IN THE COURT OF APPEAL [1992] QCA 433

SUPREME COURT OF QUEENSLAND C.A. No. 83 of 1992

FAI GENERAL INSURANCE CO LTD

Appellant

v.

GOLD COAST CITY COUNCIL

Respondent

Mr Justice McPherson
Mr Justice Davies
Mr Justice Moynihan

Judgment of the Court delivered the
day of , 1992

JUDGMENT BELOW FOR THE RESPONDENT AGAINST THE APPELLANT FOR $130,875 SET ASIDE.

JUDGMENT ENTERED IN LIEU FOR THE RESPONDENT AGAINST THE APPELLANT FOR $55,875.

APPELLANT'S COSTS OF THE APPEAL TO BE PAID BY THE RESPONDENT TO BE TAXED.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

No. C.A. 83 of 1992

Before the Court of Appeal

Mr. Justice McPherson
Mr. Justice Davies
Mr. Justice Moynihan

BETWEEN:

FAI GENERAL INSURANCE CO LTD
Appellant

- and -

GOLD COAST CITY COUNCIL

Respondent

JUDGMENT - THE COURT

Delivered the day of , 1992

MINUTE OF ORDER:

JUDGMENT BELOW FOR THE RESPONDENT AGAINST THE APPELLANT FOR $130,875 SET ASIDE.

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APPELLANT'S COSTS OF THE APPEAL TO BE PAID BY THE RESPONDENT TO BE TAXED.

CATCHWORDS: Insurance
Professional indemnity insurance
Plaintiff successfully sued respondent for negligent misstatement relating to position of water main - whether conveyance of factual information imparts any professional component to respondent's duty to provide correct information - whether within terms of professional indemnity policy.

COUNSEL: S Kiefel QC }
A Stone } for appellant

C Brabazon QC }
N McGregor } for respondent

SOLICITORS: McInnes Wilson & Jensen for appellant
Primrose Couper Cronin Rudkin for respondent

Hearing date: 21 September, 1992

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

No. 83 of 1992

Before the Court of Appeal

Mr. Justice McPherson
Mr. Justice Davies
Mr. Justice Moynihan

BETWEEN:

FAI GENERAL INSURANCE CO LTD
Appellant

- and -

GOLD COAST CITY COUNCIL

Respondent

JUDGMENT - THE COURT

Delivered the day of , 1992

This appeal is brought in an action in which a Plaintiff (not a party to the appeal) succeeded in recovering damages for negligence against the Respondent who was the Defendant in the action and who had joined the Appellant as a third party. The negligence found against the Respondent consisted of a mis-statement by one of the Respondent's servants.

This decision deals with the only one of the four grounds of appeal; that the learned trial Judge was wrong in law in holding that the Appellant was liable to indemnify the Respondent under a professional indemnity policy between them. The other

grounds were not argued.

The negligent mis-statement was to the effect that there was a water main buried in a trench at a depth of 4 metres some 4 metres from the boundary of land on which the successful Plaintiff proposed erecting a warehouse. The Respondent's servant added that the main did not affect the proposed building. The trench line was in fact closer to the boundary than 4 metres and deeper than 4 metres and as a consequence of its presence, part of the foundation of the Plaintiff's building subsided. Had the true position of the trench been known, that risk could have been accommodated in the foundation design.

The Respondent was the insured under two policies of insurance issued by the Appellant which were in force at the relevant time. The first was a general liability or "broad form" policy by which the Appellant agreed to "indemnify the (Respondent) for all amounts which the (Respondent) shall become legally liable to pay by way of compensation... in respect of property damage caused by an occurrence in connection with the business..." The policy schedule defined the business as "Local Authority." By exclusion (k) of the policy it did not apply to "the rendering of or failure to render professional advice or service by the (Respondent) or any error or omission connected therewith..."

The second policy was a professional indemnity policy by

which the Appellant agreed to indemnify the Respondent "against any claim or claims for compensation... for breach of professional duty in the conduct of the practice as defined and referred to in the schedule by reason of any negligence whether by way of act, error or omission..." The combined effect of the schedule and the definition of "the insured's profession" was that the risk insured against was a breach of professional duty in the conduct of the practice of "Municipal Authority."

The trial Judge found that the Appellant was liable to indemnify the Respondent pursuant to both policies of insurance. If the Respondent was liable for breach of professional duty, it is entitled to indemnity under the professional indemnity policy. That would engage exclusion (k) of the public liability policy so as to exclude indemnity under it.

