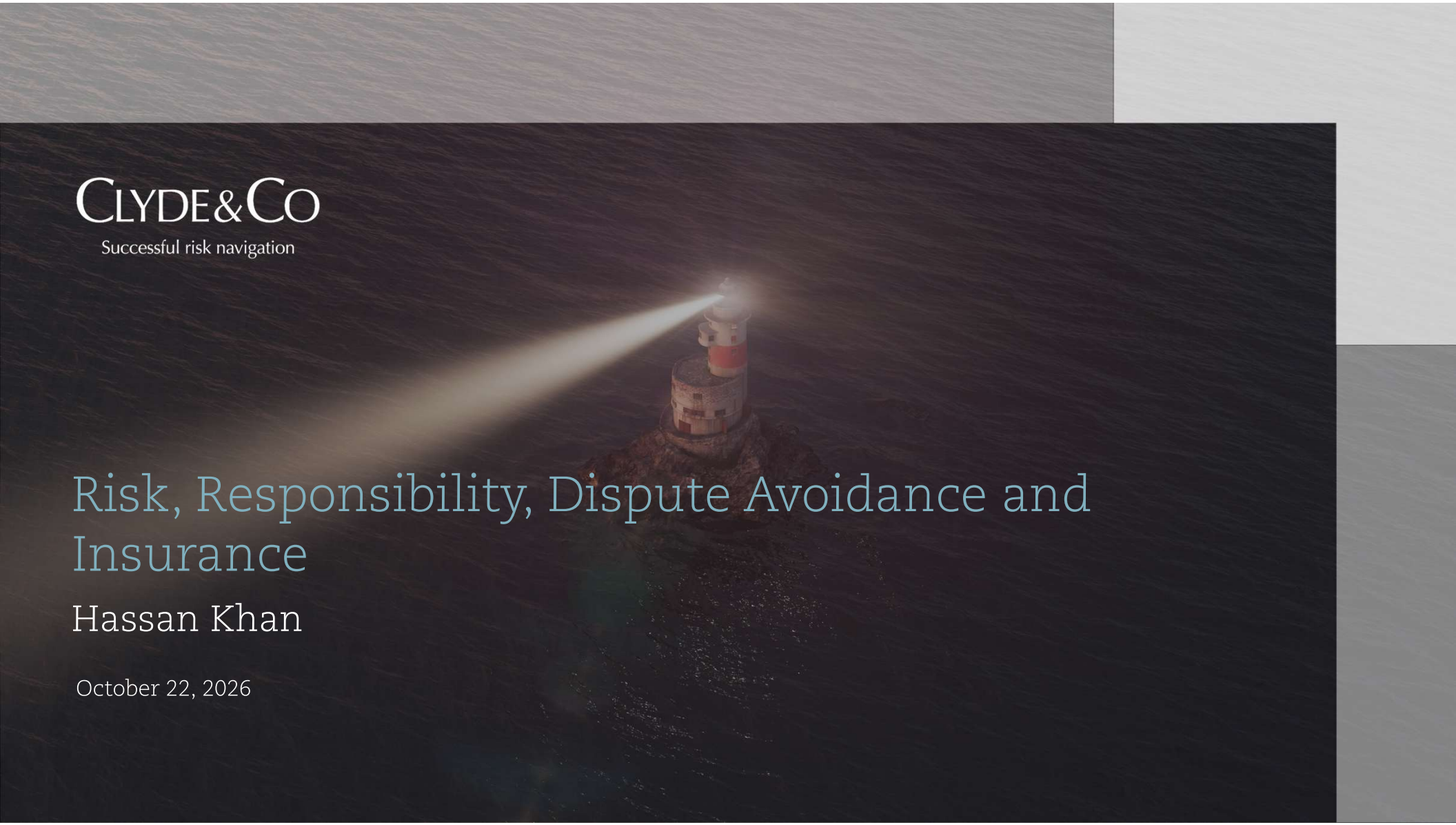


CLYDE&CO

Successful risk navigation

Risk, Responsibility, Dispute Avoidance and Insurance

Hassan Khan

October 22, 2026

Contractual allocation of risk

Contracts – always your first line of defence

Risk is transferred from one contracting party to another by:

- Limitations of liability
- Warranties and guarantees
- Indemnities

Ideally, risk should be allocated to the party that can insure it at lowest cost

- Limit liability as to amount (available insurance or fees)
- Time (two years after completion of services)
- Parties (report cannot be relied upon by third parties)

Keep it simple

Tilden Rent-A-Car v Clendenning (1978) 83 D.L.R. (3d) 400 (Ont.C.A.)

"In the case at bar, Tilden Rent-A-Car took no steps to alert Mr. Clendenning to the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that
Mr. Clendenning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was not incumbent on Mr. Clendenning to establish fraud, misrepresentation or non est factum. Having paid the premium, he was not liable for any damage to the vehicle while being driven by him."

