# The impact of *Impact Funding –v-* AIG on the construction of contracts of insurance

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## The Narrow Issue and the Wider Arguments

On one view the decision of the Supreme Court in *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers at Work Ltd) (AIG Europe Ltd, Third Party)*[1] turned upon a question of fact, namely whether a firm of solicitors received a benefit under a contract with a company which lent money to the firm's clients. If they did, then the solicitors' professional indemnity insurance could deny cover for the liability of the solicitors for breach of that contract.

The reason why that question came before the Supreme Court and why the decision of the Supreme Court is of some interest is that the parties disagreed as to the correct approach to the construction of the term in the contract which excluded cover.

## The Facts in Outline

The appeal concerned a claim by Impact Funding Solutions Ltd (Impact) under the Third Parties (Rights against Insurers) Act 1930. Impact lent money to clients of firms of solicitors who wanted to bring personal injury claims on a "no win, no fee" basis. The loans would fund disbursements, including ATE premiums. Impact required solicitors whose clients took out such loans to enter Disbursements Funding Master Agreements (DFMAs).

As well as a guarantee by the solicitor that his client would repay the loan with contractual interest, the DFMAs contained terms by which the solicitor undertook to comply with "all applicable laws, Regulations and codes of practice from time to time in force" and represented and warranted that the services to be provided to the client "shall be provided to the customer in accordance with their agreement with the customer" and so in accordance with the implied contractual duty to do so with reasonable skill and care.

The particular solicitor (Barrington) was found to have been in breach of the DFMA for failure to comply with all applicable laws and for failure to exercise reasonable skill and care when acting for numerous clients. Among other things, Barrington had failed to exercise reasonable skill and care when assessing the prospects of success of potential claims.

Barrington was insolvent. Impact therefore claimed against its professional indemnity insurers (AIG). The insuring clause in the policy was very broad

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1 [2016] UKSC 57; [2017] AC 73.

> "The insurer will pay on behalf of any insured all loss resulting from any claim for any civil liability of the insured which arises from the performance of or failure to perform legal services."

By the time the case reached the Court of Appeal the only issue was whether AIG could rely upon sub-clause (ii) of the following term (the exclusion):

> "This policy shall not cover loss in connection with any claim or any loss: … arising out of, based upon, or attributable to any : (i) trading or personal debt incurred by an insured, (ii) breach by any insured of terms of any contract or arrangement for the supply to, or use by, any insured of goods or services in the course of providing legal services; and (iii) guarantee, indemnity or undertaking by any insured in connection with the provision of finance, property, assistance or other benefit or advantage directly or indirectly to that insured."

The exclusion was substantially the same as this provision in the Minimum Terms and Conditions for Professional Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales 2009 (the Minimum Terms).[2]

The narrow issue between the parties was whether the DFMA was a "contract or arrangement for the supply to, or use by, any insured of … services in the course of providing legal services". That turned upon the construction of the DFMAs in their context and is not the subject of this paper.

**The Decision of the Court of Appeal**

In the Court of Appeal[3] the only reasoned judgment was given by Longmore LJ. He said:

> "19. In order to assess these rival arguments, one has to stand back from the detail and ask oneself what is the essential purpose of the exclusion clause 6.6 in the Minimum Terms and Conditions of the solicitors' professional indemnity insurance. To my mind the essential purpose of the exclusion is to prevent insurers from being liable for what one might call liabilities of a solicitor in respect of those aspects of his practice which affect him or her personally as opposed to liabilities arising from his professional obligations to his or her clients. Thus if a solicitor incurs liability to the supplier of, for example, a photocopier, insurers do not cover that liability nor would they cover

2 "The insurance must not exclude or limit the liability of the Insurer except to the extent that any claim or related defence costs arise from the matters set out in this clause 6 …
Any: (a) trading or personal debt of any insured; or (b) breach by any insured of the terms of any contract or arrangement for the supply to, or use by, any insured of goods or services in the course of the insured firm's practice; or (c) guarantee, indemnity or undertaking by any particular insured in connection with the provision of finance, property, assistance or other benefit or advantage directly or indirectly to that insured."

3 [2015] EWCA Civ 31; [2015] Lloyd's Rep IR 371.