The Appellant, however, contends that the claim was not one within the professional indemnity policy but is within the terms of the broad form policy. The point of the appeal is the excess under that policy is $100,000 rather than the $25,000 under the professional indemnity policy. The Respondent did not contend that if the claim was not within the professional indemnity policy it was not with the broad form policy.

The Respondent raises an issue as to costs, consideration of which it is convenient to defer until the matters raised by the Appellant's appeal are disposed of. It is necessary to turn to

the trial Judge's findings. The Plaintiff had contended for two occasions of negligent mis-statement, but succeeded in establishing only one. (That is of course sufficient to sustain the judgment against the Respondent). His Honour found that the Respondent's servant made "a positive assertion" that there was a main 4 metres from the boundary at a depth of 4 metres. He found that the Respondent knew, or ought to have known, that the information would be relied on and that it was wrong.

The trial Judge, having made the finding just set out, referred to the Respondent's servant having said that the main did not affect the proposed building and that as the facts have emerged, clearly it did. These latter findings founded a conclusion, at least an implied one, that the wrong information caused the damage of which the Plaintiff was complaining. The evidence did not disclose the source of the erroneous information conveyed by the Respondent's servant to the Plaintiff or how the error occurred. There was no evidence as to any professional qualification on the part of the servant conveying information - he seems to have been an inquiry officer.

The definition of risk and the measure of the obligation to indemnify in a professional indemnity policy in terms of breach of professional duty in the conduct of the practice of Municipal Authority requires that effect be given to the word "professional". It is not every breach of duty in the course of the conduct of the

"practice" or "business" of "Municipal Authority" which will be a breach of professional duty. The meaning of "professional" will, of course, vary with context. "Professional", however, connotes "pertaining or appropriate to a profession", "engaged in one of the learned professions".

The point is illustrated by the decision of the British Columbia Court of Appeal in Chemetics International Ltd -v- Commercial Union Assurance Co of Canada 11 DLR(4th) 754. In that case the policy excluded liability in respect of the rendering of "professional services". The relevant failure was to give proper operating instructions in a manual. The manual was prepared by a qualified engineer. That was, however, held to be irrelevant to determining whether the particular instruction in issue was characterised as a professional service. It was held not to be. The provision of operating instructions was not the provision of professional services; the service was not one which could usually be expected to be provided only by a professional engineer. It was simply part of a service provided by a vendor to a purchaser of the particular plant.

This may be contracted with Baltzam -v- Fidelity Insurance Company of Canada (1932) 3 WWR 140. There the indemnity was in terms of "in the practice of his profession". An injury to a patient because an X-ray table was improperly locked by the doctor was, not surprisingly, held to be within the

terms of the indemnity.

In the present case the Respondent's servant did no more than convey factual information which was incorrect and upon which it may be accepted that a professional judgment was exercised by those responsible for the design of the Plaintiff's building. That, however, did not impart any "professional" component to the Respondent's duty to provide correct information in the circumstances.

It follows that the breach found against the Respondent is not within the terms of the professional indemnity policy.

The Respondent seeks an order that the Appellants pay the costs and expenses of defending the claim taxed on a solicitor and own client basis. In the event the Respondent's submission in this regard relies on a provision of the broad form policy whereby the Appellant, with respect to any indemnity afforded by the policy, agreed to defend suits, pay expenses, reimburse all reasonable expenses and so on in respect of claims.

The relevant terms of the broad form policy thus provide for an indemnity, one aspect of the measure of which might prove to be the Respondent's costs taxed on an appropriate basis. In other words the right contended for by the Respondent in respect of costs flows from an alleged breach by the Appellant of the contract of the indemnity - it was obliged to defend the Plaintiff's action but did not. It emerged that there were disputed issues of

fact bearing on this alleged breach. The matter was not litigated below - it was not pleaded nor was evidence led or tested bearing on the issue. The disputed issues relate to costs incurred because of the dispute between the Appellant and the Respondent as to whether there was a liability to indemnify under the professional indemnity policy as well as the broad form policy in a context in which the Appellant contemplated settlement on the basis of the broad form policy but denied its liability under the professional indemnity policy.

As has been said, what is really being sought under the guise of a costs order is damages for beach of a contract of indemnity. It is not appropriate that the issues bearing on that are resolved by an order for costs in these proceedings. It is in any event too late to raise the matter on this appeal.

In the event the judgment below for the Respondent against the Appellant for $130,875 should be set aside. There should in lieu be judgment for $55,875. The order below otherwise stands. The Appellant should have the costs of the appeal to be taxed.