

THE FEDERAL COURT DISMISSED A CLAIM FOR INDEMNITY UNDER A PROPERTY DAMAGE INSURING CLAUSE AS THE CLAIM WAS WITH RESPECT TO DEFECTIVE WORKS RATHER THAN 'PROPERTY DAMAGE'

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The Federal Court recently dismissed a claim under the liability coverage clause of a business insurance policy (policy) for alleged 'property damage' to an underground conduit for carrying cables, finding the claim concerned defective works rather than physical injury to property or 'property damage'.

IN ISSUE

- Whether the coverage clause of the policy was engaged.
- Whether exclusions titled 'Property in physical or legal control' (exclusion 3), 'Faulty workmanship' (exclusion 4) and 'Contractual liability' (exclusion 13) applied.

THE BACKGROUND

R & B Directional Drilling (in liquidation) (R & B) was in the business of providing drilling services to the construction industry. RL Industries Pty Ltd, trading as Longfield Services (Longfield), was a construction company. As part of a larger construction project, Longfield subcontracted certain works to R & B. R & B were to install five conduit pipes for carrying cables in a steel sleeve under a railway line. Once the conduit pipes were placed, concrete grouting was to be pumped into the conduit. When pumping the concrete into the steel sleeve (sleeve), concrete entered one of the conduits making it useless for carrying a cable. The concrete and conduits were later removed and replaced without damage to the steel sleeve.

Longfield asserted R & B's works were defective and claimed for the cost of removing the conduits and grouting, for wasted expenditure and other liabilities. R & B claimed on the policy it held with the respondent insurer asserting that the general liability section of the policy was engaged as it had a legal liability to pay compensation in respect of property damage.

The insurer declined indemnity under the policy asserting that the coverage clause was not engaged and, if it was, the exclusions applied to exclude any liability in the insurer. R & B and

Longfield issued proceedings in the Federal Court of Australia against the insurer with Longfield seeking the benefit of R & B's policy with the insurer.

THE DECISION

The Court dismissed the action and held the coverage clause was not engaged. It further held that if it was engaged, exclusion 3 applied such that the insurer would not be obliged to pay anything as the sleeve was tangible property in the physical control of R & B. As regards exclusion 4, the Court held that it applied to exclude costs for correcting the defective works but not certain consequential liability for delay, and exclusion 13 did not apply as the relevant liability or obligation was not assumed under an agreement or contract.

In holding the coverage clause was not engaged, the Court did not characterise what occurred as physical injury to the sleeve. Rather, the Court considered what occurred was the placement of defective materials within the sleeve, which required removal from the sleeve, but the sleeve itself was not physically damaged. On that basis, the Court held the temporary loss of use of the sleeve was caused by defective works rather than physical injury, and thus the coverage clause was not engaged.

IMPLICATIONS FOR YOU

The decision is a reminder to consider the circumstances of any alleged property damage to ascertain whether there is property damage within the meaning of a coverage clause rather than defective works.

R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2) [2019] FCA 458

AUTHORS



SCOTT SHELLY
SENIOR ASSOCIATE

+61 3 9909 6327
scott.shelly@bnlaw.com.au