

WRONGFUL ACTS DO NOT HAVE TO BE UNINTENTIONAL FOR COVER TO APPLY

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

The Full Federal Court has confirmed that loss resulting from a policyholder's deliberate decision to leave a construction site was a "wrongful act" covered by a professional indemnity policy, despite the fact that it was not unintentional.

The case demonstrates that the Courts:

- are reluctant to restrict the cover under an insuring clause; and
- will conduct a broad factual enquiry when determining whether a policyholder was acting in the course of its professional activities.

FACTS

Aquagenics was engaged by a local council to design and construct a water treatment plant, including conducting pre-commissioning works. A dispute arose as to whether those pre-commissioning works had been properly carried out - Aquagenics maintained that they had, such that commissioning could commence. The dispute could not be resolved and Aquagenics left the construction site and never returned.

The local council successfully brought arbitration proceedings against Aquagenics for the cost of engaging another party to carry out the pre-commissioning works and was awarded approximately \$1.345 million. The liquidator of Aquagenics (which had gone into liquidation after the arbitration award) sought to recover the arbitration award under Aquagenics' professional indemnity insurance policy on the basis that it resulted from a *'claim ... arising out of [a] wrongful act committed ... in the course of [Aquagenics'] professional activities'*. The liquidator's claim was successful at first instance and the insurer appealed.

DECISION

The Full Court unanimously approved the first instance decision and ordered that the claim should be paid. The key aspects of note are as follows:

1. *The Court refused to restrict the cover provided by the policy's insuring clause, particularly where that would effectively require the implication of an additional word into the clause:* Insurers argued that the use of the words providing cover for any 'wrongful act', 'error' and 'omission' meant that the conduct giving rise to the claim had to be 'unintentional' and did not cover deliberate acts such as Aquagenics' 'commercial' decision to leave the site.

The Court rejected these arguments:

- the ordinary meaning of 'act, error or omission' can involve deliberate conduct, and to limit those terms in the way suggested by the insurer would be inconsistent with the remainder of the policy – for example, the policy exclusions suggested that the insuring clause was not intended to be limited to cover only inadvertent or unintentional acts; and
- any untoward width of operation of the phrase 'act, error or omission' argued by the insurer was addressed by operation of the policy exclusions and by the requirement that the act must have been committed in the course of professional activities.

2. *Aquagenics' decision to cease work in connection with the contractual dispute did arise 'in the course of [Aquagenics'] professional activities':* The decisions which underlay the

assertion of Aquagenics' contractual position and Aquagenics' ultimate assertion of that position were informed by a consideration of commissioning and pre-commissioning questions that involved professional expertise and skill on the part of Aquagenics. As such, the act of refusing to take further steps under the contract was committed in the course of the professional activities of a water treatment engineer.

It was incorrect to characterise the decision as 'commercial' – Aquagenics' position was that it could not conduct any further work until the council had fulfilled its contractual obligations.

ENDNOTES

1. *Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663 v Aquagenics Pty Limited (in liquidation)* [2018] FCAFC 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.



MARK DARWIN
PARTNER, BRISBANE

+61 7 3258 6632
Mark.Darwin@hsf.com



GUY NARBURGH
SPECIAL COUNSEL,
SYDNEY

+61 2 9322 4473
Guy.Narburgh@hsf.com

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