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A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

FKP Commercial Developments Pty Limited v Zurich Australian Insurance Limited (No 2) (FCA) - a clause in an insurance policy required only that claims arise from the conduct of the insured's sub-contractors where a substantive element of the factual matrix in which that liability arises is the provision by the insured of professional services, and did not require that the provision of professional services was a causal element of liability

MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd (FCA) - insured builder who was being sued for using non-fire-resistant cladding had given sufficient notice of the claim to come within s40(3) of the *Insurance Contracts Act 1984* (Cth) by notifying the insurer of reports of potential claims after a previous fire at a different building using different cladding of the same general type

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Summaries With Link (Five Minute Read)

FKP Commercial Developments Pty Limited v Zurich Australian Insurance Limited (No 2) [2023] FCA 582
Federal Court of Australia
Jackman J
Insurance - the applicants were builders insured under a Design and Construction Professional Indemnity policy issued by the respondent insurer - the applicants were sued for alleged defects in two residential and commercial apartment buildings at Rosebery - cl3 of the policy provided that the insurer agreed to indemnify the insured for loss resulting from any claim arising from the conduct of any consultants, sub-contractors or agents of the insured for which the insured is legally liable in the provision of the professional services - another judge had already answered two separate questions regarding cl3 - the Court now answered as a further separate question whether the whole of the claim in the proceedings was a "claim arising from the conduct of any consultants, subcontractors or agents of the insured for which the insured is legally liable in the provision of the professional services", based on assumed facts as to the roles of the applicants, and also on the assumption that there was no causal connection between the provision of the professional services and the defects alleged in the proceedings - held: is open to the Court to state a preliminary question by way of reference to assumed facts - once an issue is determined by way of preliminary questions and the trial continues, the Court's hands are tied in respect of all matters of fact and law involved in that determination - the Court therefore could not depart from any aspect of the other judge's reasons in relation to cl3, but, in any event, the Court was in complete agreement with those reasons - on the assumptions stated in the separate question, the claim necessarily arose from the conduct of the relevant insured's sub-contractors in performing the work - it was immaterial whether the elements of the causes of action relied upon in the proceedings included the fact of sub-contracting - under the statutory warranties imposed by the *Home Building Act 1989* (NSW), the relevant insured was legally liable for the conduct of its sub-contractors in circumstances where the work done by the sub-contractors led to the claim that that insured breached the statutory warranties - the ordinary and natural meaning of the language used in cl3 was that the claim need not result from, be based on, or arise from the insured's provision of professional services, and the necessary facts giving rise to the loss claimed do not need to include the insured's provision of professional services - all that is required is that the insured is legally liable for conduct in its provision of professional services, irrespective of the source of the legal liability - cl3, on its proper construction, provided indemnity for claims arising from the conduct of any of the insureds' sub-contractors where a substantive element of the factual matrix in which that liability arose is the provision by the insured of professional services - this test was satisfied on the assumptions in the separate questions - separate question answered "yes".
FKP Commercial Developments Pty Limited

MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd [2023] FCA 581
Federal Court of Australia

Jackman J
Insurance - the insured had built major buildings in Melbourne, including the Lacrosse Apartments in Docklands and the Atlantis Towers on Spencer Street - following a fire at the Lacrosse Towers, the insured notified its insurers of a potential claim by forwarding (1) a newspaper article referring to the fire and a possible investigation into building practices and the types of cladding being used; (2) a separate document of the insured noting that the Metropolitan Fire Brigade were of the view that the fire spread too quickly and that it would investigate; and, later, (3) a copy of the Fire Brigade's report that was critical of the type of cladding used - a fire later occurred at the Atlantis Towers, which used a different brand of cladding of the same general type - the insured was sued in respect of the Atlantis fire for the alleged non-compliant and unsafe nature of the cladding used in the Atlantis Towers - the insured sought indemnity from its insurers - the insuring clause was triggered by civil liability which the insured may become obligated to pay arising from any claim or claims first made against the insured during the period of insurance - the claims were not made during the period of insurance, and the insured relied on s40(3) of the *Insurance Contracts Act 1984* (Cth), which provides that the insurer remains liable in such cases if the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired - the Court answered as a separate question whether the insured had given notice as required by s40(3) - held: under s40(3), it is not necessary that the notification identifies the likely claimant - the notification may be of a problem which may give rise to claims by entities having particular characteristics, although the quantum of the claims and the identity of the claimants is not known - the requirement that the notification be of "facts" indicates that s40(3) is concerned with the notification of objective matters that bear on the possibility of a claim being made, rather than matters of belief or opinion as to that possibility - the reference to the possibility of a "claim", rather than of a liability, includes claims which may not have significant prospects of success, and thus the notified facts could include an event which, in common experience, is followed by the making of claims notwithstanding that those claims may have modest or limited prospects of success - the opinion of an expert, such as a professional investigator, based on reasoned explanations and substantive evidence, may constitute a "fact" for the purposes of s40(3) - it is not necessary that notice be given in a single document - the notification to the insurers concerned a problem which was not confined to the particular fire at the Lacrosse Apartments or the particular brand of cladding used there - the newspaper article, the separate document, and the Fire Brigade's report all referred to a wider problem concerning the use of non-compliant and unsafe cladding products on other buildings in Australia of the same general type - there was clearly sufficient correspondence between the notifications that had been made and the claims made in the current proceedings - separate question answered that the insured had given sufficient notice to come within s40(3).
MS Amlin Corporate Member Limited

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