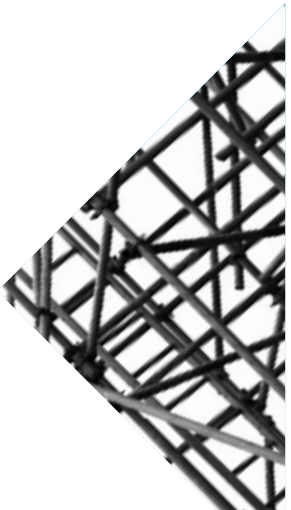
wotton kearney

Construction Bulletin

April 2014



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Welcome to the Construction Focus Group

We are delighted to welcome Sydney partner Sean O'Connor to the W+K Construction Focus Group.

Sean has practised in insurance law since his admission in 1997 and has built a highly regarded practice across a number of business lines, with particular focus on claims involving construction liabilities. Throughout his time in practice Sean has acted for clients from all areas of the construction industry in a wide range of matters, including:

+ acting for the architects in a significant building dispute arising from alleged defective design and specification of waterproofing at Sydney's largest commercial lifestyle property;

+ defending sheetpilers in a multimillion dollar claim for vibration damage to a series of neighbouring properties;

+ defending certifiers alleged to have certified a series of new town-house dwellings below the BCA requirements for flood hazard areas;

+ defending one of Australia's largest builders in a claim for property damage arising from defective installation/leaking AHAC units;

+ defending the head contractor in relation to a claim for pure economic loss resulting from damage to a computer server room caused by dust emitted by AHAC units; and

+ defending the head contractor in a claim for water damage caused by a failed liquid nitrogen plumbing freeze resulting in $20m damage to a government server room.

Please feel free to contact Sean on the below details regarding any construction-related queries you might have. Alternatively, further details of his expertise can be found here: http://www.wottonkearney.com.au/people-detail270f270g.html?staffId=6.

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Professionals acting unprofessionally? The meaning of "*professional services*" in a D&O policy exclusion

Written by Gemma Houghton, Senior Associate

This case considered the meaning of *"professional services"* in the context of a professional services exclusion in a Directors & Officers (D&O) policy.

The facts

470 St Kilda Pty Ltd (**St Kilda**) engaged Reed Constructions Australia Pty Ltd (**Reed**) as the design and construct contractor for a construction project at 470 St Kilda Road, Melbourne (**the Contract**). It was a term of the Contract that Reed must claim payment for works completed under the Contract on a progressive basis.

Reed issued a progress payment claim for works completed under the Contract (**claim no. 15**). St Kilda requested that Reed provide documentary evidence in support of claim no. 15. Accordingly, the Chief Operating Officer of Reed, Mr Robinson, executed a statutory declaration in support of claim no. 15. It followed that the payment requested in claim no. 15 was issued.

Some time later, St Kilda objected to the payment made under claim no.15 and argued that Mr Robinson did not have a reasonable basis for making the supporting statutory declaration. St Kilda commenced proceedings against Mr Robinson, which alleged that by providing the statutory declaration in support if claim no.15, he had engaged in misleading and deceptive conduct and negligently breached his duty of care (**the Proceedings**).

Reed had the benefit of a Directors and Officers (**D&O**) liability insurance policy (**the Policy**) and Mr Robinson sought indemnity in respect of the Proceedings, under the Policy. However, indemnity was denied on the basis that:

+ the Proceedings arose out of the Mr Robinson's act of providing a statutory declaration;
+ that act constituted a "*professional service*"; and
+ the Policy excluded loss in respect of any claim arising out of the provision of "*professional services*". That exclusion relevantly excluded loss arising from a claim:

> *"for any actual or alleged act or omission, including but not limited to any error, misstatement, misleading statement, neglect, or breach of duty committed, attempted or allegedly committed or attempted in the rendering of, or actual or alleged failure to render any professional services to a third party."*

Mr Robinson objected to the denial of cover and issued a cross claim in the Proceedings against his insurer.

Pursuant to that cross claim, the court considered whether the Proceedings were in respect of a claim arising from a breach of professional services. More specifically, whether, in making the statutory declaration, Robinson was providing "*professional services*".

What are professional services?

The insurer submitted that Mr Robinson was providing project management services when he gave the statutory declaration, that project management is a recognised discipline that should be characterised as a professional service, and therefore the professional services exclusion of the Policy was triggered.