> obligations to a company providing cleaning services for the solicitor's offices… It is these sort of personal obligations (which may nevertheless be part of a solicitor's practice as a solicitor) which are not intended to be covered. These obligations are to be distinguished from the obligations which are incurred in connection with the solicitor's duty to his clients which are intended to be covered.
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> (…)
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> 21. It seems to me that obligations arising out of … loans, made to cover disbursements in intended litigation, are essentially part and parcel of the obligations assumed by a solicitor in respect of his professional duties to his client rather than obligations personal to the solicitor. They are inherently part of his professional practice and are assumed as an essential part of his duty is to advise the client as to the likelihood of success in the intended litigation…"

It followed, he held, that AIG could not rely upon the exclusion.

In the Supreme Court AIG submitted that the Court of Appeal had asked the wrong question. The correct question was not what was the essential purpose of the exclusion, but whether the DFMA fell within the relevant limb having regard to the language used in the exclusion and the relevant context. The Court of Appeal had failed to have due regard to the parties' choice of wording and had introduced a confused and confusing test as to the applicability of the trade debts exclusion in the Minimum Terms.

**The Judgments of the Majority in the Supreme Court**

By a majority of 4 to 1 the Supreme Court allowed the appeal. The two reasoned judgments were given by Lord Hodge and Lord Toulson, with both of whom the other 3 in the majority agreed. Lord Carnwath dissented.

Impact had urged the Supreme Court to approach the issue on the basis that there was a broad insuring clause and that the various exclusions, including the exclusion should be interpreted narrowly and *contra proferentem.* The majority disagreed.

***Not an Exemption Clause***

They distinguished between clauses which exempted a party from a liability which he would otherwise have (e.g. a clause excluding or limiting liability for breach of a contractual obligation) or which "seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide"[4] on the one hand and clauses which, while couched in terms of exclusion, served to define the extent of a party's obligations on the other.

[4] [2016] UKSC 57; [2017] AC 73, at [35] per Lord Toulson.

Lord Toulson cited the following passage from the joint report on Exemption Clauses (1975)(Law Com. No. 69) of the Law Commission and the Scottish Law Commission:

> "If a decorator agrees to paint the outside woodwork of a house except the garage doors, no-one can seriously regard the words of exception as anything but a convenient way of defining the obligation; it would surely make no difference if the promise were to paint the outside woodwork with a clear proviso that the contractor was not obliged to paint the garage doors, or if there were a definition clause brought to the promisee's attention saying that 'outside woodwork' did not include the garage doors. Such provisions do not … deprive the promisee of a right of a kind which social policy requires that he should enjoy, nor do they … give the promisor the advantage of appearing to promise more than he is in fact promising."

The way in which the Minimum Terms were drafted involved a wide insuring clause and then a number of exclusions. Apart from the exclusion they excluded cover for liability in broad areas such as death and bodily injury, property damage, partnership disputes and employment claims.

The principal purpose of the power under s.37 of the Solicitors Act 1974 for the Law Society (now the SRA) to require solicitors to take out insurance was to ensure that solicitors were financially able to compensate their clients (and quasi-clients) for their errors.[5] The Minimum Terms fall to be construed against this regulatory background.[6]

It was also relevant that the policy described itself as "Solicitors Professional Liability". The liabilities which fell within the regulatory purpose and the heading of the policy were liabilities incurred to clients, under solicitors' undertakings and to quasi-clients such as the disappointed beneficiaries in *White v. Jones*.[7]

Against this background Lord Toulson held:

> "43 In laying down the minimum terms of professional liability cover required to be maintained by solicitors, it would have been possible for the drafting committee to have attempted to structure them by defining in positive terms the scope of a solicitor's professional liability for which indemnity cover was required, but it opted to delineate the liability against which solicitors should be required to maintain cover for public protection by a process of elimination, which involved combining an insuring clause far broader than any ordinary understanding of a solicitor's professional liability with a list of exclusions. It is important to recognise that list for what it is, namely an attempt to identify the types of liability against which solicitors are not required by law to be covered by way of professional liability insurance.

