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Subrogation and 'co-insureds'

28 April 2023

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Canadian court rules on whether COVID-19 amounts to physical damage

This month the English Court of Appeal case of **FM Conway Limited v The Rugby Football Union & Ors. [2023] EWCA Civ 418**, provided a useful reminder of the need to take care when considering the rights of 'co-insureds' and other indemnified parties to a policy.

Background

In preparation for the 2015 Rugby World Cup, the Rugby Football Union (RFU) instructed contractors to undertake improvement works at Twickenham Stadium, including installation of high voltage power cables in buried ductwork.

Conway was appointed for ductwork installation works and Clark Smith Partnership Ltd (CSP) for design of the ductwork; both being appointed under an amended JCT standard building contract (building contract) which required RFU to enter a '*joint names and all risks of the works associated'* insurance policy (under Insurance Option C).

The policy stated that the insured property included the contract works and identified that RFU *and* contractors *and* subcontractors of any tier providing goods or services were insured parties. However, the policy excluded liability for defective work, design, specification materials or workmanship. It is important to note that the policy referred to the works package for the high-voltage cable ductwork that Conway was appointed to install, but it did not specifically identify Conway.

After alleging that design and workmanship defects in the ductwork caused damaged cables, RFU was indemnified for the rectification costs for replacing the cables. RFU then sought to make a subrogated recovery from Conway and CSP.

Conway argued that RFU couldn't make a subrogated claim because Conway was co-insured under the policy so it benefitted from the cover to the same extent as RFU, meaning RFU were unable to claim against Conway regarding alleged losses covered by the policy.

Judgment

The Court considered Conway's declarations and ruled in favour of RFU, confirming the principle that insurers cannot exercise subrogation rights against co-insureds where co-insureds benefit from the cover that the insurer is attempting to pursue. However, Conway wasn't identified in the policy. Additionally, the judge considered the contractual position between RFU and Conway and RFU's intentions when taking out the policy. Accordingly, the judge rejected Conway's arguments because RFU and Conway were not insured to the same extent regarding risks and specifically, Conway wasn't co-insured for any losses that RFU suffered following defective workmanship.

This case reminds us that whilst construction contracts will often require contractors/subcontractors to be co-insured under their employer's insurance policy, care must be taken as to how this is achieved and whether it is truly effective.

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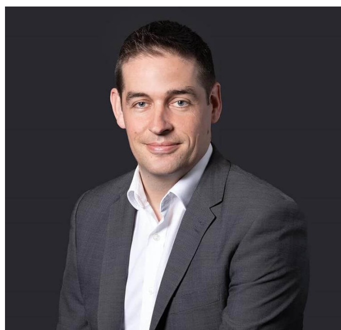
Key contact



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