Construction

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ARE YOU A 'PROFESSIONAL'?
IDENTIFYING AND MANAGING RISK IN CONSTRUCTION PROJECTS

The recent Australian Federal Court decision of *470 St Kilda Road v Robinson*[1] has significant implications for insurers and insureds alike, in relation to the coverage of project managers for professional liability.

All professional service providers commonly assume that the services they perform are 'professional'. However, this case calls into question whether some services rendered are truly 'professional services' under the terms of their insurance. This case is particularly important for project managers involved in construction projects.

470 St Kilda Road v Robinson

The case concerned a design and construction project. 470 St Kilda Road (the Applicant) had engaged Reed Constructions Australia Pty Ltd (Reed) (in liquidation). Under the contract, Reed claimed progress payments for its work. The contract also provided that the Applicant may require Reed to provide evidence justifying the claims for progress payments. To that end, Mr Robinson, Chief Engineering Officer at Reed, made statutory declarations in support of progress claims, which included details of payments made to subcontractors.

The Applicant subsequently commenced proceedings against Mr Robinson personally on the basis that in making the statutory declaration, he had engaged in conduct which was likely to mislead or deceive, and had acted negligently in breach of his duty of care. Mr Robinson denied the assertions and submitted a claim for indemnity under the director and officer (D&O) liability insurance policy Reed held with Chubb Insurance Company of Australia Limited (Chubb). Chubb denied liability under the D&O policy on the basis of an exclusion at IV(A)(v) of the policy, arguing that the clause operated to exclude the act of preparing the statutory declaration as it was a 'professional service', as defined by the exclusion clause.

1 [2013] FCA 1420

Justice Kenny held that the act of making a statutory declaration by a construction project manager was not a 'professional service' for the purpose of deciding whether the act was excluded from the company's D&O policy. The court drew a distinction between the preparation of building plans and the extraction of information, from the routine administrative task of merely providing information of a factual kind which did not require any professional assessment.[2]

Interpretation

The court identified several well-established principals of contractual interpretation. A contract must be interpreted in the context of the commercial circumstances in which the document operates and with regard to the objects which it is intended to secure.[3] Exclusion clauses should be given their natural and ordinary meaning. They must be read in the context of the contract as a whole and should be interpreted with regard to the nature and object of the contract.[4] In the insurance context, these principles require the interpreter to identify the particular risks intended to be covered by the policy.

Project management – a recognised profession?

The Court rejected Chubb's submission that project management is a recognised profession.[5] It observed that although aspects of work carried out by project managers may be classed as 'professional', the varied nature of the tasks undertaken by project managers means that it cannot be said that project management is a recognised profession. Kenny J accepted the existence of competency standards set out by the Project Management Institute for its members, but held that there was no evidence as to the significance of membership for obtaining project management work.[6] However, the possibility that project management could be classed as professional was not altogether ruled out. The Court accepted that in some circumstances it might be seen as a profession, but in an insurance contract context, it would depend on the commercial context in which the policy is made, its objects and terms.[7] It was also accepted that the class of 'professions' was not closed, so that emerging 'professions' such as project management could possibly evolve into recognised professions over time.

Meaning of 'professional services' – the nature of the task

The Court considered a number of cases on the definition of 'professional services'. It found that their nature will invariably be tied to the commercial context and purpose of the policy. The judiciary has made clear that its primary intention in interpreting these contracts is to reach a result which is consistent with the objects of the cover and that does not curtail the intended benefit contracted for. In general, courts have applied a much broader meaning of 'professional services' in the context of insuring clauses in professional indemnity policies,[8] as opposed to exclusion clauses in liability policies.[9] However, a finding that an activity is a 'professional service' for the purpose of an exclusion clause in a D&O or liability policy does not necessarily mean that it will be the same for an insuring clause in a professional indemnity policy.

Although different tests have been used, the Court was of the view that the determinative consideration was the nature of the actual task performed, rather than the title of the person performing it. For example, the actions of a qualified engineer in the role of project manager performing supervisory activities which do not require the qualifications of an engineer may not be considered 'professional services' for the purpose of an exclusion of a liability policy.[10] The rationale for this view is that if any and all negligent acts and omissions were characterised as 'professional', then the exclusions in D&O and liability contracts would operate to severely circumscribe the cover provided under the policy.[11]

Discussion

While insureds may take solace in the approach taken by the courts in facilitating the object of the policy, there remains considerable scope for arguing whether or not a person is a

2 At [112], [113] & [114]

3 *CGU Insurance Limited v Porthouse* [2008] HCA 30; (2008) CLR 103 at 116

4 See *Darlington Futures Limited v Delco Australia Pty Ltd* [1986] HCA 82; (1986) 161 CLR 500 at 510-511

5 At [78]

6 At [78]

7 At [79]

8 See *GIO General Ltd v Newcastle City Council* (1996) 38 NSWLR 558

9 See *Chemetics International Ltd v Commercial Union Assurance Company of Canada* [1984] 11DLR (4th) 754; *Fitzpatrick v Job* [2007] WASCA 63; *Toomey v Scolaro's Concrete Constructions Pty Ltd & Ors* [2002] VSC 48

10 Supra 9 above

11 Supra 9 above at [268] per Buss JA



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'professional'. It follows that there is considerable scope for uncertainty as to the meaning of insurance contracts. This leaves open the possibility that there will be gaps in insurance cover with activities that may be uninsured.

The problem affects insurers and insureds alike. Insurers want to be confident about the extent of their exclusions. Insureds, whatever their profession, want certainty about the extent of their cover. In circumstances where it is common for insureds to hold various complementary policies of insurance, each relying on a particular meaning of 'professional services' to define the ambit of the cover, the potential for problems is obvious. These clauses are intended to operate so as to avoid duplication of cover, but without a definite dividing line between the two contracts, there is scope not only for duplication, but for gaps in cover.

Perhaps even more concerning is the possibility that insureds may hold only one policy of insurance and expect it to cover all the tasks they perform in rendering their services when, in reality, tasks which the insured considered professional, would not be considered so by the court. The problem is highlighted in the construction industry, where project managers in particular, whose services cover a broad range of activities – only some of which will be considered 'professional' – are rendering a range of services. Construction and project management companies must be especially vigilant to ensure that their different policies will operate to achieve their desired result.

Lessons to be drawn

1. This case is another reminder to all professional service providers that they cannot assume that everything they do at work will be classified for all purposes as professional services.
2. They should check the specific wording of their policies of insurance to ensure that their professional indemnity policies actually reflect their business activities.
3. They should ensure that they do not undertake activities which fall outside the scope of their overall cover.
4. They should ensure that their liability policies complement their professional indemnity policies so that all non-professional activities will also be covered.
5. However, they may still be vulnerable to the differing boundaries applied by different courts.
6. Similarly, for lawyers drafting contracts[12] where such terms are used, the drafter should stipulate in as much detail as possible the exact types of loss which the parties seek to include/exclude by the instrument, rather than relying on commonly understood meanings of terms.
7. Rather, contracts and exclusions should be drafted as comprehensively as possible so as to avoid the possibility that a court interprets the policy differently to the parties.
8. Clauses referring to the specific business which the policy applies to should be drafted comprehensively to ensure coverage of all activities performed and intended to be covered.

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12 Particularly following the recent developments in the law as regards consequential loss exclusions.

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