JUDGMENT BERGIN J. Supreme Court New South Wales. Equity Division T&C List. 25th September 2008

1 The plaintiffs, Zurich Specialties London Limited and SR International SE, commenced these proceedings on 15 September 2008 seeking urgent interlocutory relief to restrain the defendants, Thiess Pty Limited and John Holland Pty Limited, from taking any steps to apply for adjudication under the *Building and Construction Industry Security of Payment Act* 1999 (the Act).

2 The plaintiffs are the insurers of the defendants (referred to as insured #3 trading as "Thiess John Holland Joint Venture") under a Construction Risks Insurance Policy dated November 2003 (the Policy) pursuant to which the defendants were indemnified in respect of the investigation, planning, development, design, construction and commissioning of the Lane Cove Tunnel Project and associated activities (the Project). The parties accept that the Policy includes several contracts, notwithstanding they are embodied in the one document: ***Federation Insurance Ltd v Wasson*** (1987) 163 CLR 303 at 319 per Gaudron J; ***Touche Ross & Co v Baker*** [1992] 2 Lloyd's Law Rep 207 per Lord Mustill at 209-210. There are five insurers and the plaintiffs' proportions of the risk are 37.5% and 20% respectively.

3 The present dispute between the parties arises by reason of the collapse of a portion of the Tunnel on 2 November 2005. In February 2007 the defendants made a claim under the Policy and negotiations in respect of the claim continued until the defendants purported to serve a Payment Claim under the Act on 2 September 2008. The plaintiffs sought urgent relief from the Court, which was initially resisted by the defendants who submitted that the process under the Act should be allowed to continue with an adjudicator deciding the various matters in due course: ***Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*** [2005] NSWSC 362 at [13]; ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at 443 [58]; ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** (2005) 226 ALR 362 at 382 [99]-[106]. However both parties have now asked the Court to decide the two issues raised by the plaintiffs.

4 The first issue is whether there is a construction contract that forms part of the Policy. If there is then the second issue is whether the plaintiffs have established that they are "*recognised financial institutions*" for the purposes of s 7(2)(a) of the Act thus excluding the operation of the Act in relation to such a construction contract.

First Issue

5 Section 7(2)(a) of the Act provides as follows:

> *(2) This Act does not apply to:*
>
> *(a) a construction contract that forms part of … a contract of insurance under which a recognised financial institution undertakes: …*
>
> *(iii) to provide an indemnity with respect to construction work carried out, or related goods and serves supplied, under the construction contract, …*

6 Section 4 of the Act provides:

> ***Construction contract*** *means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party".*

7 The definition of "c*onstruction work*" in s 5 of the Act is extremely broad.

8 The Policy includes the following:

> *18.* ***Project Deed Compliance***
>
> ***Insurers*** *agree that they are aware of the obligation imposed on* ***Insureds*** *#1 and #3 by the project deed and other contracts for the* ***Project*** *that specifies that* ***Insureds*** *#1 and #3 must – following loss or damage to the* ***Subject Matter Insured*** *for Section I:-*
>
> *(a) subject to allowing reasonable time for inspection by* ***Insurers****, take immediate steps to clear any debris and begin initial repair work;*
>
> *(b) promptly consult with* ***Insured*** *#2 and carry out such steps as are necessary to ensure the prompt repair or replacement of the* ***Subject Matter Insured*** *so that it complies with contractual requirements, disruption of the* ***Project*** *is minimised and* ***Insureds*** *#1 and #3 continue to comply with their contractual obligations to the greatest degree possible.*
>
> *Notwithstanding the above, the* ***Insured*** *shall take and cause to be taken all reasonable precautions to safeguard the* ***Subject Matter Insured*** *and to prevent loss or damage. The* ***Insured*** *shall also afford reasonable facilities for* ***Insurers'*** *representatives to examine any of the* ***Subject Matter Insured.***
>
> *19.* ***Due Observance of Policy Terms***
>
> *The due observance and fulfilment of the terms,* ***Conditions*** *and limitations of this* ***Policy*** *as far as they relate to anything to be done or complied with by the* ***Insured*** *shall be conditions precedent to any liability of the* ***Insurers*** *to make payment under this* ***Policy.***

9 Section 1 of the Policy entitled "Construction/Erection Risks" provides:

> ***SUBJECT MATTER INSURED***
>
> *This* ***Section*** *provides cover in relation to the* ***Project*** *for the* ***Subject Matter Insured*** *comprising the entire contract works and/or installations and/or parts with preparatory and/or auxiliary works of any kind and description including camp buildings and all other site buildings and their contents, temporary as well as permanent and all materials, machinery apparatus and the like incorporated or to be incorporated therein, built, constructed, erected, supplied, installed,*

repaired, revised or otherwise and/or whilst in course of being built, constructed, erected, supplied, installed, repaired, revised or otherwise, including all tests and/or trials of whatever nature as often as required.

