

High stakes – are you covered?



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THE SKYLINES OF our major cities are dotted with high rise cranes. Major construction works are underway in Auckland. The reconstruction of Christchurch continues and more recently significant building and infrastructure works are underway in Wellington and Kaikoura.

Major infrastructure and construction works also means major risk. The unexpected can quickly blow out budgets and sink companies not equipped to deal with them. Accidents can and do happen and in these industries they can be very costly.

Behind every strong machine there needs to be strong cover for those unexpected events. An argument with an insurer over cover, or inadequate insurance cover, can quickly lead to delays and escalating costs, which put jobs and businesses at risk.

Litigation, even if ultimately successful, takes time, money, involves great uncertainty and distracts from the business of getting the job done.

On August 7, 2017 the Supreme Court released its judgment in the case of *David Browne Contractors Limited*¹. The case arose from events that began in 2007. The Supreme Court judgment concerned payments made by Polyethylene Pipe Systems (PPS) to related companies.

The background to the case shows how things can go wrong when there is uncertainty and open-ended commitments.

The case was about a major sewer outfall project for Christchurch City Council involving polythene pipes being laid on the seabed in Lyttleton Harbour. PPS entered into a subcontract agreement with McConnell Dowell Contractors (MDC) for PPS to weld the pipes.

The pipes were first welded together to create 12-metre lengths, they were then transported to Lyttleton where they were welded onsite to create 360-metre pipe strings. MDC installed the pipe strings in trenches on the seabed.

The contract between MDC and PPS provided that PPS would indemnify MDC for any losses arising out of the welding subcontract works. MDC was to take out a contract works policy for the project.

In December 2007 a weld failed during the installation of the first pipe string. In May 2008 a further weld failed. MDC concluded that the welds were faulty and told PPS that it held it responsible and that it would look to recover all costs incurred as a result of the failure. These losses were claimed

to be in the region of \$3.3 million.

PPS did not itself have insurance cover for the losses claimed. PPS stated that it assumed that the failures were covered by the contract works policy taken out by MDC. PPS had never viewed the policy and it eventuated that it did not provide cover.

PPS was not able to pay the sums claimed. As a result, the company was placed into liquidation. Some sums that were transferred from PPS to its related companies will be clawed back by the liquidator. However, the practical implications are that PPS has gone under and MDC will only recover a fraction of its losses.

To avoid, or limit, such situations various tools are available. In this case, PPS gave an unlimited indemnity with no insurance cover in place. Limitations on, and exclusions from, liability in commercial contracts is not unusual. Such limitations and exclusions must be clear and unambiguous in order to be enforceable so that it is clear to the parties where the risks lie. Insurance is another important factor.

Assuming cover, as PPS did, is never a good idea. By the time a loss event has occurred, it is too late to fix any gaps in cover.

A case that takes us back to the high-rise construction business highlights the insurance cover issue, *Industrial Steel & Plant Limited*². It concerned a crane provided by Industrial Steel.

It was erected on a building site under a subcontract using the subcontractor's crane. During erection the subcontractor's crane toppled over, damaging both cranes and other property.

Industrial Steel had insurance cover for losses "caused by or in connection with or arising from goods and materials supplied, installed or used by the insured in building work". The court found that there was no relationship of cause and effect between the crane as a mere item of goods and the damage caused by the operation of the other crane, and there was no cover.

These issues are far from straightforward. Where you might find your solicitor and broker adding most value is in preparing documentation and cover before a project begins so that the contractual rights and obligations are clear and there is certainty in relation to insurance cover.

1. *David Browne Contractors Limited and David Browne Mechanical Limited v Liquidator of Polyethylene Pipe Systems Limited (in liquidation)* [2017] NZSC 116

2. *Industrial Steel & Plant Limited v A V Swanson & Sons Limited* (1982) 2 ANZ Insurance Cases 60-489 (HC)

