

OPAL TOWER BUILDER SECURES LIABILITY COVER FOR DEFECTS OCCURRING OUTSIDE POLICY PERIOD

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Legal Briefings - By **Mark Darwin and Anne Hoffmann**

KEY TAKE-AWAYS

- Despite the occurrence giving rise to the claim being outside the policy period, the Court was prepared to rectify the error to extend the policy period over the defects liability period based on evidence of the policy holder's representatives that the parties had always intended for the policy to cover the entire time period during which the policy holder was liable to third parties.
- Terms of the policy will be interpreted within their context, not just by reference to the ordinary meaning of the term. In this instance, the Court held that - in the context of a builder taking out product liability cover - a "building" is a product and so the consequential liability was covered by the insured's product liability policy.

BACKGROUND TO THE CLAIM

Icon is a construction company which built the Opal Tower at Sydney Olympic Park, with practical completion being achieved on 8 August 2018. A 12 month defect liability period then commenced.

A few months later (and within the defects liability period), major cracks were observed across three floors in certain wall panels and floor slabs and residents had to be evacuated. A class action was commenced by the residents against Sydney Olympic Park Authority which cross-claimed against Icon. Icon was liable for a total of \$31m in rectification and alternative accommodation costs and legal fees.

Icon claimed indemnity for its liability from its insurers, Liberty (as construction risks insurer) and QBE (as product liability insurer). It ultimately succeeded against both, even though the claims did not at first glance appear to be covered by either policy.¹ This case is another reminder to review coverage positions carefully before concluding that insurance will not cover a situation where you intended cover to exist. Claim for an occurrence outside the insurance period

INTENTION WAS RELEVANT TO THE POLICY PERIOD

Liberty issued Icon with a series of successive and identical 12 month contracts of third party construction liability insurance, arranged via its broker, with Icon to notify the insurer of the time period of the project, from which the premium was assessed.

Although Icon's contract with Sydney Olympic Park Authority obliged it to rectify all defects for a period of 12 months after the date of practical completion (defects liability period), Icon's notification to its insurer merely referred to the estimated construction period and did not mention the defects liability period.

When the cracking occurred during the defects liability period, although that was strictly outside the policy period, Icon relied upon the intent of the policy to apply for rectification of the policy period, and also argued that s 54 of the ICA operated to forgive its omission to notify the insurer that it required coverage for the defects liability period.

The Court held that s 54 did not apply to circumstances where cover did not exist in the first place - rather, s 54 only operates to remedy defects to trigger cover which already exists.

However, Icon succeeded in its claim that the Liberty policy should be rectified to include cover for the defects liability period. The Court was prepared to accept evidence of the policy holder's representative (broker) that he and the insurer's representative had always intended to cover all period when Icon might be liable on the project. Importantly, Liberty did not offer any evidence from its representative, so the Court was entitled to draw the inference that the evidence from the insurer's representative would not have assisted Liberty's case about the intended policy period.

INTERPRETATION OF TERMS IN THE CONTEXT OF THE INSURANCE - A "BUILDING" CAN BE A PRODUCT

Icon also lodged an alternative claim under its product liability policy with QBE, which was current when the cracks were identified. Under that policy, QBE was obliged to indemnify Icon for any legal liability incurred during the insurance period as a result of an occurrence in connection with one of Icon's products.

"Product" was defined as:

... any product or thing (including containers packaging or labelling) sold, supplied, erected, repaired, altered, treated, installed, processed, grown, manufactured, assembled, tested, serviced, hired out, stored, transported or distributed by the Insured including any container thereof (after such goods and/or products cease to be in the possession and/or under the control of the Insured) in the course of the Insured's Business in or from Territorial Limits, including liability arising out of the Competition and Consumer Act 2010 or similar legislation.

QBE denied that the building erected by Icon was a "product". It argued that the ordinary meaning of "product" did not include a building, and that Icon's products in this instance only related to carpets, stoves, cooktops, air conditioning units and the like installed in the building.

The judge rejected that argument. He held that the ordinary meaning of the term must depend on the subject matter in connection with which it is used and that:

"[i]n the context of an insurance policy issued to a construction company which delivers large-scale building projects, it is hard to imagine what other product or thing, besides a building, would be erected such to fall within the meaning of the definition".

IMPLICATIONS FOR POLICYHOLDERS

The key take-away from this decision for policyholders is to question adverse decisions on coverage which do not accord with what you believe was intended by the policy. Even if on its face it appears that the policy may not respond, it pays to consider the issues in more detail. It is another example of the Court applying a common sense approach in favour of the intention of the parties in taking out insurance cover .

ENDNOTES

1. *Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets* [2020] FCA 1493

Since the original publication of this article, Liberty has filed an appeal.

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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