Materials shall include all raw and shaped materials as well as finished parts, units, installations, machinery, constructions and/or other property of every kind and description in course of construction and/or whilst being otherwise worked upon and including maps, plans and documents.

Including all inland storage (subject to a sub-limit of $10,000,000 any one ***Occurrence*** *any one storage unit) and inland transits (subject to a sub-limit of $10,000,000 any one* ***Occurrence*** *any one conveyance) within the* ***Geographical Limits*** *stated in the* ***Schedule.***

10 The Policy defines "Occurrence" as "*an event, or continuous or repeated exposure to conditions that happens during the* ***Period of Insurance****, which results in loss and/or damage to and/or destruction of the* ***Subject Matter Insured*** *provided the* ***Insured*** *did not intend that such loss, damage or destruction would result*".

11 It is clear from the provisions of s 7(2) of the Act that the legislature envisaged that there may be contracts of insurance that include construction contracts. However before a contractor would be entitled to recover a progress claim from an insurer there would have to be some "*inclusion or incorporation*" of a construction contract so that it forms part of the insurance contract: ***Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd*** (2004) 20 BCL 373 McDougall J at 377-378, [22] – [33].

12 A very important aspect of the definition of construction contract in the Act is that it is a contract under which one party undertakes to carry out the work for another party. The work has to be carried out for that other party. There may be circumstances in which a contract between a builder and a principal/owner forms part of an insurance contract between a builder and an insurer. That cannot be decided in the abstract and will depend on close analysis of the particular contract: ***Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd*** at 378, [30]. However the defendants do not claim that this is such a case. They claim that clause 18 of the Policy is a separate construction contract between them and the plaintiffs to carry out construction work.

13 The defendants do not rely on the expression "*arrangement*" in the definition of construction contract in the Act, but claim that clause 18 of the Policy embodies the construction "*contract*" between them and the plaintiffs. It was submitted that the defendants were under a contractual obligation to the insurers/plaintiffs to do certain things namely, to take all reasonable precautions to safeguard the Subject Matter Insured and to prevent loss or damage. It was submitted that this obligation required the defendants to take steps that, in certain circumstances, would "obviously" include construction work as that term is defined within the Act. The defendants used the example of preventing a further collapse of the Tunnel or other further loss or damage. It was submitted that whether *in fact* construction work of this type had been carried out, whether it came within the scope of the contractual provision, and issues of quantum were all matters for the adjudicator, if the defendants elected to proceed to adjudication: ***Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385 at 398 [45] per Hodgson JA.

14 The Policy must be given a businesslike interpretation. In ***Fraser v BN Furman (Productions) Ltd*** [1967] 3 All ER 57, the Court considered a condition in a policy that stipulated that the insured would take "*reasonable precautions to prevent accidents and disease*". Diplock LJ said (at 61) that the purpose of such a condition was to "*ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy*".

15 The first paragraph of clause 18 is an agreement by the insurers that they are aware of the obligations imposed on the defendants by the project deed and other contracts for the Project following loss or damage. The second paragraph of clause 18 commencing "notwithstanding" imposes on the defendants the obligation to take the reasonable precautions. The clause must be read to give effect to the commercial purpose of the contract: ***Legal & General Insurance Australia Ltd v Eather*** (1986) 6 NSWLR 390 at 405 per McHugh JA (as his Honour then was). The commercial purpose of this Policy was to provide indemnity for the insured on the terms and conditions included in the Policy. The second paragraph of clause 18 was the imposition of a condition on the insured, which had to be satisfied prior to indemnity being available. It was not an agreement by the insured to carry out construction work *for* the insurer, but an agreement by the insured that in carrying out the construction work *for* the principals/owners they had to do so in a particular manner, that is , taking the reasonable precautions, in order to qualify for indemnity under the Policy.

16 The reasonable precautions clause is not a construction contract between the plaintiffs and the defendants. The Act does not apply to the Policy .

Second Issue

17 As there is no construction contract that forms part of the Policy, it is not necessary to decide the second issue as to whether the plaintiffs are recognised financial institutions. Had it been necessary to decide this issue, the plaintiffs had some evidentiary difficulties in establishing that the second plaintiff was a subsidiary of the recognised financial institution.

Conclusion

18 I am satisfied that the Act does not apply to the Policy. As the parties have consensually sought the Court's ruling on this matter it seems that it is unnecessary to issue an injunction because I apprehend that the defendants will not proceed to adjudication in the circumstances. However I will hear the parties on this aspect of the matter and on

the form of any declaration that is sought having regard to my conclusion that there is no construction contract which "*forms part of*" the Policy.

JE Marshall SC/DS Weinberger (Plaintiffs) instructed by Wotton + Kearney
M Christie/V Culkoff (Defendants) instructed by Herbert Geer