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5 *Swain v The Law Society* [1983] 1 AC 598, at 610 per Lord Diplock and at 618 per Lord Bridge.
6 *Kumar v AGF Insurance Ltd* [1999] 1 WLR 1747, at 1752 per Thomas J.
7 [1995] AC 207.

> 44 I would reject the first stage of Impact's argument about the way in which this policy and the list of exceptions are to be approached. It treats the minimum terms set by The Law Society as requiring, through the opening clause, a far broader scope of cover than would have been necessary for the protection of clients and third parties to whom they may undertake professional responsibilities, subject only to exceptions which (it is argued) are to be construed as narrowly as possible. That involves a misapprehension of the true nature and purpose of the minimum terms."

***Not to be Construed Contra Proferentem***

Nor was the exclusion to be construed *contra proferentem*: it was a limitation on the professional indemnity cover approved by The Law Society/SRA and it was not ambiguous. Such clauses are not to be approached with a pre-disposition to construe them narrowly.

**The Supreme Court Were Right**

For what little it is worth, paragraphs 7.107 and 7.108 of Cannon & McGurk, *Professional Indemnity Insurance* anticipated this approach:

> "Exclusion clauses in policies of professional indemnity insurance are not the same as contractual provisions which exclude or limit a remedy in damages for breach of contract. They serve to define the cover provided. In some policies, very wide insuring provisions are then refined by a series of exclusion clauses which have the effect of limiting cover to liability to third parties for losses caused by breach of contract or other duty in the provision of professional services and advice. For example, liability for trading debts would usually be excluded.
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> While any ambiguity in a clause excluding what would otherwise be a liability for breach of duty should be resolved against the party who put forward that clause and while it will not readily be assumed that the other party intended such clauses to be wider in scope than they expressly and unequivocally provide, there is no reason to adopt such an approach to clauses which serve to define cover..."

The point made by the Law Commission and Scottish Law Commission in their 1975 report is obviously right: a contract which defines a party's primary obligation in part by use of a clause or clauses excluding matters from that obligation is not to be construed in a different way from a contract which achieves the same result by another route. This distinction is recognised in section 64(1) of the Consumer Rights Act 2015, which exempts from the requirement of fairness terms in consumer contracts which specify the main subject matter of the contract.

And the regulatory background is plainly part of the material to be considered when construing a contract of professional insurance which a profession's regulator or professional body requires its members to take out. This is widely and rightly recognised. For example, in *McCann v Switzerland Insurance Australia Ltd*[8] the High Court of Australia considered the scope of an exclusion clause in respect of dishonesty and fraud in compulsory insurance for lawyers. Kirby J acknowledged that such policies:

> "are required for important social purposes. These are not confined to protecting particular legal practitioners, such as the partners in this case. They are intended to protect clients of legal practitioners where such practitioners would not be able otherwise to meet liability from their own resources. Such clients would then be dependent upon the existence and availability of insurance indemnity . . . The relevant terms of the exclusion clause must be approached in light of these important social purposes. Whilst it is true that the exclusion clause appears in policies approved for a statutory purpose, an overly broad ambit should not be attributed to it, at least if doing so would undermine the objectives for which the insurance was required in the first place."

**Distinguishing Between Clauses Defining Cover and Clauses Excluding Liability**

The scheme of the Minimum Terms is clear. No one who knew that they are intended to provide professional indemnity cover would expect the wide insuring clause not to be qualified by later provisions.

As noted the distinction is between schemes such as that in the Minimum Terms and clauses in policies which "seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide" (per Lord Toulson) or which are, unless construed narrowly, "repugnant to the purpose of the insurance contract" (per Lord Hodge).

***The Purpose of the Insurance Contract***

This inevitably leads to the questions as to how you decide the purpose of an insurance contract.

