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ROULESTON CLARKE PTY LTD (IN LIQ) V. FAI GENERAL INSURANCE COMPANY

Supreme Court of Tasmania – 22 December 1999

FACTS

Rouleston traded as a financial planning and investment advisement business. Badger was employed by Rouleston as a financial adviser and was responsible for receiving cheques from clients for investment in various funds.

Badger dishonestly converted some of these cheques for his own use and was eventually charged and convicted of theft charges. The clients who were defrauded made claims against Rouleston alleging fraud and negligence. Rouleston was insured by FAI and the relevant professional indemnity policy provided that Rouleston was covered for claims made by clients. The policy included optional extensions for dishonesty and fidelity. The claim limit on the insurance was $1,000,000.00 but the limit on fidelity claims was $250,000.00.

Rouleston made a claim under the insurance policy for indemnity for claims exceeding $685,000.00. FAI claimed that only the fidelity extension covered these claims and that its liability was limited to $250,000.00.

ISSUES

Was the claim by Rouleston a claim for indemnity for dishonest conduct or a claim for indemnity under the fidelity extension?

FINDING

The dishonest conduct by Badger was covered by the fidelity extension and not by the dishonesty extension as the dishonesty extension did not cover the dishonest use of negotiable instruments by employees.

QUOTE

Evans J said

"In construing the proviso [dishonesty provision], it is to be borne in mind that it relates to claims for damages for the loss of specified items.

Claims for damages are only made where a financially measurable loss has been suffered. Whilst the physical loss of some of the specified items, such as bank or currency notes, will cause a financial loss, that is not always the case with some of the other items such as negotiable instruments.

When a negotiable instrument is physically lost, for example, destroyed or mislaid, it may readily be replaced without financial loss. It is when the negotiable instrument is converted to the use of another that financial loss is suffered. This suggests that loss means more than physical loss. Whilst physical loss of the items referred to can arise from conduct of this description, the sort of loss which is more readily linked to

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this sort of conduct is a detriment or disadvantage arising from the appropriation of the specified item to the use of an employee."

IMPACT

Contract Managers should note that insurance policies may include limits on liability which may reduce the anticipated protection provided by insurance. If a contractor is to be covered by professional indemnity insurance the limits on indemnity should be noted.

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