

BE SPECIFIC WHEN IT COMES TO PROJECT INSURANCE

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Legal Briefings - By **Mark Darwin** and **Guy Narburgh**

A recent decision of the New South Wales Supreme Court reminds us of importance of carefully documenting the intended relationships and hierarchy between a project-specific insurance policy and the insurance policies which are held by the various participants in the project.¹

In this case, the court was forced by an ambiguity to look to the surrounding circumstances in order to find that the project policy was intended to be excess to a contractor's professional indemnity policy.

BACKGROUND

As part of the Australian Pacific LNG Gladstone Pipeline Project (**Project**), a project-specific professional indemnity policy (**Project Policy**) was purchased to apply to six named insureds including Kellogg Brown & Root (**KBR**). Relevantly, the Project Policy inceptioned in 2012 with a 10 year policy period and had a limit of liability of \$50 million and an excess of \$1 million. The Project Policy also included a clause providing that it responded in excess of any 'Additional Insurance', being a specific scheduled list of other insurance policies identified by insurer, policy reference number and policy type.

One of the Additional Insurances listed was a PI policy taken out by KBR with a 2012 policy reference described as "Annual Professional Indemnity" (**2012 KBR Policy**). KBR was the subject of a claim that, based on the date it was commenced, attached to KBR's 2013-2014 professional indemnity policy (**2013 KBR Policy**). KBR argued that because the Additional Insurance referred to in the Project Policy was the 2012 KBR Policy (not the 2013 KBR Policy), the Additional Insurance clause did not apply and KBR could pursue its claim under the Project Policy (which had a lower excess/deductible). The Project Policy insurer sought a declaration from the Court that the Project Policy only applied in excess over the 2013 KBR Policy (on the basis that it was a renewal of the 2012 KBR Policy listed as an "Additional Insurance").

COMMERCIALLY INCONVENIENT RESULT TO BE AVOIDED

Justice Stevenson rejected KBR's argument. He considered that the description of the 2012 KBR Policy as an "Annual Professional Indemnity" policy created an ambiguity in the context of the Additional Insurance clause which permitted him to consider the mutually known surrounding circumstances in relation to the Project Policy in order to form a view on its proper meaning and operation.

Those surrounding circumstances demonstrated that the insurer and the proposed insureds (either directly, or through their broker):

- knew that KBR and the other insureds were contractually obliged to maintain their own professional indemnity insurance for a period equivalent to that of the Project Policy;
- knew that 2012 KBR Policy was the relevant KBR policy on foot at the time of the placement of the Project Policy; and
- appear to have understood (albeit mistakenly) that the 2012 KBR Policy was the policy which KBR would maintain throughout (and beyond) the construction phase of the Project.

In light of those surrounding circumstances, the Judge, applying ordinary rules of construction for commercial contracts, concluded that a reasonable business person in the position of the parties would have understood that the Project Policy was to be in excess of any insurance effected and maintained in accordance with the contractual insurance obligations in the Project documents.

His Honour said he needed to give a business-like interpretation to the policies, and it seemed highly unlikely that the parties would have intended the Project Policy to have a commercially inconvenient operation which would defeat the purpose of the "Additional Insurance" structure and lead to the "extraordinary results" which KBR's interpretation contemplated (which would mean that the Project Policy was no longer to be treated as excess if *any* of the specific details in the Additional Insurance schedule changed over the 10 year Project Policy period).

Of course, more careful wording of the Project and policy documents from the outset may have avoided the ambiguity and the argument which therefore opened up for KBR to pursue.

ENDNOTES

1. *Liberty Mutual Insurance Company v Kellogg Brown and Root Pty Ltd* [2017] NSWSC 1519.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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