

# (Another) case on the importance of clear drafting

31 January 2023

[< Previous](#)

The Word, January 2023

[Next >](#)

[California bomb cyclone set to 'to exceed \\$1bn' in storm damage costs](#)

In [Arch Underwriting at Lloyd's Ltd on behalf of Syndicate 2012 & Ors v EP Financial Services Pty Ltd](#), the Queensland Court of Appeal rejected the application of the contra proferentum rule, in determining whether an exclusion was ambiguous.

## Facts of the case

In 2013, an authorised representative and employee of EP Financial Services Pty Ltd (EPFS) advised a client to invest in a company. The client acted upon the advice and subsequently incurred a loss. The client sought damages from EPFS and the representative.

EPFS was named as one of the companies specified as the 'INSURED' in a professional indemnity policy held with underwriters at Lloyd's. The policy covered claims against an 'INSURED' in respect of conduct by its authorised representatives, but excluded cover for the authorised representatives themselves. EPFS was therefore covered in respect of the conduct of the representative, but the representative was not himself covered for his conduct. As the representative was also an employee of EPFS, the act of providing negligent financial advice to the client was covered.

The insurer declined to indemnify EPFS on the basis that the policy excluded any claims based upon financial products not contained in the insured's approved products list. Further, it was informally accepted by all parties that investment advice was not intended to be included in the approved products list.

## The exclusion stated:

'WE [will not cover any claim due to:] ...financial products...not contained in the INSURED's approved product list at the time the advice was given unless the advice is in respect of switching from an existing product not in the INSURED's Approved Product List to a product in the INSURED's Approved Product List ...

However, the 'INSURED's approved product list' was not defined.

## Judgment

The main issue in dispute was whether the 'INSURED's approved product list' referred to EPFS' approved list, or the approved list of the representative. EPFS asserted that the exclusion excluded a claim by the representative himself, but not a claim by EPFS for its liability arising from the actions of the representative.

The court held that the policy was a 'composite policy', whereby cover is extended to several insureds in respect of their different interests. As such, the representative's conduct and his entitlement to indemnity was to be determined separately from the conduct of EPFS and EPFS' indemnity claim.

The court held that the definition and use of 'INSURED' gave rise to 'uncertainty or even ambiguity' meaning the exclusion should be read in accordance with the principle of contra proferentum. As such, the policy was to be read in favour of EPFS. The judge's reasoning was influenced by the existence of a second, more specific policy exclusion, which excluded liability for any 'representative, authorised representative or agent who operated without an Australian Financial Services Licence'. This additional exclusion – according to the judge – indicated that the intention of the first exclusion was not to apply to EPFS.

Resultantly, the court determined that the exclusion did not apply to EPFS, which was essentially covered for advice on any product.

The insurers appealed.

## On appeal

The Court of Appeal (CoA) disagreed with the first instance decision, stating that 'INSURED' was clearly defined and gave rise to certainty as several entities were defined as 'INSURED' in the policy. This included EPFS and the representative.

The CoA noted that the approved product list at the time the negligent advice was given, was prepared by EPFS and disclosed in their insurance proposal form. The CoA said the approved product list could be described as both EPFS' and the representative's approved product list, as the list was to be used by employees when giving advice to the client.

The argument that the advice was given solely by the representative and not by EPFS was unconvincing as EPFS was the 'INSURED' for the purposes of the exclusion. Further, it was stated that EPFS provided financial services through its agents and employees, and so, the advice given through its representative was advice given by EPFS.

Therefore, the CoA allowed the appeal and dismissed the EPFS' indemnity claim. It is important to note the CoA did not disagree with the application of contra proferentum in principle; simply that there was no ambiguity in this case such that the principle did not come into play.

## Conclusion

The case serves as another reminder that underwriters should always be cautious when ensuring appropriate phrases are defined.

Further, as the CoA considered supporting policy documents such as the proposal form, the decision reflects the significance of ensuring additional documents align with the policy's intended coverage.

Whilst the application of the contra proferentum rule is legally sound here, it is worth mentioning that the claim and need for litigation could have been avoided entirely through more precise drafting.

## Contents

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[The Word, January 2023](#) →

---

[\(Another\) case on the importance of clear drafting](#) →

---

[California bomb cyclone set to 'to exceed \\$1bn' in storm damage costs](#) →

---

[Systemic Event Risks: the need for a customer-centric approach to policy drafting](#) →

---

[The rising number of cyber-attacks](#) →

---

[Out of this world insurance – proposed changes to orbital liability and insurance](#) →

---

[The continued threat of piracy in Southeast Asian waters](#) →

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