OPINION Piece- Insurance in the construction sector, more "Emperor's New Clothes" than good risk management tool?

Following the High Court decision in *Nautilus* in April 2015, is insurance in the construction industry more like the Emperor's new clothes than a sensible risk management tool? Is the insurance you are paying for worth the money-or any amount of money for that matter if the existence of an off risk cause of damage co-existing with an on-risk cause of damage means the policy for indemnity you hold and have paid for will not respond?

Already insurance for builders is more often limited to funding legal costs that might be incurred in facing a claim. But now Justice Gilbert's decision in *Nautilus* must make all business owners and advisors question the viability of professional indemnity insurance across the wider construction sector.

Very few policies cover all aspects of a construction project. That's a given. There will always be areas of any project that are excluded from cover-presumably because the high likelihood of such risks eventuating makes them uninsurable.

In the Brookfield Multiplex scenario in *Nautilus* their Zurich professional indemnity policy covered any breach ….. *of professional activities and duties*…… *but not day to day supervision of manual operatives, labour and construction work usually undertaken by building, engineering or business support providers*. In simple terms - design defects, subject to various limitations, were in and defects caused through poor workmanship were out.

Justice Gilbert agrees no difficulty arises where a claim has only one cause. If the cause is within the insuring clause and not excluded by an exclusion clause, the claim is covered. However where a claim has two or more causes like in *Nautilus,* and I would suggest this is the case in the vast majority of constructions projects that result in a claim, the claim will only be covered if at least one of these causes is within an insuring clause and **none** of the causes is excluded by an exclusion clause.

Justice Gilbert goes on to say that the relevant cause does not need to be the proximate cause, just a material contributing factor. In *Nautilus,* again to simplify it, the existence of workmanship defects being only one of the causes of damage to the building meant that Brookfield Multiplex was not entitled to indemnity for any part of its liability as defects caused by workmanship were contained within an exclusion clause. Justice Gilbert concluded therefore the entire claim was quite clearly excluded from cover.

So how does this look for your business? Are you getting what you paid for or is it like the Emperor's new clothes – you think you have taken a precautionary approach to your business and covered its major risks where you can, but in reality is it something less? Does it even exist? And potentially, are you as exposed as the Emperor?