One might think that the best way to find out what the parties' purpose was in entering a contract was to look at the words used in the contract. But it is clear that the Courts will attach significance to the broad type of insurance. For example, in *Tesco Stores Ltd v Constable*[9] the Court of Appeal held that the fact that a policy of insurance was against public liability was "a strong pointer to the meaning of the words used", albeit "not conclusive". Such policies did "not generally cover liability in contract for pure economic loss". This impacted not only on the basic insuring clause (which was held to be limited to liability in tort for loss which was not purely economic) but also to the scope of an extension of cover to contractual liability. Particularly in regard to the scope of the extension of cover this could be seen as the Court imposing its

8 [2000] HCA 6; (2000) 203 CLR 579.
9 [2008] EWCA Civ 362; [2008] Lloyd's Rep IR 636.

preconception of what the parties intended onto the words which they chose. Or it could be that this is what the parties intended the particular contract of public liability insurance to provide.

In *Bedfordshire Policy Authority v Constable*,[10] another case concerning public liability insurance, Longmore observed that it was:

> "not unreasonable to start with the premise that a public liability policy will give an indemnity in respect of liability to the public at large. Of course that will depend on the precise terms of cover …"

The caveat is important. A pre-conceived idea as to the scope of cover the parties intended is not a reliable guide to the interpretation of the words they have used.

An example of just that approach is to be found in the judgment of Carnwath LJ in *Tektrol Ltd v International Insurance Co of Hanover Ltd*.[11] The decision concerned the construction of exclusion clauses in an "All Risks" policy.

> "[Counsel for insurers] described the exclusion clauses as designed to 'shape' the cover in respect of particular risks. I am prepared to assume that that was the intention, although it does not seem the most obvious drafting technique to achieve it. In any event, I agree with Buxton LJ that the exclusions should, where possible, be narrowly construed. One should start from the presumption that the parties intended an 'all risks' policy to cover all risks, except when they are clearly and unambiguously excluded."

It might be thought that the parties' intention in the *Tektrol* case was that there should be cover for loss suffered by reason of all risks save those which fell within the scope of the exclusion clauses and that those clauses should be given their natural meaning.

There are dangers in starting from a preconception as to what the parties intended rather than looking at the words they have used. Indeed, this was the very criticism which AIG made of the decision of the Court of Appeal in the *Impact Funding Solutions* case.

A further potential problem is that there is scope for disagreement as to the purpose or essential purpose of either a policy of insurance or of a provision within it. In the *Impact Funding Solutions* case both the Court of Appeal and the Supreme Court construed the exclusion in accordance with its purpose. They disagreed not as to whether that was the right approach, but as to what the purpose of the exclusion was. Apart from matters of which the Court can take judicial notice or what advocates manage to work into their submissions there will not usually be material before the Court on this question. It is unlikely that a judge would be receptive to an application to adduce evidence on the point.

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10 [2008] EWCA Civ 64; [2009] Lloyd's Rep IR 607.

11 [2005] EWCA Civ; [2006] Lloyd's Rep IR 38.

***Repugnancy***

There are, of course, cases where provisions, if construed widely, would render cover under the policy nugatory or illusory. It is well established that such a result should be avoided if at all possible. A classic example is to be found in the decision of the Court of Appeal in *Fraser v B N Furman (Productions) Ltd*.[12] There a condition precedent to insurers' liability in an employer's liability policy required the insured to have taken "reasonable precautions to prevent accidents and disease". If it required the insured to have exercised reasonable care it would mean that there was no cover for negligence. That would have deprived the contract of most if not all of its value to the insured. The Court of Appeal held that the condition has a narrower meaning. It required the insured "where he does recognise a danger should not deliberately court it by taking measures which he himself knows are inadequate to avert it". For the Court to adopt this approach there has to be an alternative construction of the term in question.[13]

The distinction between such cases and the *Impact Funding Solutions* case is to be found in the insuring clause. The insuring clause in *Fraser v B N Furman (Productions) Ltd* was against liability to employees for bodily injury or disease. On a wide construction the condition precedent would have left little if any cover. The insuring clause in the *Impact Funding Solutions* case was extremely wide, wider than required by the statutory context and the description of the policy. Giving literal effect to the exclusions still left the insured with cover which was of real value and was consistent with the statutory purpose of the compulsory insurance.