The Court was not persuaded by the insurer's submissions and instead concluded that:

+ Mr Robinson provided a "*service*" but not a "*professional service*" when he executed the statutory declaration;

+ it is not an accepted principle that providing project management services will always be regarded as a "*professional service*". The Court further stated that:

> *"So far as an insurance contract is concerned, however, whether or not project management falls within the meaning 'profession' or involves 'professional services' would depend on the commercial context in which the policy is made, its objects and its terms"*;

+ in this case, Mr Robinson was not providing project management services when he provided the statutory declaration. The statutory declaration was merely a mechanism to provide documentary evidence of payment of monies due. In other words the statutory declaration provided factual information only and was an administrative activity, not a project management activity; and

+ the professional services exclusion is intended to exclude services that are truly professional in nature, for example architectural design, engineering or surveying. An administrative activity of this nature should not fall within the professional services exclusion.

In reaching its decision, the Court also referred to and relied on the following general principles:

1. The starting point should be the general principles governing construing insurance contracts, namely the overarching principle referred in ***McCann v Switzerland Insurance Australia Ltd*** (2000) 203 CLR 579:

> *"A policy of insurance...is a commercial contract and should be given a business like interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which a document addresses, and the objects which it is intended to secure..."*

2. The correct approach to construing an exclusion clause is as outlined in ***Darlington Futures Ltd v Dellco Australia Pty Ltd*** (1986) 161 CLR 500. In that case, the High Court stated as follows:

> *"The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract and where appropriate, construing the clause contra proferentum in case of ambiguity..."*

3. It was necessary to look at the specific conduct that attracted the exclusion clause, in order to determine its application to the policy in question. Looking at the nature of Reed's business, in that it was a design and construct contractor, the Court considered it was clear that the policy intended to insure against risks in performing those activities.

4. If an exclusion clause is open to interpretation and one of those interpretations would inappropriately circumscribe the cover provided by the insuring clause and the other would not, the latter is to be preferred.

5. The fact that Reed had the benefit of professional services cover under another insurance policy had little, if any, bearing on the construction of the exclusion clause.

Impact of this case

The court's findings in this case regarding the meaning of "*professional services*" in the context of a D&O Policy exclusion, are important to both insurers and insured for a number of reasons including:

1. **Clarifying what your policy excludes:** if parties to an insurance contract want to be sure what aspects of an insured's operations are excluded pursuant to a professional services exclusion (particularly project management tasks), such activities should to be clearly defined.

2. **Professional services providers:** professional service providers cannot assume that all of their activities will be classified as a professional service for the purpose of their insurance cover.

3. **Overlap of policy cover:** just because an insured has separate professional indemnity cover, does not necessarily mean that a Court will construe a professional services exclusion in a D&O policy in an insurer's favour.

The main message from this case is that if parties to an insurance contract want specific "*professional services*" activities to be excluded (or included), make sure those activities are clearly defined in the policy.

Comments

The Court's approach of looking at the object of insurance cover provided, when determining the meaning of professional services, is consistent with long standing authority. In this case however, because of the lack of clarity in defining the professional services to be excluded, the decision generates some uncertainty for insureds and insurers regarding the meaning of professional services and what cover may or may not be available under a policy with a professional services exclusion. Nonetheless, parties can take steps to avoid interpretation uncertainty by ensuring that the meaning of "*professional services*" in their insurance policies is clearly defined.

That the Court did not reach a definitive view on whether project management is a recognised professional service also creates uncertainty for project managers. Whilst on the one hand such uncertainty may be unhelpful, the flip side is that it allows courts to look at the wider commercial picture, when considering the scope of a professional services exclusion. The decision does serve as a reminder to focus upon the task that is the subject of the cause of action and consider whether that task falls within the excluded professional service. ■

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Recent changes to Queensland building and construction industry legislation

Written by Raisa Conchin, Special Counsel

The Queensland Government has recently enacted a number of changes to the laws governing the building and construction industry. The changes (which came into force on 1 December 2013) are anticipated to be the tip of the iceberg, with further amendments expected to be on the Government's legislative agenda in the coming months.

So what has changed?

Licensing

The existing licensing requirements have been modified to more closely reflect the commercial arrangements common to the industry. Previously, a party which contracted to undertake "*building work*" was required to hold a building licence. Now, the **Queensland Building and Construction Commission Act 1991 (Qld)** (**the QBCCA**) provides that certain persons are not required to hold a building licence when contracting to undertake building work.

