

Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltv & Ors [2008] NSWCA 243

28 November 2008



Background

Between 1992 and 1994, Baulderstone Hornibrook Engineering Pty Ltd (**BHE**) entered into a contract with Sydney Airport Corporation Ltd (**SAC**) to design and construct a third runway at Sydney's Kingsford Smith Airport.

In 2002, SACL commenced proceedings against BHE alleging that there were defects in the design and construction of the retaining walls of the third runway which caused sand loss. The proceedings settled in June 2004 on the basis that BHE would undertake rectification works.

BHE sought indemnity for this rectification work under its professional indemnity policy with AMP General Insurance Limited (AMP) and under a project specific professional indemnity policy arranged by SAC. To some extent, the insurers who had underwritten those policies, refused to indemnify BHE. BHE commenced proceedings against those insurers.

The litigation originally involved a number of insurers but many settled with BHE. BHE pursued its claims against two of SAC's insurers who did not settle; Gordian Runoff Limited (Gordian) and CGU Insurance Pty Limited (CGU).

The policy indemnified the Insured '*against any claim or claims for breach of professional duty in the profession.....*'. Like most professional indemnity policies this policy excluded '*....construction work performed involving the means, methods, techniques, sequences, procedures and use of equipment, of any nature whatsoever which are employed by the Insured's contracting staff or others in executing any phase of any Project.*'

The Issues

The main issue in the proceedings was whether the sand loss resulted from defects in the design of the walls or defects in the construction of the walls or as a result of both. BHE asserted that the design by its subcontractors was negligent. Gordian and CGU alleged that the design was not negligent and that the loss of sand was due to defects in the construction by BHE.

At first instance BHE was unsuccessful. Einstein J found that the loss of sand was caused by the construction defects and therefore Gordian and CGU were entitled to deny indemnity.

The Court of Appeal endorsed Einstein J's finding that the loss of sand was caused by BHE's defective construction of the wall and therefore the policy exclusion applied. The Court of Appeal also held that in accordance with the principle in *Wayne Tank and Pump Co Ltd v The Employers' Liability Assurance Corp Ltd* [1974] QB 57, where there were two or more causes to the loss, one falling within an insuring clause and the other within an exclusion, the policy will usually not respond.

The Lesson

This case illustrates why insured, whether they be construction companies or not, need to be aware of the limitations of their insurance policies and be satisfied that those limitations have been addressed.

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