



A wide 'business like' approach to conduct constituting 'professional activities' by an insured

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At a glance

The Full Court of the Federal Court of Australia has recently held¹ that the concept of 'wrongful act' in a professional indemnity insurance policy extends to a situation where an insured takes a contractual position ultimately resulting in a breach of its contractual obligations. Such an act constitutes conduct within the course of the insured's professional activities, provided that the insured exercised skill and expertise in adopting that contractual position.

The implications

The decision illustrates the Court's approach to giving the insuring clause a wide 'business-like' operation.

Significantly, insurers may be required to indemnify loss sustained by a third party subsequent upon a deliberate contractual stance adopted by an insured (such as a refusal to undertake further work under a contract), provided the stance was based on skill and expertise.

The facts

The respondent (insured/Aquagenics), entered into a design and construct contract with the Break O'Day Council (Council) to perform water treatment engineering works. The works included pre-commissioning and, following the Council's seed sludge delivery, commissioning works.

In 2007 a dispute arose relating to the performance of the pre-commissioning works.²

The relevant events arising from the dispute were as follows:

1. Following Council's refusal to deliver the seed sludge critical to continuing works, Aquagenics left site on the basis that it could not proceed with commissioning
2. In Council's view Aquagenics' works constituted a substantial contractual breach. The Council exercised its contractual right to issue a show cause notice requiring Aquagenics to show cause why the Council should not exercise its right to take out of Aquagenics' hands the balance of the works under the contract
3. Aquagenics maintained that the pre-commissioning works were adequate
4. Consequently, the Council exercised its contractual right to take out of Aquagenics' hands the balance of the works. In a subsequent letter the Council notified Aquagenics of its claim for damages subsequent upon Aquagenics' breach of contract (Demand)

The Council commenced arbitral proceedings pursuant to which an award was published in favour of the Council in the sum of \$1,346,111.57 (Award). The arbitrator found that Aquagenics had failed to undertake pre-commissioning works in compliance with the contract.

As Aquagenics had entered liquidation, its administrator claimed against its professional indemnity policy held with the appellant (Policy) indemnity from the Award (Claim).

The Policy insuring clause in essence covered claims arising out of a wrongful act in the course of Aquagenics' professional activities. The insurer declined cover for the Claim.

The decisions

The primary judge decided that indemnity was available for the Claim. The insurer appealed to the Full Court of the Federal Court of Australia (FCA).

The FCA agreed with the primary judge and dismissed the appeal, ultimately finding that:

1. The Demand amounted to a Claim, irrespective that the demand was in future tense
2. The definition of a 'wrongful act', which included any 'act, error or omission', extends to intentional acts by Aquagenics
3. Aquagenics' taking of a position in the conduct of the contract informed by engineering considerations was conduct undertaken in the course of its professional activities. Specifically the refusal to take further steps under the contract, on Aquagenics' view it had completed what it was contractually obligated to do, was one committed in the course of its professional activities as an engineer

¹*Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663 v Aquagenics Pty Limited (in liq)* [2018] FCAFC 9.

²The applicability of the proportionate liability regime to the dispute was dealt with by the Tasmanian Full Court in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3; 20 Tas R 239.

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