

Approved product lists and financial planners and their PI policy is not a free for all

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In *Arch Underwriting at Lloyd's Ltd obh of Syndicate 2012 v EP Financial Services Pty Ltd*,¹ the court had to construe an exclusion clause in a policy of insurance. EP Financial Services (EPFS) was a financial planner that had given financial planning advice to an individual and her company (the clients). The clients had acted upon the advice and had suffered loss. EPFS paid the clients \$840,000 in settlement of the claim. The advice was given negligently. In particular, the insured had advised the clients to invest in a product that was not on the Insured's approved product list.

The exclusion clause

At issue was whether the following exclusion clause applied:

Section 7: EXCLUSIONS

WE will not cover the INSURED, including for DEFENCE COSTS or other loss in respect of:

...

7.20 Approved Product and Product Disclosure

Any CLAIM or liability directly or indirectly based upon attributable to or in consequence of any:

- (a) financial products or instruments not contained in the INSURED'S approved product list at the time the advice was given unless the advice is in respect of switching from an existing product not in the INSURED'S Approved Product List to a product in the INSURED'S Approved Product List ...²

While the Policy did not define "Insured's approved product list", it was used more than once in the Policy. It was uncontroversial that EPFS and Mr Bonnet, the authorised representative and employee of EPFS were both an "Insured" under the Policy. It was also accepted that EPFS had an approved product list.

Was the exclusion clause ambiguous?

However, the primary judge found that cl 7.20 was ambiguous and applied the *contra proferentem* rule. The primary judge referred to *Zhang v Minox Securities Pty Ltd*.³ In that case, the court had construed an exclusion clause that excluded the insurer's liability in respect of any claim concerning:

- ... (i) any financial or investment product that at the time the actual or alleged act, error or omission occurred is not

listed on the Approved Product List of the entity which has issued the Insured with a proper authority to deal in financial products ...⁴

The Court of Appeal said the exclusion clause as applied to claims against an insured (being the employee) in respect of investments in financial products which were outside the authority conferred by the employer. However, the exclusion clause did not apply to claims against an innocent employer who was otherwise insured under the policy.⁵ This construction was clearly open upon a literal construction of the exclusion clause.

The Qld Court of Appeal did not agree with the primary judge that cl 7.20 was ambiguous. The court said that the "Insured" was unambiguously defined.⁶ The primary purpose of the exclusion clause was that there should be an approved product list and that the financial advice to be covered by the Policy should be limited to advice on products within the list. This purpose is evident from a reading of the words of the exclusion clause. On the construction of the primary judge, however, the underwriters had agreed to indemnify a licensee for advice given on any product.⁷ In the result, the court said that cl 7.20(a) did apply to EPFS as an "Insured".

Conclusion

This decision should provide comfort to Insurers that their policies, which are not intended to cover liability arising from rogue planners will be given effect to. It reinforces the need for employers to keep a close eye on their financial planners to ensure that they are working on the remit of the authority. This is something that the clients are entitled to expect from their financial planners and it ought to lead to a better outcome for both financial planners and their clients.



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Footnotes

1. *Arch Underwriting at Lloyd's Ltd obh of Syndicate 2012 v EP Financial Services Pty Ltd* [2022] QCA 229; BC202215577.
2. Above, at [12].
3. *Zhang v Minox Securities Pty Ltd* (2009) 72 ACSR 556; [2009] NSWCA 182; BC200905871.
4. Above, at [19].
5. Above n 3, at [26].
6. Above n 1, at [27].
7. Above n 1, at [31].