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ABSENCE DOES NOT MAKE THE HEART GROW FONDER: AN UPDATE ON THE INTERPRETATION OF EXCLUSION CLAUSES

OCTOBER 3, 2019 | INSURANCE ISSUES

The NSW Court of Appeal overturned the primary judge's decision on the construction of a 'prudent lender' exclusion clause in a professional indemnity insurance policy, holding that an insurer was entitled to decline indemnity under the policy because of a contravention of the policy exclusion.

IN ISSUE

- Whether an insurer was entitled to decline to indemnify its insureds including for their defence costs, by reason of the contravention of an exclusion clause in the insurance policy

THE BACKGROUND

BNY brought a claim against three property valuer defendants (MMJ) for professional negligence arising out of three property valuations undertaken for BNY in 2010. The defendants' insurer (XL) declined to indemnify them or pay their defence costs due to an exclusion clause in their professional indemnity insurance policy, specifically an exclusion for valuations that do not include a 'Prudent Lender Clause'. MMJ cross-claimed against XL, seeking to enforce coverage of their insurance policy.

THE DECISION AT TRIAL

A summary of the trial decision can be found in our earlier article, Court found in favour of the defendants.

In making her determination the trial judge found that, reading the policy as a whole, the insurer was not entitled to decline indemnity and found in favour of the defendants. In February 2019, XL appealed to the Court of Appeal.

THE ISSUES ON APPEAL

The issues on appeal included whether the trial judge erred in her construction of the exclusion clause; and whether she erred in granting declaratory and other final relief in circumstances where the defendants' liability to BNY had not yet been established.

THE DECISION ON APPEAL

As to the first issue, the Court of Appeal was required to determine what a 'reasonable business person' would have understood the relevant terms of the insurance policy to mean, with reference to its context and purpose. The Court of Appeal's preferred construction of the exclusion clause was that it *"applies to exclude cover for "Loss" as defined in the policy where the valuation is undertaken by or on behalf of the Insured for a non-Authorised Deposit Taking Institution (ADI) lender and the valuation does not include a prudent lender clause"*

. As such, the Court of Appeal ultimately found that the valuations undertaken by MMJ for BNY answered the description specified in the exclusion clause, and thus XL was entitled to rely upon the exclusion to decline cover to MMJ, including for its defence costs.

The Court of Appeal did not decide on the second issue, but commented on the appropriateness of the trial judge's grant of final relief, the scope being criticised as being "too wide" and the declaration on liability *"not usually appropriate".*

IMPLICATIONS FOR YOU

This case is a useful reminder of the 'canons of construction' that the courts will consider when interpreting insurance policies and commercial contracts. It also raises questions over the appropriate scope of declarations and final orders being made at an interlocutory stage and/or before the final disposition of primary proceedings.

XL Insurance Co SE v BNY Trust Company of Australia Limited [2019] NSWCA 215

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