CONTRACTUAL INDEMNITY CLAUSES

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Leighton Contractors Pty Ltd v Rodney James Smith & Anor [2000] NSWCA 55

Smith was injured on a construction site while working for B&B Detailed Joinery Manufacturers Pty Limited ("B&B"). Leighton was the head contractor, protected by an indemnity clause with the subcontractor B&B. At trial, Leighton sought a declaration that B&B was to indemnify it. The trial judge refused the application and the jury went on to decide that Leighton was responsible for 65% of the plaintiff's loss. The Court of Appeal reversed this decision and required B&B to indemnify Leighton in full for the verdict against Leighton. The clause read:

> *"The subcontractor shall indemnify and keep indemnified the company against all loss or damage including but not limited to all physical loss or damage to property (other than property for which the subcontractor is responsible under clause 16) and all loss or damage resulting from death or personal injury arising out of or resulting from any act, error, or omission or neglect of the subcontractor."*

Meagher JA concluded (Mason P and Fitzgerald JA agreeing) that the clause should be read in light of the natural and ordinary meaning of the words (per *Darlington Futures Limited v Delco Australia Pty Limited* [1986] HCA 82). Mason P and Fitzgerald JA stated that in the present case the clause mandated indemnity to be provided for all loss or damage from personal injury arising from any act, error or omission or neglect of the subcontractor. As such, the indemnity was broad.

State of NSW v Tempo Services Ltd [2004] NSWCA 4

The plaintiff at trial was a cleaner employed by the contractor Tempo to clean a NSW state school. She was injured while working, and sued the State. The State brought a cross claim against Tempo seeking indemnity under the cleaning contract, then settled the proceedings with a verdict for the defendant, bearing its own costs and then pursuing Tempo for its costs. The trial judge rejected the claim for indemnity, finding that Tempo had no blame for the accident.

The indemnity clause read as follows:

> *"The Contractor shall be liable for and indemnifies and shall keep indemnified the Government against any liability, loss, expense, damages, claims, suits, actions,*

demands or proceedings, whether arising under any statute or at common law, in respect of personal injury (including illness) to or death of any person arising out of or in connection with or caused by the performance of the Services."

Hodgson JA (Giles JA agreeing) determined that the injury arose out of the performance of the services (given that the plaintiff was working at the time in the specified role). Meagher JA gave similar reasons. Thus the Court of Appeal said that the issue of Tempo's responsibility for the accident was irrelevant; of relevance was the fact that the plaintiff was present in the course of performing her duties, as per the language of the indemnity clause.

Accordingly, the NSWCA found that the State was entitled to an indemnity, which was sufficiently broad so as to cover legal costs incurred by the State. Tempo sought special leave to appeal to the High Court which was rejected.

Erect Safe Scaffolding (Australia) Pty Limited v Sutton [2008] NSWCA 114

Sutton was injured at work while employed as a sub-foreman and leading hand by Dalma Formwork Pty Limited. The Head Contractor on the site was Australand Constructions Pty Limited. Erect Safe Scaffolding (Australia) Pty Limited, the appellant, provided scaffolding services to Australand pursuant to a contract dated 9 September 2002. It was responsible for erecting and maintaining the scaffolding on the site.

The trial judge found that both Erect Safe and Australand breached their duty of care to the plaintiff. The trial judge ordered that Erect Safe indemnify Australand, and Erect Safe appealed this decision. The relevant clause read:

"11 The Subcontractor must indemnify Australand Constructions against all damage, expense (including lawyers' fees and expenses on a solicitor/client basis), loss (including financial loss) or liability of any nature suffered or incurred by Australand Constructions arising out of the performance of the Subcontract Works and its other obligations under the Subcontract."

12.1 Public Liability

Before commencing work, the Subcontractor must effect and maintain during the currency of the Subcontract, Public Liability insurance in the joint names of Australand and the Subcontractor to cover them for their respective rights and interests against liability to third parties for loss of or damage to property and the death of or injury to any person.

In interpreting the indemnity clause, McLellan CJ at CL distinguished *Leighton v Smith* on the basis that the liability of Australand did not "arise" out of the performance by Erect Safe of any of its contractual obligations, but rather from Australand's own negligence. In *Leighton v Smith*, the clause was worded to protect the principal from claims howsoever caused. Here, the clause was read to only confer indemnity for liabilities arising from the performance of Erect Safe of its duties, rather than covering all liability of Australand in relation to the works. Thus it only operated to the extent of Erect Safe's negligence.

The insurance clause only operated to the extent of the indemnity clause – thus not requiring Erect Safe to insure beyond the scope of its liability to indemnify Australand (i.e. no requirement for Erect Safe to insure Australand against Australand's negligence). The Court of Appeal held that in the absence of express words, obligations under an insurance clause in a contract which is provided to support an indemnity clause will not require a sub-contractor to maintain insurance against loss occasioned by a head contractor's negligence. It was held that the insurance clause could not be construed in isolation from the indemnity clause.

