

POLICY TERMS REIGN SUPREME - QLD COURT OF APPEAL DENIES COVER TO PRINCIPAL CONTRACTOR ASSIGNED RIGHTS UNDER SUBCONTRACTOR'S INSURANCE POLICY

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A recent Queensland Court of Appeal decision has considered whether losses sustained by a principal in remedying defective excavation works done by a subcontractor were covered under the subcontractor's insurance policy following a settlement involving the assignment of the subcontractor's policy rights to the principal.

IN ISSUE

- Whether a claim by a principal (Delta) as an assignee of a subcontractor's alleged right to indemnity under an insurance policy pursuant to a settlement deed could be established.
- Whether a subcontractor's insurance policy extended to cover the principal, therefore providing the principal with indemnity for costs incurred in undertaking preventative repairs.

THE BACKGROUND

In 2006 the Queensland Investment Corporation (QIC) contracted with Delta Pty Ltd (Delta) to undertake excavation work for a high rise building in Brisbane. Delta engaged Team Rock Anchors Pty Ltd (TRA) to install rock anchors. The purpose of the rock anchors was to secure four retaining walls constructed in the excavation of the basement. TRA's installation of the anchors was defective and ultimately required Delta to backfill the site and begin the excavation process again causing significant delay and cost.

Delta sued TRA alleging negligence in its installation of the anchors. TRA's insurer, Mecon declined indemnity and TRA commenced proceedings against Mecon. For unrelated reasons, TRA's claim against Mecon was dismissed. Delta settled with TRA and the settlement terms assigned TRA's rights under the Mecon policy to Delta, and provided for a settlement payment from TRA to Delta 'on demand' with its liability limited to the amount recovered by Delta under the Mecon policy as assignee.

Delta claimed against Mecon for the losses sustained both as an assignee of TRA, and as an insured under the Mecon policy. At trial it was held, inter alia, that Delta was not entitled to indemnity under the Mecon policy, either as an insured or an assignee. Delta appealed this decision. It was not in issue that TRA's rights under the policy had been properly assigned.

The Decision

In considering the claim by Delta as an assignee, the Court of Appeal considered whether the terms of the settlement created a legal liability, whether TRA's assumption of that liability was reasonable and whether the Mecon policy responded to that liability. The Court of Appeal held that as the deed rendered TRA unconditionally liable, a legal liability was created and that the settlement amount was reasonable, overturning the trial judge on those issues. On the latter issue, it was held that the liability was for losses incurred in preventing movement of the retaining walls and that this was not 'Property Loss' happening as a result of an 'Occurrence' as required by the policy. Rather, the loss was only an expected loss created by TRA's breach of contract. While the policy did provide for 'loss of use' in certain circumstances, this argument was not pleaded by Delta at first instance and could not be maintained. Further, Mecon was also entitled to rely on an exclusion clause within the policy related to the depth of the excavation works undertaken by TRA.

As to coverage under the policy as an insured, Delta submitted the definition of insured which provided cover to "*principals and contractors who are not otherwise insured*" and a clause which insured principals "*for the principal's liability arising out of work performed by you for that principal*" afforded coverage. These propositions were not upheld. Delta was otherwise insured, and despite some ambiguity, the insuring clause on a commercial construction did not extend to Delta. Additionally, costs of preventative repairs were not 'Property Loss' and Delta's claim for the repairs was time barred.

IMPLICATIONS FOR YOU

The decision shows that being assigned a right to claim under a policy does not equate to being provided an indemnity, and that prior to any settlement which includes such an assignment, a thorough consideration of the policy terms and loss claimed needs to be undertaken. It also lends support to the established position that insurance contracts will be interpreted in a business-like manner, and the proposition that movement of a retaining wall is not property loss in the absence of tangible damage.

[Delta Pty Ltd v Mechanical and Construction Insurance Pty Ltd \[2019\] QCA 62](#)

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