

THE INCOMPLETE PROPOSAL – WHAT TERMS ARE INCORPORATED INTO A POLICY?

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The NSW Supreme Court found that terms of a page inadvertently omitted from a proposal form still formed part of the insurance policy.

IN ISSUE

- Whether the terms on an omitted page of a proposal form still formed part of the policy;
- If not, whether the policy ought be rectified to include the terms of the omitted page.

THE BACKGROUND

IUS Pty Limited (IUS) was a firm which provided architectural services. Around March 2007, IUS had submitted a proposal form for professional indemnity cover to Lumley General Insurance Limited (Lumley) via intermediaries for the 2007/2008 period. The policy which was subsequently effected incorporated terms from the proposal form. The policy was on risk from 23 March 2007 to 23 March 2008 and then renewed for a further year.

The proposal form that was submitted was missing the second page. The second page included terms headed "*Notice of Occurrence or Events*" which was effectively a deeming provision providing cover for any occurrence notified during the policy period which subsequently became a claim.

IUS had been engaged by Bechini to provide architectural services in relation to the construction of two houses on property which they owned. Development control plans were altered which prevented two houses being built on Bechini's property. IUS was notified of Bechini's claim against it in July 2008 and it was alleged that IUS did not notify Lumley of Bechini's claim against it until early 2014.

The issue of what was incorporated into the terms of the policy was submitted for separate determination.

THE DECISION AT TRIAL

As to whether the terms on the missing page were nevertheless incorporated into the policy, the court noted that the first two pages of the proposal form comprised terms being brought to the attention of the insured. Page 1 was headed "*Important Notice Relating to this Proposal*" which was then followed by "*PLEASE READ THE FOLLOWING ADVICE BEFORE PROCEEDING TO COMPLETE THIS PROPOSAL FORM*".

Lumley submitted that the 'Proposal' only consisted of the parts of the document completed by the insured (IUS) and did not include the first two pages comprising the notice provisions (specifically the omitted second page).

The court held that the terms 'Proposal' and 'proposal form' were interchangeable in this case, as both the

Proposal and the form were referred to as 'this Proposal'. Consequently, the second page was part of the Proposal which, despite not being submitted to Lumley, was nevertheless incorporated. As the parties clearly intended for the entire proposal form to be part of the policy, omission of the second page did not preclude the inclusion of its terms into the policy.

Although the court found that the terms on the second page of the proposal form were incorporated, it still dealt with the question of whether rectification would otherwise have been possible. Rectification allows the form (i.e. document) of a contract to be rectified, but this is only to eliminate a mistake - where there is a continuing common intention that can be inferred which requires the contract to be rectified.

As the parties intended to transmit the entirety of the document, rectification to re-include the second page would not have altered the contract itself. The court did not find anything to suggest that the written document did not embody the final intention of the parties. However, the court prefaced this finding with the caveat that if it was found to be wrong about the parties' intention for the terms on the second page of the proposal form to be incorporated, this would result in the finding that the policy should be rectified to reflect the parties' intention.

IMPLICATIONS FOR YOU

Taking a birds-eye view of the relevant issues, the approach taken by the court was relatively straightforward. Lumley was aware of the terms on the second page (as it was its own form) and IUS did not indicate that it was unaware of those terms - this was sufficient to establish a shared intention on what terms were incorporated.

The judgment nevertheless demonstrates how the courts approach the issue of the intention to incorporate terms into a policy. Where terms would ordinarily be part of a policy (even if it is not included in the wording or schedule), clear evidence will be needed to establish that the particular term was not intended to be incorporated.

Bechini v IUS Pty Limited (ABN 93 003 359 279) (In Liquidation) [2019] NSWSC 427

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