Beware ‘Defend’

UDC-Universal Development v CH2M Hill, 181 Cal.App. 4th 10

“[CH2M Hill] shall indemnify … UDC .. .from and against any and all claims … to the extent they arise out of or are in any way connected with any negligent act or omission by [CH2M Hill]. .. [and CH2M Hill] agrees, at his own expense, and upon written request by UDC … to defend any suit, action or demand brought against UDC on any claim or demand covered herein”

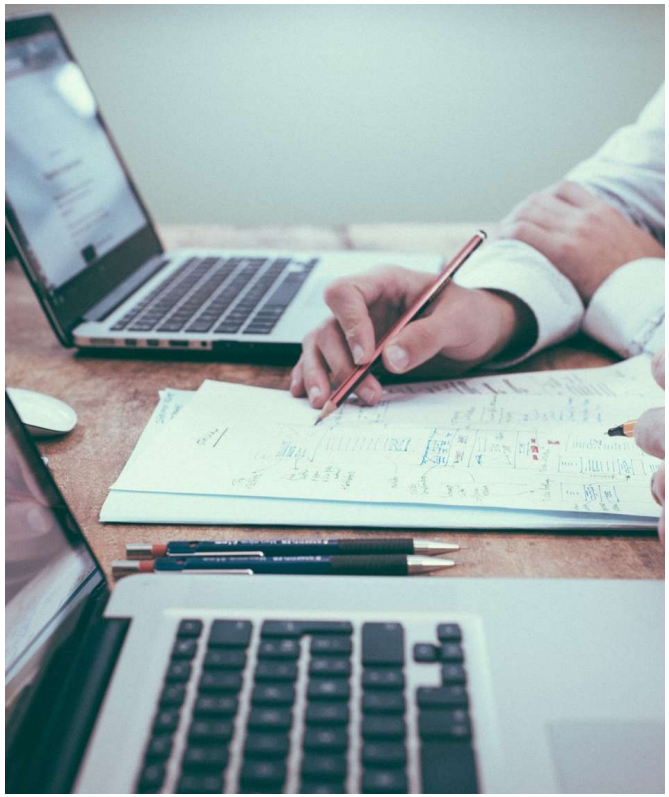
- UDC sued by purchasers for alleged construction defects and third-partied CH2M Hill citing the above clause
- The court found none of the defects were due to negligence on the part of CH2M Hill – so no indemnity
- But the obligation to defend was found to be independent of the duty to indemnify and CH2M Hill was responsible for UDC’s defence costs



Beware ‘Defend’ (continued)

UDC-Universal Development v CH2M Hill, 181 Cal.App. 4th 10

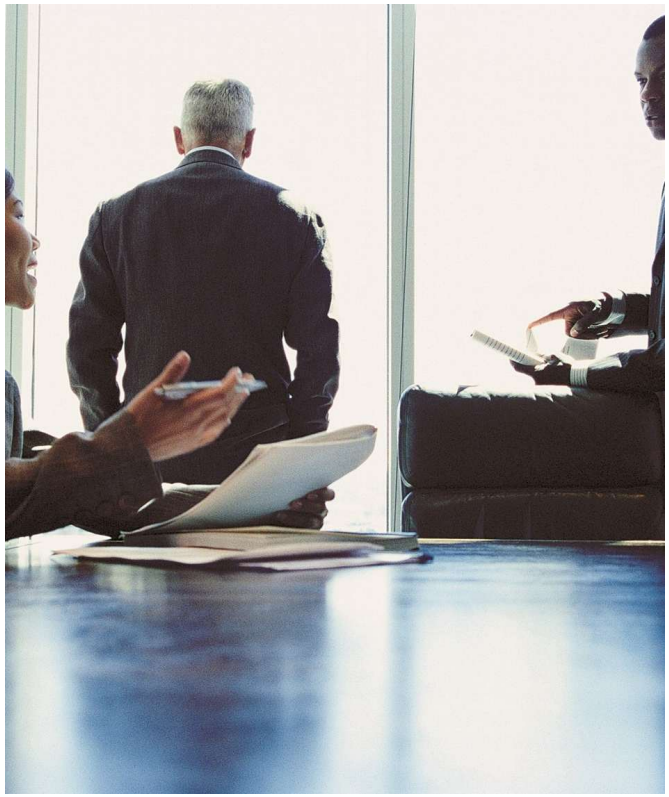
- Many consultants would not have insurance or resources to caver such an obligation
- Moral: make sure your contractual allocations of risk fit the available insurance
- Seek professional advice from broker/lawyer



