

WORDING CONFLICT RESOLVED IN FAVOUR OF POLICYHOLDER

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

The New South Wales Court of Appeal has resolved a conflict in the provisions of a policy in favour of the policyholder in a decision which emphasises the common sense approach taken to policy interpretation.¹

In particular, the Court held that a claim arising from advice on the structural integrity of a building was not excluded by the 'professional advice' exclusion in the policy. In this case, the policy specifically addressed the hierarchy of different provisions of the policy (here, an extension overruled an exclusion) in the event of a conflict - however, a similar outcome may result even where the policy is silent on the issue.

Where a policy exclusion is asserted by an insurer, policyholders should give careful consideration to the whole of the policy wording and surrounding circumstances as these may support a different, and more favourable outcome.

FACTS

Complete Building Inspection Services Pty Ltd (**CBIS**) provided a building inspection report regarding a family home, including advice that the balustrades of the home's balcony '*appear secure and in fair condition*'. Subsequently, a child fell and was injured when a balustrade at the home failed. CBIS was successfully sued for negligence in the preparation of its report and ordered to pay damages to the homeowner and her child. CBIS succeeded in obtaining an order that its insurer, Pacific International, indemnify it for the damages, under a public liability and professional indemnity policy. Pacific appealed the decision.

DECISION

The policyholder CBIS succeeded on appeal. The Court of Appeal dismissed the two main arguments raised by the insurer in defence of the claim:

1. DID THE POLICY COVER THE ADVICE PROVIDED IN THE REPORT?

Pacific contended that the words '*[t]his Policy covers all inspections/reports as requested in your proposal unless excluded in your Premium Advice*' in the policy schedule bore a very narrow meaning which restricted cover only to certain types of reports listed in Complete Building's insurance renewal proposal form. The Court rejected this argument holding that this was:

- not a natural meaning of the words '*all inspections/reports as requested in your proposal*'; and
- difficult to reconcile with the 20 species of cover in the proposal form.

Pacific further contended that a clause in an endorsement which required that building inspection reports include a recommendation that annual inspections take place indicated that CBIS was not covered for reports about a building's structural integrity. Again, the Court rejected this argument - CBIS's obligation to include a particular recommendation in a report of itself said nothing about whether other content of the report was insured. Moreover, the endorsement also required reports to include advice regarding the structural *inadequacy* of certain structures, which was analogous to structural integrity, and suggested that such advice was insured.

2. EVEN IF IT WAS COVERED, DID A 'PROFESSIONAL ADVICE' EXCLUSION APPLY?

Pacific also contended that CBIS's advice constituted '*professional advice or services*' which were specifically excluded by the policy. The Court rejected this argument, reasoning that the insurer's policy could not both require advice to be given yet leave provision of that advice uninsured. Moreover, a policy clause provided that where an endorsement conflicted with an exclusion, the endorsement applied.

ENDNOTES

1. *Pacific International Insurance Co Ltd v Walsh* [2018] NSWCA 9.

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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