

# SCOPE OF COVERAGE FOR CONSTRUCTION CLAIMS UNDER PROFESSIONAL INDEMNITY POLICIES

## *FKP Commercial Developments Pty Ltd v Zurich Australian Insurance Ltd (No 2) [2023] FCA 582*

The scope of coverage under a professional indemnity policy for construction companies undertaking design and construction services is often a vexed issue. Pure construction activities are often not covered. However, the Federal Court of Australia's decision in *FKP Commercial Developments Pty Ltd v Zurich Australian Insurance Ltd (No 2) [2023] FCA 582* has clarified the scope of cover for construction activities where policies have a particular type of extension clause. The decision has important implications for construction companies and insurers. It serves as a reminder to be aware of the precise wording of an insurance policy, including how particular clauses may be interpreted in the context of the policy as a whole.

### Background

The applicants, FKP Commercial Developments and FKP Constructions Pty Ltd (**FKP**), were insured by the respondent under a Design and Construction Professional Indemnity policy in relation to the development of two apartment buildings. The owners corporation brought a claim for damages against the applicants in relation to defects in the building works. The applicants sought indemnity from the insurer. Their claim was denied.

The Federal Court considered the construction and operation of clause 3 of the extension of cover in the policy, which provided:

#### **Consultants, Subcontractors and Agents**

*We agree to indemnify the insured for loss resulting from any claim arising from the conduct of any consultants, sub-contractors or agents of the insured for which the insured is legally liable in the provision of the professional services. No indemnity is available to the consultants, sub-contractors or agents.*

The Federal Court considered whether the claim made against FKP was a:

*"claim arising from the conduct of any consultants, subcontractors, or agents of the insured for which the insured is legally liable in the provision of the professional services".*

Key to the issue was whether the coverage extended to FKP in circumstances where:

- FKP had sub-contracted the design and construction works it was obliged to perform under the head contract and had itself performed only project management and construction management services; and
- there was no causal connection between the provision of the professional services and the alleged defects.

The Court considered this by reference to three components:

1. whether the claim arises from the conduct of FKP's sub-contractors;
2. whether FKP is legally liable for the conduct of its sub-contractors; and
3. whether FKP is legally liable in the provision of the professional services.

### The decision

The Court concluded that clause 3 provided coverage to FKP as:

- (1) it was clear that the claim made against FKP arose from the conduct of its sub-contractors in performing the residential building work.
- (2) FKP was liable for a breach of statutory warranties, whether they undertook the work themselves or engaged subcontractors to perform the work.
- (3) the claim did not need to result from the insured's professional services and the facts giving rise to the claim need not include the insured's provision of professional services. Rather, it was enough that the claim arose from conduct by the insured's sub-contractors where a substantive element of the factual matrix in which the liability arose was the provision by the insured of professional services.

In reaching this view the Court was influenced by the wording of the extension clause which did not explicitly require a causal connection between the insured's legal liability for its sub-contractors and the insured's provision of professional services. It was noted that, if the parties had intended such a causal connection, there were many connective phrases which were available and which could have been used in the clause. It was also noted that this construction was consistent with the absence from the definition of "sub-contractors" of any reference to "professional services".

## Key takeaways

Construction companies should carefully review their professional indemnity policies, or seek advice, and determine whether the policy contains a similar extension of cover for work undertaken by sub-contractors. If so, claims for construction activities undertaken by sub-contractors may be covered depending on the wording of the extension clause, the circumstances of the claim and the wording of the policy as a whole.

For more information, please contact the author(s) of this alert



**SOPHY WOODWARD**

Partner, Melbourne

**T** +61 (0)408 765 746

**E** [sophy.woodward@hfw.com](mailto:sophy.woodward@hfw.com)