration of the period of insurance cover provided by the policy.

It follows from the above that Dr Darshn is entitled to cover under the 2018-19 Avant policy in respect of Ms Sanchez’s claim in the TCI Proceeding, and the legal defence costs associated with defending her claim in the proceeding (which, at the present time at least, equates to his legal defence costs associated with defending the proceeding generally). Dr Darshn’s Second Contention is, therefore, substantially made out. I do not consider it necessary or appropriate to determine, at this time, whether Dr Darshn will be entitled to coverage under the policy with respect to non-party group members within the Darshn Sub-Group. It is more appropriate, in my view, to determine that question if and when any such group members come forward and indicate that they wish to participate in the proceeding (for example, by providing particulars of their personal loss and damage). It may well be the case that the reasoning set out above regarding Ms Sanchez’s claim would apply equally to the claims of such group members; but that is something that can be determined, if necessary, at the point in time when such group members come forward.

1. According to the submissions for Dr Darshn, if the framing of the declaration involved an exercise of discretion, then that exercise miscarried in the sense described in *House v R* (1936) 55 CLR 499 at 505 because in a representative proceeding under Pt 10 of the *Civil Procedure Act 2005* (NSW) (which applies to the TCI proceeding) there is no relevant distinction between the claims of Ms Sanchez as the twelfth plaintiff and the claims of the members in the “Darshn sub-group” as identified in the FASOC in the TCI proceeding. The members of that sub-group are fixed and identifiable by the terms of the FASOC and Ms Sanchez represents those sub-group members to the extent of the common issues.
2. With due respect to the otherwise meticulous reasons of the primary judge, we agree. The error in the primary judge’s framing of the declaration is exposed in the fact that his Honour assumed in [172] and [173] that s 40(3) operates only in respect of Ms Sanchez’s claim, leaving it to his Honour to determine the appropriate scope of the declaration as a matter of discretion. That assumption is incorrect. As the notification was of the Darshn sub-group claims the subject of the representative proceedings, s 40(3) operates in respect of every member of the Darshn sub-group being those women including Ms Sanchez who suffered injury, loss and damage in consequence of undergoing BAS performed by Dr Darshn as described in paragraphs 2 and 2A of the FASOC in the TCI proceeding. The claims of those sub-group members have been made in the FASOC. Those were the claims that were notified to Avant within the policy period. They are claims that may be carried into completion by subsequent steps taken by individual sub-group members bound by the findings in the representative proceedings or there may be individual claimants who opt out of the representative proceedings. However, those future possibilities do not mean that claims by every member of the Darshn sub-group have not been notified to Avant. We do not need to deal with the character of any future claim subsequently made by an individual claimant who elects to opt out. We are here concerned only with a claimed indemnity for liabilities in respect of the representative proceedings. Section 40(3) being satisfied in respect of all sub-group members, the assumption apparent in [172] and [173] in the primary judge’s reasons (that there remained uncertainty as to whether s 40(3) was satisfied in respect of claims by sub-group members other than Ms Sanchez) was in error. Contrary to [173], the primary judge had determined that s 40(3) was satisfied with respect to “non-party group members”. Those sub-group members, by the terms of the FASOC, could not be in any position different from Ms Sanchez for the purposes of s 40(3) of the Insurance Contracts Act. This erroneous assumption caused the primary judge’s framing of the terms of the declaration to miscarry.
3. Contrary to Avant’s submissions, Dr Darshn was not able to raise the issue before the primary judge as the primary judge in [172] and [173] had already decided the issue. By order 1 of the orders on 25 June 2021 the parties were permitted only to file proposed orders “to give effect to these reasons”. It was not open to Dr Darshn to argue before the primary judge that [172] and [173] involved error. Otherwise, it is not to the point that Avant will be subject to the doctrines of res judicata and issue estoppel. The terms of the declaration made resulted from error. The error should be corrected.
4. For these reasons the cross-appeal must be allowed and the declaration should be re-framed to apply to all members of the Darshn sub-group in the TCI proceeding.

## Costs

1. We are unaware of any reason why the usual order as to costs should not be made in respect of the appeal.
2. As to the cross-appeal, when we indicated to the parties during the course of the hearing that we did not need to hear from Dr Darshn in response to the appeal, Dr Darshn pressed only ground 5 relating to the terms of the declaration. As a result, we have not considered the merits of grounds 1-4 of the cross-appeal. Given the responsiveness of grounds 1-4 of the cross-appeal to the appeal, Dr Darshn should also have his costs of the cross-appeal as agreed or taxed.
3. Despite this, we will give the parties an opportunity to be heard about costs in the event we are unaware of some relevant circumstance.

|  |
| --- |
| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot, Derrington and Colvin. |

Associate:

Dated: 29 March 2022