

COVERED WITHOUT BEING NAMED - UNDERWRITERS BEWARE!

SEPTEMBER 18, 2019 | INSURANCE ISSUES

The Western Australian Court of Appeal has recently found that a non-contracting party to a policy may be included within the definition of 'Insured' where the policy schedule includes reference to all Principals, Contractors, and Sub-Contractors.

THE BACKGROUND

In February 2015, Frederick and Jennifer McMurray (McMurrays) engaged Mosman Bay Construction Pty Ltd (Mosman Bay) to undertake renovations to their property in Western Australia. Mosman Bay subsequently engaged Hans Bo Kristian Holgersson (Holgersson) as an internal painting sub-contractor.

Prior to that, Tokio Marine & Nichido Fire Insurance Ltd (Tokio Marine) had issued Mosman Bay with an Annual Projects Construction and Legal Liability Insurance Policy (Tokio Marine Policy).

During the course of construction work, a fire broke out causing damage to the property. As a result, the McMurrays brought proceedings against various parties, including Tokio Marine. Tokio Marine granted indemnity to Mosman Bay, and in the exercise of its rights of subrogation, then required Mosman Bay to maintain proceedings against Holgersson on the basis that Holgersson was responsible for the fire. Holgersson, in turn, asserted that he qualified as an insured under the Tokio Marine Policy and this precluded Mosman Bay being able to sue him.

The primary judge was required to determine as a preliminary question whether the Policy provided liability insurance cover for Property Damage to Holgersson. The primary judge found that in accordance with the definition of 'Insured' in the Policy Schedule, Holgersson was so insured. Tokio contended on appeal in the Court of Appeal (WA) that on a proper construction of the Policy, Holgersson would not be covered as an 'Insured'.

The Decision at Trial

The primary judge was required to determine whether the Tokio Marine Policy provided coverage to Holgersson. The Policy Schedule identified the Insured as 'Mosman Bay Construction Pty Ltd and all Principals, Contractors, and Sub-Contractors'. However, despite commencing with capital letters, the terms 'Principals', 'Contractors' and 'Sub-Contractors' were not defined in the Tokio Marine Policy. The critical issue was the meaning of, and effect of, the phrase 'and all Principals, Contractors, and Sub-Contractors'.

The primary judge found that the Tokio Marine Policy did respond for the following reasons:

- Holgersson was a sub-contractor of Mosman Bay;

- Therefore, Holgersson was within the class of persons 'named' as Insured in the Schedule; and
- Because he was 'named' in the Schedule, Holgersson then met the definition of 'You' in the Tokio Marine Policy wording.

THE DECISION ON APPEAL

The Western Australian Court of Appeal rejected the arguments advanced by Tokio Marine and upheld the primary judge's findings. In coming to that conclusion, the Court of Appeal broadly summarised its reasons as follows:

- a contract should not be construed in a manner that renders a provision or part of the contract superfluous. However, the court will justify the omission of words, or treat them as superfluous:
 - (a) if, and to the extent that, when regard is had to the contract as a whole, the inclusion of those words can be seen as an obvious error; or
 - (b) if those words are inconsistent with, or repugnant to, the objective intention revealed by the contract as a whole;
- in the case of a contract comprising a pre-printed set of terms (in this case the Policy Wording), a court will be more inclined to read the provisions of the Schedule as having an operative effect against a policy wording which has no room to operate;
- naming a non-contracting party in a Schedule cannot be seen as an obvious error or repugnant to a policy wording or a policy as a whole; and
- the naming of 'all Principals, Contractors, and Sub-Contractors' as 'Insured' under the Tokio Marine Policy did not produce consequences so uncommercial, and was not so incoherent with the policy as a whole, as to demonstrate that it was an obvious mistake to which effect should not be given.

IMPLICATIONS FOR YOU

This case is a useful reminder of the construction principles that a court will consider when construing contracts and particularly, insurance contracts. Insurers and contractors alike should look closely at the policy wording and schedule to ensure that the correct entities are included as an insured. The fact of Mosman Bay not being required to take out insurance for Holgersson did not prevent him from ultimately being found to be an insured should be a wake up call for insurers.

Tokio Marine & Nichido Fire Insurance Co Ltd -v- Hans Bo Kristian Holgersson trading as Holgerssons Complete Home Service [2019] WASCA 114

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