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Liability insurance: reasonable care and compliance with statutory requirements

Some policies require the assured to comply with statutory or regulatory standards. A recurring question is whether such an obligation is absolute or whether it is subject to reasonable care restrictions. The most recent decision, Manitowoq Platinum Pty Ltd v WFI Insurance Ltd [2017] WADC 32, a decision of Davis DCJ in the Western Australia District Court, has shown a clear preference for a reasonable care interpretation. Earlier cases demanding absolute compliance were distinguished.

The facts

MPP owned a restaurant in Hay Street, Perth. In 2007 and 2008 Boss Shop Fitting fitted out the premises at a cost of AUS$786,628. The work to be carried out included plumbing. After a short time it became apparent that the work was defective, with water damage being noted within weeks of completion.

The floor in the kitchen also began to sink. Increasing amounts of damage were noted, and there were various unsuccessful attempts to put matters right. In September and October 2013 MPP had to close the restaurant to effect repairs. MPP issued proceedings against Boss, and Boss in turn made a claim against its liability insurers WFI. Boss subsequently went into liquidation and was deregistered. Under section 601AG of the Corporations Act 2001 (Cth) the effect was that MPP could pursue WFI as if it were the assured under the policy. There was no dispute as to the liability of Boss to MPP, and the issues in the present proceedings were the precise causes of the damage, the quantum of liability incurred by Boss and the coverage under the policy.

Davis DCJ considered a good deal of factual evidence as to what had gone wrong and how much it had cost to put matters right. The expert evidence showed that there were 19 defects in the hydraulic services (plumbing), including: the use of unfit materials, mainly uPVC piping; the installation of piping at less than minimum prescribed gradients; improperly secured piping; unsatisfactory and incomplete pipe jointing procedures; absence of a hydrostatic pressure test to the installed piping; and failure to seal pipes at the point where they passed through the floors and walls. Most of the defects identified amounted to contraventions of Australian Standards for the installation of plumbing and drainage. Damages were assessed at $1,549,721.83.

The policy and the defences

The policy taken out by Boss with WFI was described as a "Commercial Plan Insurance Cover", consisting of up to 18 different policies on a variety of risks, covering a range of risks. Boss chose from that list three types of cover: Business Liability, General Property and Motor Vehicle. The relevant policy was Business Liability.

The insuring clause of the Business Liability policy covered Boss in respect of "legal liability to pay compensation for ... damage to property caused by an occurrence" during the period of insurance and in connection with Boss's business, described as "Shop Fitter". The policy contained a series of General Conditions. There was no specific sanction stated for breach, the policy merely describing them as: "Conditions which you must meet whilst you have the policy (if you don't meet these conditions we may be able to refuse or reduce any claim or cancel your policy)". The policy again stated that: "If you do not do what you are obliged to do under your policy, we may refuse to pay a claim or any part of it". General Condition (b) stated that Boss had to "comply with legislation and Australian Standards". This was coupled with a standard reasonable care provision in General Condition (d), requiring Boss to "take reasonable care to avoid causing harm to others or to property belonging to others".

There were two specific exclusions relevant to the present case. The first related to products, excluding any claim:

"for failure of products sold or supplied by you to meet the level of performance, quality, fitness or durability you represented either expressly or impliedly for the cost of:

- investigating the cause of any defect or deficiency or suspected defect or deficiency or products sold or supplied by you

- tracing, recalling, repairing or replacing products or refunding the purchase price for products sold or supplied by you."

The second related to workmanship, excluding any claim:

"for the cost of doing, redoing, completing, correcting or improving any work (including the supply of materials or parts) which you or anyone for you or on your behalf did not do correctly or did not do but should have done in the first place."

WFI relied upon three defences. First, as regards the claim as a whole, WFI relied upon General Condition (b). Secondly, in respect of the defective plumbing, they argued that they were exempt from liability by virtue of the Products exclusion. Thirdly, in respect of the failure of Boss to obtain a compliance certificate for the original work, so that a fresh compliance certificate had to be obtained for the refit, WFI relied upon the Workmanship exclusion.

General Condition (b): the authorities

It was argued by MPP that the obligation under General Condition (b), to "comply with legislation and Australian Standards", was not absolute and had to be read subject to a reasonableness requirement. That aside, there was no stated sanction for breach of General Condition (b), and compliance was not to be read as a condition precedent to liability. Davis DCJ agreed with both arguments. The court reasoned as follows.

