

‘You get what you pay for’ – the meaning of ‘professional services’ in D&C policies

11 November 2022

< Previous

An update on articles in previous editions of the Word

Next >

‘Final judgment’ or ‘final adjudication’ - what’s the difference?

The recent case of FKP Commercial Developments Pty Ltd v Zurich Australian Insurance Limited considered the meaning of ‘professional services’ within a design and construct policy.

Facts of the case

FKP Commercial Developments Pty Limited was the developer of a building project under a contract with FKP Constructions Pty Limited, a head contractor. FKP Constructions used third party consultants and sub-contractors, choosing not to perform any design or construction works itself.

The registered proprietors of the common property and commercial buildings alleged:

1. numerous defects and non-complying construction work; and
2. losses arising from breaches of the statutory warranties under the Home Building Act 1989 and/or a common law or statutory duty of care.

The FKP parties sought an indemnity for the claim under their ‘Design and Construction Professional Indemnity’ insurance policy. Insurers rejected the claim on the basis that the potential liability did not arise from the provision of ‘professional services’ as defined under the policy.

Judgment

On the question of whether the claim was a ‘claim for civil liability... based on the insured’s provision of professional services’, the court held the claim fell outside the scope of the policy. The court held that FKP’s liability arose from its position as the owner/developer of the property, and not from the provision of professional services.

The court characterised the liability of the FKP parties as wholly based on or arising from the following, which were not covered under the policy:

1. Construction, manufacture, assembly, installation, erection, maintenance or physical alteration of buildings, goods, products or property (which are excluded from the definition of ‘Professional Services’); or
2. Defects in or lack of suitability of products and goods used in the construction of the common property of the residential building’ (which are excluded under the policy).

Considerations for underwriters

This case serves as a reminder that, in the words of the judge in the case, ‘a party gets the policy they pay for’.

Contents

<u>The Word, November 2022</u>	→
<u>An update on articles in previous editions of the Word</u>	→
<u>‘You get what you pay for’ – the meaning of ‘professional services’ in D&C policies</u>	→
<u>‘Final judgment’ or ‘final adjudication’ - what’s the difference?</u>	→
<u>Atlanta adopts Plain Numbers to improve policy readability</u>	→
<u>Duty to defend - when is it triggered?</u>	→
<u>Date of incident or date of coverage decision – when does the cause of action commence?</u>	→

Contact



Tim Johnson

Partner

tim.johnson@brownejacobson.com

+44 (0)115 976 6557

Our expertise

Construction all risks

Coverage disputes and policy interpretation

Insurance claims defence

Policy drafting and distribution