***Reasonable Expectations of the Insured?***

There is an obvious risk that the approach in the *Fraser* line of cases will result in the Courts imposing their view as to what cover was reasonably expected to be by the insured to be provided over the parties' choice of words. It is one thing to hold that the parties are unlikely to have intended that there should be little or no effective cover under a policy and to construe the policy so as to avoid such a result. It is another to hold that it was reasonable to expect the policy to cover a particular loss and to construe it so that it does so in the face of language suggesting otherwise. The former is a sensible approach to construction and gives effect to the objectively ascertained intention of the parties. The latter risks a judge re-writing the contract in accordance with his own view as to what is reasonable.

Recent authority has emphasized that it is not the role of the Courts to relieve a party from the consequences of having made a bad bargain.[14] This should apply to contracts of insurance as it does to

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12 [1967] 1 WLR 898.

13 There was no such alternative in *Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008] EWCA 222 (Comm); [2008] Lloyd's Rep IR 552.

14 *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at [19]–[21] per Lord Neuberger PSC, with whom Lord Sumption, Lord Hughes, and Lord Hodge agreed. . See also (1) *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 35; [2009] 1 AC 1101, at [20] per Lord Hoffmann, with whom the other members of the House of Lords agreed; (2) *Rathbone Brothers Plc v Novae Corporate Solutions Ltd* [2014] EWCA Civ 1464; [2015] Lloyd's Rep IR 95, at [76] per Elias LJ,

other contracts. And, as Briggs J explained in *Jackson v Dear*,[15] the dictates of commercial common sense do not "subject the parties to the individual judge's own notions of what might have been the most sensible solution to the parties' conundrum". Nor should the parties to a contract of insurance be subjected to the individual judge's own notions as to what would have been reasonable insurance cover.

In this regard it should be noted that insurers can make bad bargains too. For example, it would be reasonable to expect a liability insurance policy to include an aggregation clause. And an insurer who fails to ensure that one is included may live to regret the omission. But that reasonable expectation does not permit the Court to imply an aggregation clause.[16]

***Conditions Which Exclude Liability Entirely***

Nothing in the decision in the *Impact Funding Solutions* case alters the approach to clauses in insurance policies non-compliance with which could result in the insurer being able to exclude liability in respect of a claim which would otherwise fall to be indemnified under the policy.

If there were any doubt as to this, the decision of the Court of Appeal in *Zurich Insurance Plc v Maccaferri Ltd*[17] removes it. The decision concerned a condition precedent in these terms:

> "The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof. The Insured shall also on receiving verbal or written notice of any claim intimate or send same or a copy thereof immediately to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit."

Christopher Clarke LJ, who gave the only reasoned judgment, rejected insurers' construction of the condition. He held:

> "This is a condition introduced by Zurich into its policy which has the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity. If Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result. It has not done so."

Having concluded that the condition bore the narrower meaning for which the insured had argued, he continued:

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with whom Sharp LJ agreed and (3) *Wood v Sureterm Direct Ltd* [2015] EWCA Civ 839, at [29]-[31] per Christopher Clarke LJ, with whom the other members of the Court of Appeal agreed.

15 [2012] EWHC 2060 (Ch).

16 *Mabey and Johnson Ltd v Ecclesiastical Insurance Office Ltd* [2001] Lloyd's Rep IR 369.

17 [2016] EWCA Civ 1302.

> "It is, in any event, far from clear that [insurers' construction] is the right interpretation and given the nature of the clause the ambiguity must be resolved in favour of [the insured]. Clauses such as these need to be clear if they are to have effect…"

Unlike the exclusion clauses in the Minimum Terms, clauses such as that considered in the *Zurich* case do not define cover. They make it subject to compliance with them.

**The Limits of Purpose as a Guide to Construction**

Knowledge of the regulatory or statutory purpose or expectation as to the purpose of a particular type of insurance may assist in construing the terms of a particular policy, at least at a high level. But such knowledge or expectation will not always be a helpful guide. This was the conclusion of Teare J in *AIG Europe Ltd v OC320301 LLP*[18] when construing the scope of the aggregation clause in the Minimum Terms (judgment from the Supreme Court is awaited with interest). He referred to the purpose of the Minimum Terms but derived little help from it. This was because an aggregation clause was part of the result of discussions between the SRA and the insurance industry. It involved a balance between a reduction in protection to solicitors' ability to compensate and the premium paid for the insurance. In order to determine what that compromise was the aggregation clause should be approached in "a neutral manner".

