

Exclusion clauses in insurance policies can't operate to make the contract a commercial nonsense

Cate Doosey v Nigel Walsh & Complete Building Inspection Services Pty Ltd [2017] NSWDC 8

Key Points

- The District Court of NSW determined that an exclusion clause relied upon by the insurer did *not* exclude an obligation under the policy to indemnify the building inspector for the claim.
- The Court emphasised that exclusion clauses which impose an inappropriate limit on the promised field of cover under the policy will not be effective.

Background

Ms Doosey (**the plaintiff**) engaged Mr Walsh (**the defendant**) a professional building inspector, to conduct an inspection of a home that she was purchasing. The defendant reported that the home was in satisfactory condition and the plaintiff proceeded with the purchase in reliance on the report.

Shortly after moving in, the plaintiff's seven year old daughter fell through the balustrade on the upstairs balcony and sustained serious injury.

Montgomery DCJ found that the defendant had failed to exercise reasonable care and skill in the provision of his inspection and report because he did not identify or warn the plaintiff of any defect in the balustrade.

The defendant's insurer refused to indemnify him for the claim, relying on an exclusion clause under the insurance policy.

The policy promised cover for personal injury claims arising in respect of "Business Activities", which included the provision of a building inspection and report, but in the general liability part of the policy there was an exclusion for:

- (a) [The building inspector's] provision of, or failure to provide, any professional advice or services, or any related error of omission.
- (b) Advice, design or specification given by [the building inspector] for a fee or otherwise in carrying out any Business Activities.



The Law

As affirmed in *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, insurance policies are commercial contracts and must be given the same business-like interpretation. Policies must be interpreted to give effect to the object of the contract and avoid making the contract a commercial nonsense.

Conclusion

Montgomery DCJ concluded that the exclusion clause did *not* allow the insurer to refuse indemnity for the personal injury claim against the plaintiff. Rather, the clause merely had the effect of excluding cover for professional advice and services that went *beyond* the prescribed Business Activities.

Montgomery DCJ held that had he interpreted the clause as the insurer contended, a commercial nonsense would have resulted because the very risk the defendant sought cover for would have been excluded.

Lessons Learnt

This decision serves as a reminder that exclusion clauses cannot limit the promised field of cover of a policy to defeat the commercial object of the policy.

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