Chubb Insurance v Robinson: how to interpret a professional services exclusion

***Chubb Insurance Company of Australia Limited v Robinson* [2016] FC AFC 17**

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What happened

Victorian Full Federal Court:

+ Agreed that a professional services exclusion in a D&O policy was not triggered by the insured officer providing a statutory declaration to secure payment to the company.
+ Agreed that a professional services exclusion is interpreted more narrowly than a PI policy insuring clause.
+ Held that the provision of the statutory declaration was the compilation of factual material and not the provision of project management services, which surprisingly were held not to be professional services in any event.

The implications

+ Insurers cannot expect that a professional services exclusion will apply to exclude all risks that ordinarily fall for cover under a professional indemnity policy.
+ In order to maximise the effect of a professional services exclusion and avoid two policies being hit by a large claim or dual insurance issues arising, professional services exclusions should be reviewed, possibly in a manner set out in this update.
+ An exclusion clause will be interpreted in light of the purpose of the policy. Here, the purpose was to cover management and auxiliary services of a construction company. An exclusion clause cannot be interpreted in a manner that may inappropriately restrict the purpose of the cover being provided.

In *Chubb Insurance Company of Australia Limited v Robinson* [2016] FC AFC 17 (**Chubb**) the Full Federal Court recently clarified the operation of a 'professional services' exclusion within a D&O policy. In so doing, it confirmed how such exclusion clauses are to be interpreted, which provides useful guidance to both insurers and insured as to:

1. the interpretation and application of such clauses; and
2. the potential for unintended consequences where a professional indemnity exclusion is broadly framed.

THE FACTS

Relevantly:

- The insured, Reed, entered into a design and construct contract with 470 St Kilda Road Pty Limited (**St Kilda**) on 25 October 2010 for the redevelopment of an office building into apartments (**Leopold Project**).

- The terms of the contract required Reed to submit claims for payment depending on the progress of the redevelopment (**progress claims**).
- The progress claims were to detail the value of the work undertaken and other sums due to Reed, in this case payment of subcontractors.
- In December 2010, Reed was instructed that any progress claims should be accompanied by a statutory declaration.
- Mr Robinson was the Chief Operating Officer of Reed (not a director) and supervised a number of construction projects including the Leopold Project. Mr Robinson was not involved in the day to day management of the Leopold Project.
- On 12 December 2011, Mr Robinson provided a statutory declaration in support of Reed's progress claim for $1,426,641.70. Reed was subsequently placed in liquidation.
- St Kilda commenced proceedings against Mr Robinson alleging that the statutory declaration he provided was misleading and deceptive and negligent.
- Reed had a PI policy with Liberty International Underwriters and a corporate policy with Chubb, which provided D&O cover (**Chubb policy**). Mr Robinson sought cover under that D&O policy, which was denied on the basis that he had rendered a professional service to St Kilda such that the professional services exclusion applied. Mr Robinson issued a cross-claim against Chubb.

THE POLICY

The Chubb policy relevantly offered PI and D&O cover. However, Reed purchased D&O cover only, with its professional indemnity cover being obtained from another insurer. The insuring clause of the D&O cover broadly covered directors and officers when acting in their capacity as the directors and officers of Reed, subject to the following 'professional services' exclusion:

> *"for any actual or alleged act or omission…in the rendering of, actual or alleged failure to render any professional services to a third party"*.

Professional services was not defined.

THE DECISION

Robinson succeeded at first instance[1] and Chubb appealed that decision. Chubb argued that the professional services exclusion was applicable as:

i. the Court should look at the overall activities of Reed in the context of which Mr Robinson's conduct occurred (i.e. the provision of construction services), rather than merely on the specific conduct of Mr Robinson (which the Court held was ancillary in nature); and

ii. the provision of project management services by Reed under the contract were *"professional services"*.

The Full Court disagreed and, in determining what it said was the *"true construction of the Professional Services Exclusion",* held that:

[1] *470 St Kilda Road Pty Ltd v Robinson* (2013) 308 ALR 411.

- the purpose of the policy was to protect executives from incurring liabilities in the course of carrying out their duties as executives of a construction company. An exclusion clause cannot be interpreted in a manner that removes the real benefit and purpose of the policy;

- the term professional in the insuring clause of a professional indemnity policy does not necessarily mean the same as in a professional services exclusion.[2] The professional services exclusion must relate to a narrower band of activity than merely acts/omissions that generally comprise or support the delivery of building and construction activities by Reed, as otherwise the D&O cover would be inappropriately restricted; and

- professional services in an exclusion mean services of a professional nature involving application of skill and judgment. This meant that the exclusion applies for the acts or omissions of executives which occurred in the course of rendering services of a requisite professional character. In other words, the exclusion is intended to exclude activities that are truly professional in nature, not the routine activities of Reed or its executives.

The Full Court held that the exclusion did not apply as:

i. surprisingly, they considered that there was no evidence to show that project management was regarded as a profession in 2010 or 2011. We are surprised by that finding and expect that there are many project managers who would disagree; and

ii. in any event, the provision of the statutory declaration did not constitute the rendering of any service (irrespective of whether or not that was professional). Rather, it was an act done on behalf of Reed in the discharge of contractual obligations regarding claims for payment. *"Those acts amounted to nothing more than the routine compilation of factual material in order to secure a contractual payment"*.

IMPLICATIONS

Insurers may need to review their professional services exclusions to assess whether, in light of the Full Court's decision:

1. *"professional services"* ought to be defined. However, this approach may have its own difficulties. An expansive definition referrable to the provision of *"any service"* may overcome a narrow interpretation of *"professional"*, but would not have assisted in this matter, given the Court's finding that no service had been provided. Alternatively, the exclusion of any acts, errors or omissions howsoever undertaken pursuant to a contract for the provision of services to a client may have been sufficient in this instance, although such an exclusion could be said to *"inappropriately restrict"* the intended purpose of the policy and may be hard to sell; or

2. to the extent possible, make the professional service exclusion referrable to the insured's specific PI policy. The exclusion of any loss covered under the insured's PI policy would provide the most comprehensive exclusion, but would entail the PI policy being known and expressly identified in the exclusion.[3] This again may not necessarily have occurred in this matter, as we understand that the particular PI policy was not in existence at the time of inception of the D&O policy, and cover under that PI policy was in question in any event.

Practically speaking, Underwriters want to avoid having more than one policy hit by the same loss (PI v D&O v PLIP see below) or having unintended double insurance claims. Accordingly, it is important that the professional services exclusion operates in the manner intended. As a further safeguard, if more than

[2] The Full Court agreed with the reasons of Buss JA in *Fitzpatrick v Job* (2007) 14 ANZ Ins Cos 61-731.
[3] So as to overcome the effects of section 45 of the Insurance Contracts Act (Cth) 1984 – as otherwise the clause would be struck down as being an "other" exclusion clause

one policy is offered by an insurer, all policies should have a non-accumulation clause so that more than one limit is not hit by the same claim or types of claim

Insureds should ensure correlation between their PI and D&O cover, so that nothing can fall in between the two. To the extent possible, cover should be obtained from the same insurer, so as to avoid falling in the middle of a dispute about which policy should respond, although that might result in less cover if non-accumulation clauses are included.

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