

ABSENCE MAKES THE HEART GROW FONDER: WHETHER INSURER ONLY ENTITLED TO DECLINE INDEMNITY IF THE ABSENCE OF A PRUDENT LENDER CLAUSE CAUSED THE LOSS

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The court held an insurer was not entitled to decline indemnity under a professional indemnity policy because of a valuer's failure to include a Prudent Lender clause in a valuation report in contravention of a policy exclusion.

IN ISSUE

- Whether a policy exclusion applied to entitle an insurer to decline cover for a professional indemnity claim by a valuer who did not include a prudent lender clause in a valuation report

THE BACKGROUND

During December 2010, Mr Volk and Mr Hosking on behalf of the defendant valuer (MMJ), prepared three valuation reports for BNY in relation to property situated at 14A Hurrell Way, Rockingham in Western Australia for the plaintiff, Bank of New York Trust Company of Australia (BNY). BNY was not at the time, an "Authorised Deposit-Taking Institution" (ADTI) supervised by Australian Prudential Regulation Authority. None of the valuations included a prudent lender clause (PLC). BNY advanced loans in reliance on the valuations. Both mortgagees defaulted on their loans, which resulted in BNY bringing proceedings against both parties. BNY tried unsuccessfully to sell the property.

BNY subsequently issued proceedings against MMJ who in turn commenced separate cross claims against its professional indemnity insurer, seeking indemnity under a Professional Indemnity policy (the policy). The court ordered that the issues of the proper construction of clause (ix) of Endorsement 1 of the Policy (endorsement clause) be determined separately to the main proceedings.

Both parties submitted that the endorsement clause was not ambiguous. The insurer contended that the Policy excluded cover in respect of liability arising from any valuation provided to a lender that was not an ADTI, when the valuations did not include a PLC.

MMJ submitted that the endorsement clause only excluded cover in circumstances where

when the absence of a PLC in a valuation was causative of the loss.

THE DECISION AT TRIAL

Notwithstanding both parties' positions, the court was of the view that the endorsement clause was in fact ambiguous, given the introductory words used and what appeared in the clauses which followed. However, upon a proper construction of the endorsement clause, the court held that the provision required that there be a causal link between the absence of the PLC and the loss for which indemnity was claimed.

In terms of the causation issue, the court did not accept that either the introductory words, or those used in endorsement clause (ix) had the meaning for which the insurer contended. That position was supported by various considerations, such as *"the introductory words are concerned with losses **caused** by the matters dealt with in the clauses that follow..."*. Further, the commercial circumstances surrounding the entry into the Policy made it unlikely that the insurer's construction was in the parties' contemplation when endorsement clause (ix) was agreed.

Ultimately, the court was *"satisfied that the proper construction of [Endorsement Clause (ix)], driven as that must be by its text, read in the context of the endorsement as a whole, including its introductory words and all of the clauses which follow, is that for which the defendants contended"*.

Consequently, the court concluded that *"[Endorsement clause (ix)] requires that there be a causal link between the absence of the prudent lender clause specified by that clause in the valuation and the loss for which indemnity is sought"*. As the parties agreed that no such link existed, the insurer was not entitled to rely on the clause to deny indemnity.

IMPLICATIONS FOR YOU

This case is a helpful summary of the applicable principles that will be considered by the courts when interpreting the construction of insurance policies, and particularly exclusion clauses. It is also another reminder that when construing particular clauses, the courts will have reference to not only the clause, but to the contract as a whole.

[BNY Trust Company of Australia Limited v MMJ Real Estate \(WA\) Pty Ltd \(No 2\) \[2018\] NSWSC 1938](#)

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