If you are a:

+ special purpose vehicle (**SPV**) recognised by the Queensland Treasurer and engaged to carry out a public-private partnership;
+ lead contractor;

+ property developer; or
+ tenderer,

provided that the person actually carrying out the "*building work*" is appropriately licensed, you are now not required to hold a building licence.

This change removes the burden of holding a licence, particularly for head contractors and property developers, and recognises the commercial reality that building works are largely carried out by appropriately licensed contractors.

However, these changes:

+ cease to apply if the unlicensed person causes or allows any of the "*building work*" to be performed by a person who does not hold an appropriate licence;
+ do not allow for unlicensed persons to administer, advise, manage or supervise the "*building work*"; and
+ do not apply to residential construction or domestic "*building work*" (persons engaged in this type of work are still required to hold the appropriate license).

Definition of "building work"

The **Queensland Building and Construction Commission Regulation 2003 (Qld)** now provides that certain activities are not considered to be "*building work*" for the purposes of the QBCCA. Activities which do not constitute "*building work*" now include (among others):

+ hanging curtains, or installing, maintaining or repairing blinds or internal shutters;
+ laying carpets, floating floors or vinyl;
+ earthmoving or excavating;
+ services performed by a registered property valuer in the course of his/her professional practice;
+ inspection, investigation or report for assessment of an insurance claim;
+ installing insulation (acoustic or thermal);
+ installing insect or security screens; and
+ installing hot water systems and solar panels.

Retention monies under building contracts

The QBBCA now expressly provides for retention money relief for contracts involving SPVs which have been engaged to carry out a public-private partnerships. The existing ability to contract out of the retention of 5% of the contract sum for contracts (other than subcontracts) now also applies to SPVs

(section 67K).

Further, the requirement that 5% of the contract sum be retained in respect of subcontracts does not apply where the subcontractor is an SPV.

What are the potential risks?

Head contractors and property developers could potentially fall foul of the new licensing exceptions if they *"cause or allow" "building work"* to be carried out by an unlicensed person. It is not clear if this carve out is directed at punishing purposive acts or if it also includes inadvertent acts or omissions by an unlicensed person. Unlicensed persons are urged to remain vigilant to ensure that *"building work"* is always carried out by appropriately licensed persons.

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Brookfield Multiplex – Special Leave Application

By: Paul Spezza, Partner and Hayden Gregory, Paralegal

On 14 March 2014 the High Court granted Brookfield Multiplex special leave to appeal the decision of the NSW Court of Appeal in ***The Owners Strata Plan No 61288 v Brookfield Australia Investments Ltd*** [2013] NSWCA 317. That decision has been condemned in some circles as an unwarranted extension of the common law duty of care owed by builders to subsequent owners for certain types of latent defects in buildings.

The appeal is expected to be heard in July or August 2014. Given the implications arising from the NSW Court of Appeal decision, the construction and insurance industries will no doubt anxiously await the outcome in the High Court.

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COMMERCIAL STRUCTURAL DEFECTS INSURANCE – VICTORIA TO FOLLOW TASMANIA

Written by: Connor Burdon-Bear, Solicitor

The Victorian Government, as part of its response to a Victorian Competition and Efficiency Commission inquiry, has recently committed to reducing "*red tape*" in order to boost productivity and reduce costs for Victorian businesses.

The Honourable John Lloyd was appointed the Red Tape Commissioner. He previously held the role of the Australian Building and Construction Commissioner.

As part of his review process, Mr Lloyd consulted with the business community, ultimately proposing 36 red tape reforms. One of the 36 red tape reforms involves reform to mandatory commercial builders defects insurance.

Currently all commercial builders must hold structural defects insurance as required by the Building Practitioner's Insurance Ministerial Order.

The only exception to this requirement is that commercial builders who are limited to works regarding fitouts that are non-structural are not required to hold mandatory insurance.

In 2008, Tasmania, which had similar requirements in place, removed a similar form of mandatory commercial builders defects insurance. However, builders are still required to obtain contract works and public liability insurance. It now appears that Victoria will follow suit.

The Government has advised that 22 of the 36 reforms will be "*implemented in time to meet the Government's 25 per cent red tape reduction target commitment of July 2014 with the* [others] *to be introduced in the near future.*"

The Government is yet to stipulate which of the reforms will be implemented by July 2014. We will keep you advised of developments in future bulletins.

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