

# INSURER HUFFS AND PUFFS... BUT POLICYHOLDER'S CLAIM STANDS

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

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A policyholder whose negligence led to the catastrophic destruction of a residential home in Brisbane has secured liability insurance coverage in a recent Queensland Supreme Court decision, despite its insurer's insistence that a freak storm (for which the policyholder could not be liable) was the cause of the loss.

The case is a pertinent reminder to policyholders that:

- The Courts will adopt a common-sense approach to determine 'in a real and practical sense' what caused damage, rather than a more technical approach which seeks to bring the claim outside policy coverage or within the scope of an exclusion; and
- The fundamental purpose and object of an insurance policy will be relevant in interpreting its terms.

## UNDER PRESSURE

The plaintiff homeowners' property suffered an explosive over-pressurisation during a severe summer storm, when wind gusts deflected the windows inwards, allowing the air pressure to build up inside until the roof of the property came off and the internal walls failed. The plaintiff sued its builder for the loss, who held a "Business Insurance" policy covering all sums which it became legally liable to pay "*in respect of: ... property damage; ... happening during the period of insurance... as a result of an occurrence in connection with [its] business or products*". The builder's insurer had denied coverage on 2 grounds:

- first, the insurer alleged that the property damage was caused by the storm, not the builder's negligence, so was not as a result of an "*occurrence in connection with [the builder's] business*"; and
- secondly, if the loss was in connection with the business, the insurer alleged that the house was the builder's product so it alleged an exclusion applied for "*property damage to products if the damage is attributed to any defect*".

Justice Daubney held against the insurer on both arguments.

## **CAUSE FOR CONCERN**

On the first issue, the Court held that it was not the storm *per se* which damaged the house, nor did the defectively installed windows directly damage the remainder of the house. Rather, the Court found (based on expert evidence) that the window failure (deriving from the builder's negligence) was causative of the explosive over-pressurisation, and determined that that the explosive over-pressurisation was, "in a real and practical sense, the event which directly did the damage". The loss was therefore an occurrence in connection with the builder's business, and the builder was therefore *prima facie* entitled to be indemnified unless the exclusion applied.

## **HOUSE IS NOT A 'PRODUCT'**

On the second issue, the Court held that the plaintiffs' house was not a 'product' of the insured's building supervisory services for two reasons:

- first, while there was authority that a building could be a product, such a conclusion in this case would potentially rob the insurance policy of its fundamental purpose of covering the builder for liability in connection with its building business; and
- secondly, the policy contained a specific exclusion in respect of construction work which contained an exception extending coverage for individual contracts of a value less than \$500,000, so a broad 'defective products' exclusion would render this exception meaningless.

As a result, the Court declared that the builder was entitled to be indemnified meaning that the plaintiff homeowners recovered their loss.

## ENDNOTES

1. *Bigby v Kondra & Anor* [2017] QSC 37 (14 March 2017) (Daubney J).

## 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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