February 2023

Insurance Insights

Insurer permitted to invoke professional liability exclusion clause for Queensland flooding class action

***SunWater Limited v Liberty Mutual Insurance Company* [2022] NSWCA 273**

Key takeaways

- Professional liability exclusions are not confined to claims brought by the recipient of the professional service or advice.
- A court may construe the professional liability exclusion more stringently where the insured can seek refuge under another policy.
- There are no special rules that apply to construing exclusions in insurance contracts. Clauses should be construed according to their natural and ordinary meaning, unless such a reading results in "commercial nonsense".
- The principle of *contra proferentum* has limited vitality and should be considered a principle of last resort.

Factual Background

A class action was brought against SunWater Ltd (**SunWater**), the Queensland Bulk Water Supply Authority (trading as **Seqwater**) and the State of Queensland, for property damage caused by the Queensland Floods of January 2011.

It was alleged that these authorities failed to properly release water from the Somerset and Wivenhoe Dams, located in South East Queensland. As a result, dam operators were forced to release large volumes of water from the dams during extreme rainfall, which exacerbated the damage caused by the floods.

Seqwater had engaged SunWater to provide flood management services. SunWater did this by providing qualified and experienced engineers, including the appointment of Mr Robert Ayre as Senior Flood Operations Engineer.

Settlement of Class Action

Justice Beech-Jones of the New South Wales Supreme Court held that SunWater was vicariously liable for Mr Ayre's negligence. He found that SunWater itself did not owe a duty of care to the group members in the class action, but Mr Ayre did. SunWater appealed this decision, but settled prior to determination of the appeal.

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Insurance Policies

SunWater sought indemnity for the settlement under two contracts of insurance:

1. The first policy was a combined policy of General and Products Liability insurance on the one hand, and Professional Indemnity insurance on the other.
2. The second policy was issued by Liberty Mutual Insurance Company (**"the insurer"**) for the first excess layer of the General and Products Liability insurance (and on the same terms).

The General and Products Liability policy contained the following exclusion clause (**"the Exclusion"**):

8. PROFESSIONAL LIABILITY

arising out of the rendering of or failure to render professional advice or service given for a fee by The Insured

Earlier Court Decision

Justice Stevenson of the New South Wales Supreme Court determined that the Exclusion applied to deny SunWater entitlement to indemnity in its liability out of the class action.

SunWater appealed on two grounds:

1. SunWater was not actually providing flood management services. Rather, it simply engaged others (such as Mr Ayre) to provide these services.
2. The Exclusion was confined to claims brought by the recipient of the professional advice or service. That is, the Exclusion would only apply if the claim had been brought by Seqwater.

Decision

Ground 1

The Court rejected the argument that SunWater did not provide professional flood management services. SunWater clearly provided these services by appointing qualified and experienced engineers, such as Mr Ayre. To say otherwise would be inconsistent with Justice Beech-Jones' conclusion that SunWater was vicariously liable for Mr Ayre.

Ground 2

The Court also rejected SunWater's submission that the Exclusion only applied to claims brought by the recipient of the professional advice or service. The natural and ordinary meaning of the Exclusion did not contain any such qualification. The words "arising out of" are broad and well capable of capturing SunWater's liability in the class action.

Interestingly, the Court acknowledged that there may be a basis for some qualification if the natural and ordinary meaning of the Exclusion excessively limited SunWater's coverage. However, this was not the case here as SunWater could seek indemnity under the Professional Indemnity component of the policy. This

suggests the Court may have construed the Exclusion more stringently if SunWater had no other recourse under the policy.

Principles of Constructing Exclusion Clauses

Importantly, the Court reiterated the fundamental canons of construing exclusion clauses in insurance policies, as follows –

1. One must be cognisant that an insurance policy is a commercial contract and is to be given a business-like interpretation.
2. Interpreting an insurance policy requires attention to:
    a. Language used by the parties;
    b. Commercial circumstances the policy addresses; and
    c. Objects of the policy.
3. The meaning of the exclusion is to be determined objectively by reference to its text, context and purpose.
4. There is no special rule that applies to construing exclusions in insurance contracts. However, it may be necessary to deviate from the natural and ordinary meaning of the exclusion if the result is "commercial nonsense".
5. The principle of *contra proferentum* has "limited vitality" when interpreting exclusion clauses. Under this principle, exclusion clauses are construed against the insurer for the benefit of the insured. The Court made it clear this should only be done where the exclusion has an ambiguous meaning and only as a "last resort".

Concluding Remarks

This case is clearly a win for insurers. The Court clarified that professional liability exclusions can apply beyond claims brought by the recipient of the professional service or advice.

Perhaps, most crucially, this case demonstrates the depreciating importance of the principle of *contra proferentum* when construing insurance policies. If this trend progresses, we may see more insurers successfully invoking exclusion clauses, based on a common-sense and business-like reading of the insurance contract.

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