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## Insurance Law Ealert

### Can the insured obtain payments from its insurer for construction work where the work was to safeguard and minimise the insured risk? *Thiess Pty Ltd & Anor –v– Zurich Specialities London Ltd & Anor [2009] NSW CA 47*

#### Background

This is an appeal from the decision of Justice Bergin in the Technology & Construction List of the Equity Division of The Supreme Court of NSW. In this case the insured (Thiess) contended they were able to obtain progress payments from their insurer (Zurich) for construction work undertaken by them after a tunnel collapsed.

#### Appellant's Submissions – a separate construction contract existed

Thiess submitted that a separate construction contract between them and Zurich existed within their contract of insurance. It was submitted that the obligation to take "all reasonable precautions" to safeguard the insured subject matter and to prevent loss or damage would, in certain circumstances, include the need to carry out construction work.

#### Primary Judgment – the commercial purpose of this policy

The appellant's submissions were rejected in the first instance. Justice Bergin based her decision on the fact that the clause must be read to give effect to the commercial purpose of the contract (*Legal & General Insurance Australia Ltd –v– Eather [1989] 6 NSW LR 390 at 405 McHugh JA*). Her Honour ruled that the commercial purpose of this policy was to provide indemnity for the insured on the terms and conditions included in the policy. The clause was not an agreement for the insured to carry out construction work for the insurer, but an agreement that construction work carried out for the principals/owners had to be done in a particular manner to qualify for indemnity under the insurance policy. The insured was required to take "reasonable precautions" in order to qualify for indemnity under the policy.

#### Decision

The judgment of the Court of Appeal was delivered by their Honours Justice of Appeal MacFarlan, President Allsop and Acting Judge of Appeal Sackville agreeing. His Honour Justice MacFarlan agreed with the reasoning and conclusion of Justice Bergin.

His Honour Justice MacFarlan decided that the critical question was whether the requirement for the insured to take "reasonable precautions" constituted a condition precedent to the insured's right to indemnity or whether it embodied a contractual promise by the insured to take the steps. His Honour noted that the proper approach to construction of an insurance policy is to give it a business like interpretation (*McCann –v– Switzerland Insurance Australia Ltd [2000] HCA 65*, per Gleeson CJ; affirmed in *CGU Insurance –v– Porthouse (2008) 235 CLR 103*, at [43]).

His Honour ruled that the commercial purpose of the policy was to provide indemnity against certain loss and damage. It was not to enable the insurers to procure the performance of construction work. The requirement to take "reasonable precautions" was designed to protect the insurer by limiting its obligations to indemnify the insured. The insured's policy made it clear that compliance with the terms, conditions and limitations of the policy was a condition precedent to any liability of the insurers to make payment under the policy.

His Honour's final test in determining whether there was a promise to carry out construction work was asking whether the insurers would have been able to sue the insured for damages if the insured failed to take the reasonable precautions required by the insurance contract. In his Honour's view it is clear that they could not as this would not be in conformity with the commercial purpose of the policy.

The appeal was dismissed.

#### Conclusion – a separate contract of construction does not arise

It is clear that the duty to take reasonable precautions to avoid and/or minimise loss can cost an insured money out of its own pocket. It is more to the point though, that the obligation to take these precautions is a **condition precedent** to the liability of the insurer under the policy. We observe that, because the liability of the insurer has not arisen until the condition is satisfied, section 54 cannot be availed by the insured to access the policy indemnity.

New South Wales legislation protecting parties who undertake construction work, specifically the *Building and Construction Industry Security of Payments Act* will not apply between the insurer and the builder. The builder will not be entitled to progress payments from the insurer.

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