What's in a name?
Insurers need to be careful how and where they name a third party on a policy

Tokio Marine & Nichido Fire Insurance Co Ltd v Holgersson [2019] WASCA 114

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Overview

The WA Court of Appeal has found that indemnity was available to a party who fell within the definition of a 'subcontractor' under the principal's liability policy without the restrictions on cover of the principals and subcontractors extension in circumstances where the notation of 'subcontractors' was included in the schedule under the definition of 'Insured' without any further detail.

Insurers and underwriters must be vigilant in the manner in which they note non-contracting parties on endorsements or policy schedules or risk providing indemnity in circumstances where the provision of cover was not intended by the insurer.

Facts

Mosman Bay was a builder insured in relation to its building activities under a policy ('the Policy') issued by Tokio Marine & Nichido Fire Insurance Co Ltd ('Tokio'). The McMurrays engaged Mosman Bay to renovate their home, and Mosman Bay engaged Holgersson as a subcontractor painter.

The subcontractor agreement did not require Mosman Bay to obtain insurance to cover Holgersson.

However the Schedule of the Policy read:

> *INSURED: Mosman Bay Construction Pty Ltd and all Principals, Contractors and Sub-Contractors.*

During the project, a fire caused damage to the McMurrays' property and they commenced action against Tokio, Mosman Bay, and Holgersson amongst others.

Tokio indemnified Mosman Bay and required Mosman Bay to maintain a third party cause of action against Holgersson alleging he was responsible for the fire. Holgersson contended that he was an insured under the Policy and that this prevented Tokio from requiring Mosman Bay to sue him.

The primary judge was required to determine as a preliminary question whether the Policy provided liability insurance cover for Property Damage to Holgersson. The primary judge found that in accordance with the definition of 'Insured' in the Policy Schedule, Holgersson was so insured.

Tokio contended on appeal in the Court of Appeal (WA) that on a proper construction of the Policy, Holgersson would not be covered as an 'Insured'.

Wording of the Insurance Contract

The Policy wording provides 'The Company and You are identified and referred to in the Policy and the Schedule'. The relevant definitions were as follows:

You, Your, Insured *means the Person(s) or legal entity named in the schedule.*

Named Insured *shall mean:*

a) You.

b) Your personal representatives;

c) Additional insured(s):

- *a. any principal; or*
- *b. the head contractor; or*

c. *the project manager; or*

d. *all contractors and sub-contractors but excluding manufacturers and suppliers,*

not being You but ***being a legal entity with whom You have entered into a Contract and provided their interests are required to be insured jointly by You****, and then only to the extent required by the terms set out in the Contract, and only in respect of work performed as part of the Project.*
(emphasis added)

Despite commencing with capital letters in the Policy Schedule, the terms 'Principals', 'Contractors' and 'Sub-Contractors' are not defined in the Policy. The critical issue at trial and on appeal was the meaning of, and effect of, the phrase 'and all Principals, Contractors, and Sub-Contractors'.

The Primary Judgment

Tokio denied indemnity to Holgersson on the basis:

- that the definition of 'Named Insured' in the Policy qualified the inclusion of 'all contractors and sub-contractors' by the phrase 'provided their interests are required to be insured jointly by You, and then only to the extent required by the terms set out in the Contract, and only in respect of work performed as part of the Project'; and
- that the word 'named' contained in the definition of 'You, Your, Insured' in the Policy Wording indicates an intention to precisely identify who falls within that definition by their full name or legal entity name.

The primary judge rejected this argument, finding:

- *a reasonable business person reading the …Schedule description of the Insured would understand the policy to extend to all principals, contractors and subcontractors regardless of whether their particular name was specified;*
- the inclusion of principals, contractors and sub-contractors in the definition of 'Insured' in the Schedule appeared to render paragraph (c) of the definition of 'Named Insured' in the Policy unnecessary.

The primary judge rejected Tokio's argument that paragraph (c) served to limit the express and specific definition of the Insured given in the Schedule or to add a qualification to that definition.

The primary judge found that the Policy provided cover to Holgersson for the following reasons:

1. he was a subcontractor to Mosman Bay;
2. therefore he fell within the class of persons 'named' as Insured in the Schedule; and
3. being so 'named' in the Schedule, he came within the definition of 'You' in the Policy wording.

Appeal

Tokio appealed on five grounds alleging errors of law, ultimately contending that on a proper construction of the Policy, the phrase 'and all Principals, Contractors and Sub-Contractors' under the definition of 'Insured' in the Schedule, should be treated as having no content or operation.

This contention was advanced by two arguments:

1. That the Schedule phrase is redundant because it does not amount to 'naming' a person or legal entity.
2. Alternatively, if the phrase does amount to naming, then its inclusion is so opposed to the terms of the Policy Wording that it must be considered to be an error.

The Court of Appeal found there is only one true construction of a contractual instrument and that in determining the appeal it need only determine the correct construction of the instrument to find whether there had been an error.

The Court of Appeal upheld the primary judge's finding and dismissed the appeal.

The Court of Appeal:

- found that by reason of the wording of the Policy Schedule, all principals, contractors and subcontractors were 'named in the Schedule' and therefore came within the meaning of the definition of 'Insured' – without the hurdle of the principal/ subcontractor's extension part of the definition that the subcontract require insurance to be taken out by the principal;

- viewed the word 'named' in its ordinary sense as synonymous with 'specified', 'mentioned', designated', or 'described' and not confined in its meaning and application to identification of a proper noun, being a person's given name or an entity's legal name;
- refused to accept Tokio's narrow construction of the word 'named' and instead confirmed that a broader construction applied whereby a person or entity may also be 'named' by reference to membership of an identified class stipulated in the Schedule;
- considered that given that another definition in the policy uses the phrase 'identified by name', you would expect that if that was required in this definition, those words would be used rather than the word 'named'.

Importantly for insurers, the Court of Appeal also noted:

- that where the Schedule contradicts the Policy wording - given that the Schedule was created specifically for this contract and the Policy wording was not - it would "*more readily read a provision of the Schedule as having the effect that a particular provision of the Policy wording has no room to operate*" than the other way around;
- that there was nothing preventing a non-contracting party falling within the definition of 'You' in a contract of insurance if that is what was intended;
- therefore in circumstances where it is open to parties to an insurance contract to name a non-contracting party as an 'Insured' in order to provide that party with cover, then the naming of a non-contracting party in the Schedule as being an Insured could not be considered an obvious error or repugnant to the Policy as a whole;
- the naming of 'all Principals, Contractors and Sub-Contractors' as 'Insured' under the Policy does not produce consequences so uncommercial as to demonstrate that it was an obvious mistake;
- the Court is generally reluctant to construe a contract in a manner that renders a provision or part of the contract superfluous – such reluctance being greater if the term or phrase to be construed was drafted specifically for that contract (e.g. in a schedule or an endorsement).

Implications

- Insurers have always needed to be careful in adding parties as 'interested' or 'noted' parties on policies. However this decision emphasizes the importance of where and how those parties are noted.
- If noted within the 'Insured' on the schedule, even if not specifically named, the party may be entitled to the full rights of the contracting insured under the policy – even in circumstances where the intention of the insurer was to restrict the cover available by reference to the principals extension.
- While the present case dealt with a liability policy, property and first party loss insurers and underwriters should be equally careful that in adding parties to the schedule or adding terms by way of endorsements, the limits of the cover intended to be provided to those parties are clearly stated.

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