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COMMERCIAL PURPOSE IS PARAMOUNT WHEN INTERPRETING CONFLICTING PROVISIONS IN POLICIES

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NSW Court of Appeal upholds decision that the insurer of a builder who prepared a building report was liable to indemnify under a public and general liability policy, and a professional liability exclusion did not apply.

IN ISSUE

- Interpretation of professional indemnity insurance policy.

THE BACKGROUND

In 2011, Cate Doosey suffered psychological harm when her seven year old daughter fell 2.57m from the balcony of their home onto concrete below. The cause of the fall was a defective balcony rail. Before she purchased the property, Ms Doosey had engaged Nigel Walsh to prepare a building inspection report which stated that the balcony was “secure” and “in fair condition”. Ms Doosey relied upon the building inspection report when purchasing the property. In proceedings brought in the District Court of NSW, Mr Walsh was found to have been negligent and Ms Doosey was awarded $175,934.89. Her daughter’s damages were also ordered to be assessed.

Mr Walsh held a Professional Indemnity (PI) and Public & General Liability (P&GL) policy with Pacific International Insurance (Pacific). The PI policy provided cover for claims relating to breach of professional duty in relation to "Business Activities", but specifically excluded cover for property damage or personal injury. The P&GL policy provided cover for personal injury and property damage in connection with "Business Activities" which were defined in the Endorsement to include pre purchase building reports which were required to include recommendations for structural assessment, and for annual inspections. Mr Walsh made claims under both policies, but they were rejected by Pacific. Consequently, Mr Walsh commenced a cross-claim for indemnity against Pacific.

THE DECISION AT TRIAL

Despite Pacific’s attempt to rely on exclusion clauses relating to personal injury and professional liability, and argue that neither the PI nor the P&GL wordings responded, the trial judge found that the P&GL wording responded to the claim and Mr Walsh was entitled to indemnity from Pacific. The trial judge adopted a narrow reading of the Professional Liability exclusion in clause 6.19 of the P&GL wording and emphasised the need to construe the wording from a commercial perspective, rather than focusing strictly on the contractual text. Pacific appealed.

THE DECISION ON APPEAL

Pacific argued on appeal that the words "*subject to*" in the P&GL insuring clause were contractually intended to limit indemnity to the circumstances set out in the policy terms. Because the Endorsement detailed the types of inspection reports that would be understood as "Business Activities", but the inspection report that Mr Walsh provided dealt with questions of structural integrity, his report was outside the scope of the Policy.

The Court of Appeal referred to *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 514, where the High Court found that the words "subject to" established the dominance and subservience of the relevant provisions. However, the use of that phrase in the Policy was found not to be determinative in this case, as more elaborate contractual provisions were at play, such that the conflict between the exclusions and the endorsements generated the most important questions arising from policy construction.

In view of the insuring clause and the Endorsement, the Court of Appeal concluded that provision of advice was central to the report and that this was consistent with the Endorsement. As a matter of construction, the obligation to include a particular recommendation said nothing about the content of the report generally. It was also easy to envision circumstances where a building inspector would need to give advice as to the structural *inadequacy* of external timber work.

The Court of Appeal agreed with the interpretation of the trial judge that the P&GL exclusion clause extended to professional advice *other than* the activities required for the Business Activities – which avoided any inconsistency with the Endorsement.

As a further point, the Court of Appeal specifically noted that clause 4.5 of the P&GL policy stated that where an Endorsement conflicted with a general exclusion, the former would prevail. This left two possibilities – either the PI exclusion clause was construed narrowly and did not exclude advice given in the course of Business Activities, or it was construed more broadly, but then engaged clause 4.5 and did not apply in any event.

Finally, the Court of Appeal observed that Pacific had allowed Mr Walsh to hold himself out as having general and liability cover in the amount of $5M. It would have been unscrupulous for the $5M cover to be inapplicable whenever a building inspection report contained negligent advice which caused personal injury or physical damage. The cover would otherwise have been very limited in scope, as this risk was at the heart of Mr Walsh's business.

Pacific's appeal was dismissed with costs.

IMPLICATIONS FOR YOU

While there is some evidence of the court performing intellectual gymnastics in order to ensure that Mr Walsh was covered by his policy, the overarching reasoning is clear. The courts will always try to give precedence to a commercially pragmatic approach to policy interpretation, taking into account commercial efficacy and the cover the policy is intended to afford to the insured.

Pacific's arguments, if accepted, would have resulted in a policy that was intended to cover a building inspector for advice (amongst other things) not responding because of interplay between different terms in the policy. The courts will generally endeavour to avoid such a conclusion, particularly where the construction contended for by the insurer would deny cover for the risks that lie at the very core of an insured's business.

Pacific International Insurance Co Ltd v Walsh [2018] NSWCA 9 (14 February 2018)

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