

# High Court examines insurance cover across two policies

January 03 2017 | Contributed by [Jones & Co](#)

## Facts

### Insurance policies

### Claim

### Decision

### Comment

## Facts

Trustees Executors Ltd (TEL) was the trustee of Canterbury Mortgage Trust Group Investment Fund which invested in mortgage securities. Fund Managers Canterbury Ltd (FMC) was incorporated to manage Canterbury's portfolio. A trust deed between TEL and FMC governed their respective rights and obligations.

Clause 214 of the deed required FMC to certify quarterly that, among other things:

- it had managed the fund to the best of its endeavours;
- no circumstance had arisen that adversely affected the fund's interests; and
- it had complied with the fund's mortgage investment guidelines.

Clause 13 of the guidelines required the general manager to confirm that each of the mortgages met the trust's lending criteria and were approved by two of FMC's directors.

The fund suspended trading in June 2008, hobbled by bad debts and crippled following a run by unitholders trying to extract their money.

TEL then sued FMC and its directors and general manager alleging breaches of duty and other obligations set out in the trust deed. TEL sought to challenge the certificates and confirmations under Clauses 13 and 214 and alleged that they had been improperly made by FMC and its directors.<sup>(1)</sup>

## Insurance policies

FMC and its directors and general manager were insured with AIG Insurance New Zealand Ltd under a professional indemnity (PI) policy and separate directors' and officers' (D&O) cover. The PI policy had a sum insured sum of NZ\$1 million and the D&O had a sum insured sum of NZ\$2 million. The PI policy had a retroactive date of December 15 2006 and the D&O policy had no retroactive date. Aspects of TEL's case were based on steps taken before the retroactive date. The choice of policy therefore affected the extent of cover available.

The directors and general manager made a claim for cover under the D&O policy. AIG denied liability on the basis that the D&O policy was subject to an endorsement excluding cover for a claim, "alleging, arising out of, or based upon or attributable to the Company's, or an Insured's performance of professional services for others for a fee". The D&O policy also contained a general exclusion clause which provided that the policy did not cover for a claim based on or attributable to "provision of professional services of any kind, other than the services provided in an insured person capacity [FMC]".

## AUTHORS

[Sarah Wroe](#)



[Paul Biddle](#)



## **Claim**

TEL alleged that FMC and its directors and general manager had failed to comply with the terms of the trust deed and other obligations. Further, TEL alleged that FMC's directors and general manager had assumed personal liability in providing the Clause 214 certificates on which TEL relied. FMC and the directors had failed to make due inquiries to ensure accuracy in the contents of the certificates.

The court was asked to determine a preliminary question regarding whether the giving of the certificates and confirmations by the directors constituted "the performance of professional services for others for a fee", which would allow AIG to rely on the endorsement to deny cover under the D&O policy.

## **Decision**

The court held that the endorsement excluding cover for a claim, to which the D&O policy was subject, applied. In so doing, it considered the interpretation of 'professional services', 'others' and 'fees'.

The court recognised the difference between the D&O policy's general exclusion clause and the endorsement excluding cover for a claim and commented that the latter was intended to reduce coverage under the D&O policy further by excluding professional services that did not fall under the general exclusion. The court noted that the scope was limited and the endorsement excluding cover for a claim was cautionary by nature, highlighting specific types of conduct that were already covered by the general exclusion clause.

### ***Professional services***

The court found that the provision of the certificates and confirmations constituted 'professional services'. The purpose of the certificates was to provide assurances to TEL that the Canterbury Mortgage Trust Group Investment Fund was being properly managed by FMC and that assurance was part of the professional service that FMC provided.

Counsel for the directors argued that if the insurers' argument were accepted, everything that FMC did could be considered fund management, since it was a "single purpose, bespoke, entity whose sole function is to manage the Fund" and would therefore be excluded by the endorsement excluding cover for a claim. They argued that interpreting professional services in that way would effectively swallow the whole policy.

The court rejected this argument and concluded that the directors would still have cover under the D&O policy for claims of a regulatory nature, such as breaches of the Companies or the Securities Act and Inland Revenue statutes.

The court also took a wider view of what constituted professional services and concluded that the endorsement excluding cover for a claim applied to the provision of certificates by the directors, as it was enough to show that the certificates were provided as an adjunct to the performance of a wider professional service by FMC for a fee.

### ***Others***

To determine whether the term 'others' applied to TEL, the court examined the roles that FMC and the directors and general manager played regarding the provision of the certificates and confirmations. The court found that:

- although the directors had personally prepared and signed the certificates for FMC, only FMC was obliged under the trust deed to provide the certificates to TEL; and
- the directors and general manager undertook these services within their scope of employment with FMC.

Further, the court held that FMC and the directors and general manager provided professional services to 'others' (ie, TEL). The fact that the directors and general manager were providing these services for their employer did not detract from this finding, as the court viewed it as an adjunct to

FMC's activities.

### **Fee**

The court held that the fee associated with the fund management, which included the provision of certificates and confirmations, constituted the requisite terms of the endorsement excluding cover for a claim, to which the D&O policy was subject.

### **Coverage under PI policy**

Although the court was not asked to address cover for the directors and general manager under the PI policy, it examined that policy as confirmation of its interpretation of the D&O policy. The court held that the two policies could be read together because they were executed simultaneously by the same authorised signatory for the insurer as part of a coverage package.

Claims against the directors and general manager under the PI policy were subject to an exclusion clause for any claim "brought against an Insured as a director, officer or equivalent executive".

If that were interpreted as applying to the actions of the directors and general manager, there would be a gap in coverage. In considering the parties' intentions and the court assumed that such a gap in coverage was unintended. In interpreting the policies together, the court found that if claims against the directors and general manager were not covered by the D&O policy there must be coverage under the PI policy on the basis that they would not be acting as a director or officer in signing the certificates and confirmations, but as FMC employees.

The court concluded that there was coverage under the PI policy as the exclusion "can and must be interpreted in light of the more specific exclusion in the D&O policy".

The court answered the preliminary question in the affirmative. The giving of certificates and confirmations by the directors constituted "the performance of professional services for others for a fee". Cover for the directors under the D&O policy was excluded by the D&O policy's endorsement excluding cover for a claim.

Cover was available under the PI policy, which would be limited to NZ\$1 million in the aggregate and a retroactive date of December 15 2006.

### **Comment**

The decision highlights that the courts will consider a number of relevant factors to interpret multiple policies, the most relevant in this case being the commercial intent of the policies as a whole.

Where there are perceived gaps which would leave the insured without cover, the court's decision suggests that it will look to all of the circumstances – including other contemporaneous policies – to aid interpretation. That interpretation was carried out on the basis of a presumption that the objective intention of the parties must have been to provide cover for those particular circumstances.

The court expressly noted that the US authorities referred to in submissions involved different legal tests. The court may have been referring to the US doctrine of reasonable expectations, which allows the courts in some US states to search for an interpretation that agrees with the insured's reasonable expectations. That is not a doctrine that the New Zealand or the UK courts follow. However, the court's approach in looking across both policies with the expectation that the intention was not to create a gap in coverage comes close to a court seeking to meet the insured's reasonable expectations.

*For further information on this topic please contact [Sarah Wroe](#) or [Paul Biddle](#) at Jones & Co by telephone (+64 9 601 9600) or email ([sarah@jonesandco.nz](mailto:sarah@jonesandco.nz) or [paul@jonesandco.nz](mailto:paul@jonesandco.nz)). The Jones & Co website can be accessed at [www.jonesandco.nz](http://www.jonesandco.nz).*

### **Endnotes**

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).