It may also be the case that the regulator or professional body has accepted the risk of gaps in cover. For example, claims made liability insurance is thought to work to the benefit of both insurer and insured because, as opposed to occurrence based insurance because there should be a far shorter tail and so greater certainty and lower premiums.[19] But claims made policies carry with them the risk that an insured will not obtain or will not be able to obtain cover in future years and claims made and notified policies carry the risk that an insured will not notify as required in order to trigger cover. In *Sawyer v Canadian Lawyers Insurance Association*[20] Stekal J was unable to construe a claims made policy so as to provide cover for a claim against a lawyer who had failed to give the required notice.

Knowledge of the purpose of a type of insurance policy can only be a general guide as to how it should be interpreted. It may assist at a high level (as in the *Impact Funding Solutions* case), but when it comes to the construction of particular provisions it may be of limited or no value. The words used will show how the parties sought to achieve that overall purpose.

Where the language is clear, the Courts are and should be unwilling to do violence to it in order to bring it into line with the presumed purpose of the policy. The paramountcy of the language used by the parties

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18 [2015] EWHC 2398 (Comm); [2016] Lloyd's Rep IR 147.

19 See, for example, *HLB Kidsons v Lloyd's Underwriters* [2007] EWHC 1951 (Comm); [2008] Lloyd's Rep IR 237, at [198]-[20] per Gloster J.

20 2015 ABQB 132.

was acknowledged in *McCann v Switzerland Insurance Australia Ltd*.[21] In that case Kirby J, having referred to the social purpose of compulsory professional indemnity insurance for solicitors, found against the insured, explaining that "the context is not a sufficient reason to distort the meaning of the exclusion clause as derived from its language".

As LeBel J said when giving the judgment of the Supreme Court of Canada in *Jesuit Fathers of Upper Canada v Guardian Insurance Company of Canada*:[22]

> "In the long run, a contextual but unprincipled approach would render a disservice not only to the industry, but also to insured and to victims. It would lead to further difficulties in obtaining coverage and compensation. Both parties to an insurance contract are entitled to expect that well-established principles will be reflected in the interpretation and application of that contract. In this respect, another form of public interest is also at stake. For these reasons, courts must pay close attention to the structure and actual wording of the policy, read as a whole."

***Contra Proferentem* and Minimum Terms**

Impact's attempt to invoke the doctrine of *contra proferentem* failed. In part this was because Impact did not identify any ambiguity in the exclusion. Rather it seemed to rely on the difficulty of applying it on the facts as generating the necessary uncertainty.

But the attempt also failed because the Minimum Terms are negotiated between the SRA and participating insurers. While the insured is not directly a party to that negotiation and might well be prepared to have less cover for less premium, the result of those negotiations is not being proffered by one party to another. Solicitors are not the only profession with minimum terms of insurance. This aspect of the reasoning of the Supreme Court will apply to the minimum terms of other professions.

**Overview**

The decision in the *Impact Funding Solutions* case is not a decision of earth-shattering importance and does not require insurers and brokers to tear up current policy wordings or authors to rush out new editions of their books.

What it does do is to underline the difference between terms defining the extent of cover and exemption clauses. That is part of a wider trend by which the Courts are showing greater respect for the parties' choice of language.

Insofar as the regulatory background and stated overall purpose of the policy in question were relevant to the construction of the exclusion, the Supreme Court applied them at a high level and in the context of the scheme of the policy before them, a policy which followed the scheme if not the precise wording of the

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21 [2000] HCA 6; (2000) 203 CLR 579.

22 (2006) 267 DLR (4th) 1.

Minimum Terms. They led to the conclusion that the exclusion should not be approached with a pre-disposition to a narrow construction.

The regulatory background and broad nature of the policy are less useful, and possibly misleading, guides as to the construction of particular terms, particularly if they are argued to justify cutting down the natural meaning of the words chosen by the parties. Imposing expectations as to what the parties meant may be justified if a term would, on a wide construction, rob the contract of insurance of any real value to the insured. But otherwise the risk is that the parties' intentions will be frustrated and replaced by what a particular judge considers to be reasonable.