The reasonable care cases showed that a policy would not be construed in a fashion that rendered cover meaningless, so that the words were to be construed as providing a defence only in the case of recklessness. See: in England, *Fraser v B N Furman (Productions) Ltd* [1967] 2 Lloyd's Rep 1; and in Australia, *Albion Insurance Co Ltd v*

Body Corporate Strata Plan No 4303 [1983] 2 VR 339, *Legal and General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390, *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 Qd R 162, *State Government Insurance Commission v Lane* (1997) 68 SASR 257 *VACC Insurance Co Ltd v BP Australia Ltd* [1999] NSWCA 427 and *CGU Insurance Ltd v Lawless* [2008] VSCA 38. The cases on the point were most recently discussed in *Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd* [2016] Lloyd's Rep IR 433, where it was held that there could only be recklessness if the assured was aware of the risk and deliberately courted it.

Turning to the Australian authorities on compliance with statutory obligations, the court found some inconsistency in them. In *Casino Show Society v Norris* (1984) 3 ANZ Ins Cas 60-580 the obligation on the assured was "to comply ... with all statutory obligations ... or regulations imposed by any Public Authority in respect thereof for the safety of persons or property". The assured, the operator of a Chair-o-Plane ride, had failed to erect the equipment properly, in contravention of statutory regulations, and three children were injured as a result. The New South Wales Court of Appeal held that the insurers were entitled to refuse the claim, and refused to read the clause as being confined to recklessness. A similar decision was *Kim v Cole* [2001] QSC 289, in which the assured plumber and gasfitter had a liability policy required him to: "(a) take all reasonable measures to prevent ... damage to property" and "(c) comply ... with all statutory obligations, By-laws and Regulations imposed by any Public Authority". The assured failed to install a valve in an oven in a pizza shop in the manner required by regulations, leading to an explosion that destroyed both the shop and caused damage to nearby buildings. The Queensland Court of Appeal held that there were separate provisions for reasonable care and for statutory compliance, and that the latter was not to be read subject to the former. In other words, the obligation to comply with legislation was absolute.

However, a series of other cases showed a different approach. In *Buckley v Metal Mart Pty Ltd* [2008] ACTSC 79 there was a general clause headed "Reasonable Care", with separate obligations: (a) to take all reasonable precautions to prevent damage; and (b) to comply with laws, by-laws, regulations and recognised standards. There were other conditions listed as well. The court held that the obligation in the list of conditions, including condition (b), were subject to a reasonable care restriction, and that if the conditions were to be construed as unqualified they could operate in a draconian fashion. In *Victorian WorkCover Authority (VWA) v Concept Hire Ltd* [2009] VSC 194 an employers' liability policy provided that the assured "shall comply at all times with the provisions of the Occupational Health and Safety Act 1985 and the Dangerous Goods Act 1985". The court held that the provision had to be construed as a reasonable care clause. Most recently, in *Barrie Toepfer* a clause headed "Reasonable Care" contained distinct obligations to exercise reasonable care to prevent loss, and to comply with statutory requirements. The court held that the latter was to be construed as being subject to the overriding reasonable care requirement, the rationale being the need to give the policy a consistent interpretation.

General Condition (b): the outcome

Davis DCJ took the view that each of the cases turned upon its own facts. *Norris* did not limit the obligation by reference to reasonable care and the clause was in any event limited to the safety of persons or property. *Kim v Cole* involved a serious safety breach, and the clause made no reference to reasonable care. The judge also noted that not every minor breach of regulations could be regarded as infringement of the compliance obligation. That aside, compliance with the obligation was not specifically expressed to be a condition precedent to recovery. Further, there was a list of other conditions, none of

which was expressly qualified by any reasonable care requirement but, as in *Buckley*, unless there was such a restriction then the conditions could operate unfairly: business efficacy so demanded. The correct interpretation, as in *Barrie Toepfer*, was to construe the conditions consistently and thus subject to an overriding reasonable care requirement. On the facts there was no recklessness, just negligence, and accordingly WFI could not rely upon General Condition (b).

The Products exclusion

The Products exclusion was held to have no application to the present case. It was designed to exclude liability where there had been a failure in products "sold and supplied" by Boss. In the present case, the goods were not defective; it was simply the case that Boss had failed to carry out its refitting obligations properly.

The Workmanship exclusion

The judge noted that the Workmanship exclusion operated to exclude cover for the costs of correcting poor workmanship. It did not apply to consequential loss flowing from not performing the work properly in the first place. That had been held in a series of cases: *Graham Evans & Co (Qld) Ltd v Vanguard Insurance Co Ltd* (1986) 4 ANZ Ins Cas 60-689; *Prentice Builders Ltd v Carlingford Australia General Insurance Ltd* (1988) 6 ANZ Ins Cas 60-951; *Walker Civil Engineering Pty Ltd v Sun Alliance and London Insurance plc* (1999) 10 ANZ Ins Cas 61-418. In the present case there had been substantial cost involved in re-doing plumbing work, and that was excluded (the sum estimated at AUS$100,000). However, the loss to MPP's business was covered. There was also coverage for the cost of obtaining a compliance certificate: although the certificate required the work to be redone, the cost was not incurred as a result of that work but of the original failure to carry out the work properly.