Browne Jacobson

Underlying contracts remain key in arguments over scope of co-insurance

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Co-insurance is commonplace in the construction industry but when does it prevent one party to the project suing another?

The recent appeal in FM Conway v RFU & Others arose from arguments about the nature, scope, and effect of a co-insurance policy. The decision serves as a reminder to parties to a project to ensure underlying contractual documentation correctly reflects the intention and authority of the party procuring cover for others.

Facts

Ahead of the 2015 Rugby World Cup, the RFU engaged Conway to undertake refurbishments at Twickenham Stadium. The RFU alleged the works were defective and led to losses of almost £4.5 million.

RSA, the Second Respondent, indemnified the RFU for most of their losses under the terms of their construction all risks policy.

Throughout the litigation it was never in dispute that Conway were co-insured under the RSA policy but it was the nature, scope, and effect of this co-insurance where the parties disagreed.

Conway's position was that the RSA policy afforded them the same level of cover as the RFU; the result of which was a bar to claims in respect of the alleged losses, in addition to any subrogated claims pursued against them by RSA.

Commercial Court decision

At the first instance, Eyre J rejected Conway's co-insurance defence on the basis that the extent of RSA policy coverage was as envisaged in the underlying JCT contractual documentation and no wider.

Conway was therefore insured against specified perils but not for the damage caused by their defective work.

Court of Appeal decision

Coulson LJ upheld the first instance decision.

In determining the scope of co-insurance, intention and authority had been correctly considered and interpreted by reference to the underlying contract between the parties (National Oilwell (UK) Ltd v Davy Offshore Ltd, [1993] applied).

Conway's cover was limited by the JCT contract which obliged the RFU to procure cover in respect of physical loss and damage but not for breaches by Conway and other contractors.

Pre-contractual discussions evidencing intention of 'comprehensive insurance' cover were held not to adequately displace contractual intention.

Cover under the RSA policy was therefore no defence to a claim since Conway were not an insured for the purposes of the alleged damage. The RFU were entitled to seek recovery, and RSA free to exercise subrogation rights.

Comment

The Court of Appeal's decision is the latest in a line of authorities providing guidance on potential co-insurance tensions within construction all risks policies.

Even though multiple parties may enjoy coverage under a policy, it is necessary to ascertain the scope to which they are co-insured by examining the underlying contractual documents. It is not automatic that the employed (i.e. contractor, subcontractor, consultant) will enjoy the same level of cover as the employer. In determining the scope, the judgment gives weight to the intention displayed in underlying contract.

Where contractual documentation doesn't provide a complete answer, the court may then seek extraneous evidence from the parties. However, as made clear on the facts of this case, compelling evidence of wider intention may prove difficult to establish.

As the underlying contract, rather than the policy itself, is best placed to provide evidence of authority and intention, parties should be diligent in ensuring contractual wording clearly reflects the envisaged scope of any project insurance.

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