Giles JA concurred with McLellan CJ at CL, but employed slightly different reasoning. Giles JA also considered that the indemnity did not protect Australand from its own negligence, and contended that the extent of ambiguity on the subject, the clause was to be construed in Erect Safe's favour.

Basten JA dissented, arguing that the commercial purpose of the clause was to have Erect Safe cover Australand, because ordinarily there would be no such indemnity (Australand not being vicariously liable for the conduct of an independent contractor), and so to have purpose the clause must operate to confer indemnity. Basten JA argued that the phrase "arising out of" must have a strong meaning because otherwise the clause would be of no effect.

Pritchard v Trius Constructions Pty Limited & Ors **[2011] NSWSC 749**

Pritchard was injured when a forklift ran over his leg at a coal processing plant owned and operated by Oceanic. Pritchard was employed by Trius, a contractor performing works at the site. The forklift was being operated by an employee of Oceanic at the time.

The plaintiff was aged 61 at the time of the incident and suffered a serious injury to the right knee, as a result of which it was amputated below the knee. The claim by the plaintiff against Oceanic was settled for $850,000 inclusive of costs.

Oceanic cross claimed against Trius and relied on clause 13 of its General Purchase Order Terms and Conditions which was in the following terms:

> *13.3 You will be liable for and will indemnify us and keep us indemnified from and against any liability and/or any loss or damage of any kind whatsoever, arising directly or indirectly from:*
>
> *...*
>
> > *(b) the illness, injury or death of any of your employees, agents, contractors and/or subcontractors arising out of or in connection with this agreement;*
> >
> > *(c) any loss or damage arising out of, or in connection with, any personal injury, illness or death to any person or damage to any property or any other loss or damage of any kind whatsoever caused or contributed to by:*
>
> *...*

> *(ii) the entry onto, and the activities undertaken on and in, our premises by you and/or your employees, agents, contractors and/or subcontractors;*
>
> *(d) any negligence or wilful act or omission by you and/or any of your employees, agents, contractors and/or subcontractors in connection with this agreement;*
>
> ...

In relation to "in connection with" in clause 13.3(b), Justice Hoeben referred to *Tempo* (above) and found that the fact that the plaintiff was at his workplace working as required was sufficient to render the injury to be in connection with the agreement (thus invoking the indemnity clause)

As to clause 13.3(c)(ii), the words "any person" in 13.3(c) were held not to include Trius' employees, because the clause elsewhere had specifically referred to "employees" where employees were intended to be covered. Thus the clause is only activated upon injury to a person other than an employee of Trius.

However the issue was academic as it was held that the clause did not form part of the agreement because there was no evidence that the General Purchase Order Terms and Conditions were ever provided to Trius at any stage in their commercial relationship before the accident in January 2007. It was noted that where there is no signed contract, terms are only incorporated in the contract if reasonable notice has been given of them.

Accordingly, Oceanic's claim in contract against Trius failed. At tort, liability was apportioned 60% against Trius (employer) and 40% against Oceanic (occupier).

Conclusion

The indemnity clauses above were construed differently. Some were construed in favour of the supposed indemnifier, while others were construed in favour of the supposed indemnified party. However, while there are differences in reasoning, a number of messages are consistent:

1. Clauses are to be read strictly in the context of the contract of a whole. Only if there is ambiguity does the *contra proferentem* rule apply: *Andar Transport v Brambles Limited (2004) 217 CLR 424.*

2. The context and purpose of the indemnity clause are of importance in construing its meaning, but do not override the natural and ordinary meaning of the words.

3. The phrase "in respect of" is considered to be narrowed than the phrase "in connection with" in the context of indemnity provisions.

4. Extrinsic factors such as the fact that in the absence of the indemnity clause the indemnifying party would not be liable are largely irrelevant. To consider such factors would circumvent and render the clause useless.

It is important to note the following comments in *Erect Safe*:

- "*The operation of any contractual indemnity must be found in the application to the facts of the words of the relevant clause, construed as part of the contract as a whole. Decisions on the operation of contractual indemnities in different words in different contracts are likely to be of limited assistance*." (per Giles JA)

- "*The resolution of any disagreement about a particular clause in a contract must be approached by considering the terms of the relevant document. Although the resolution of disputes in other cases may provide guidance, each dispute must be resolved by the application of the accepted principles of construction to the particular contract.*" (per McLellan CJ at CL)

It is also most important to note the difference between an indemnity clause which reads so as to apply only where there is a causal connection between the liability of a party and the performance of services (eg. as in *Erect Safe*) and an indemnity clause which reads so as to apply when there is a causal connection between an injury and the performance of services (eg. as in *Tempo).*

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