Dispute avoidance

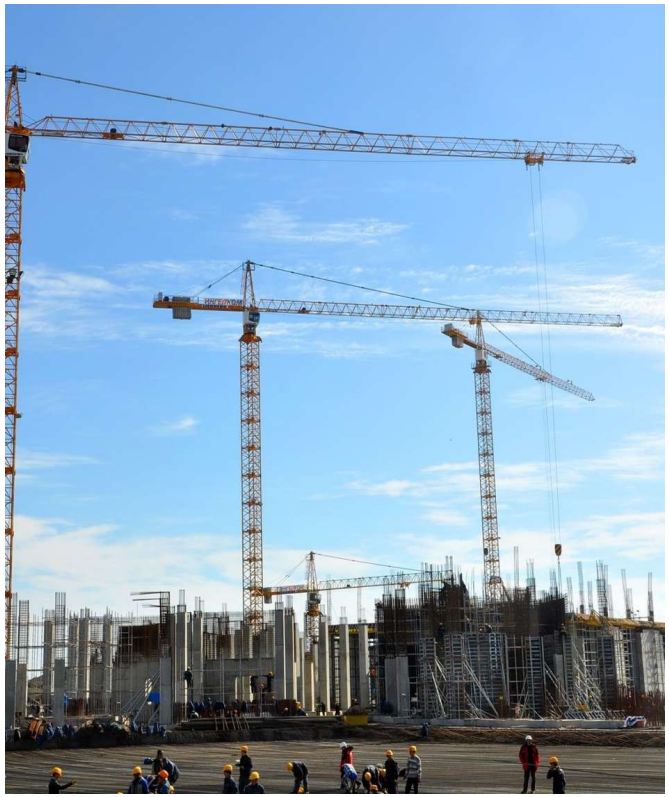
Communication:

- Communicate with your client!
- 50 per cent of cases are about failures to communicate
- Define your scope of work
- Beware ‘scope creep’
- Say what you are not doing



Types of insurance applicable to construction projects

- Commercial General Liability (CGL)
- Property Insurance
- Builders' Risk Insurance
- Wrap-up Liability Insurance
- Professional Liability Insurance (E&O)



Note: all policies are subject to deductibles, limits and exclusions.

Commercial General Liability (CGL)

- Common policy carried by most businesses
- Liability policy –covers the insured's liability to others due to accidents:
  - eg bucket of concrete dropped on passing truck

Exclusions (what it does not cover)

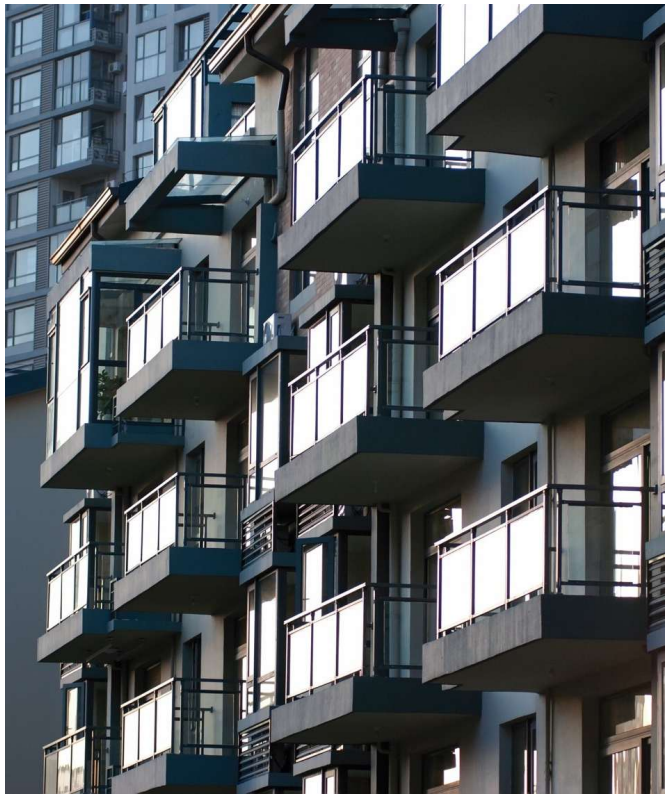
- 'Your work product', 'workmanship' and 'own property'
- Not intended to be insurance against defective work, although damage resulting from defective work is covered

Property Insurance

Insures tangible property against ‘perils’ or ‘all-risks’: eg flood

Exclusions (what it does not cover)

- ‘Wear and tear’, ‘latent defects’, ‘faulty materials, workmanship or design’
- Some specific exclusions: eg earthquake



Builders' risk insurance

- Specific type of property insurance applicable to contractors (also known as 'Course of Construction' since it generally applies only during construction)
- Arises because the project, while not owned by the contractor, is 'at the contractor's risk' during construction
- Insures damage to the project property, including temporary structures such as shoring, formwork and scaffolding

Exclusions (what it does not cover)

- Construction delays, defects, weather
- Note that some policies have specific exclusions:
  eg collapse due to excavation and/or shoring

Wrap-up liability insurance

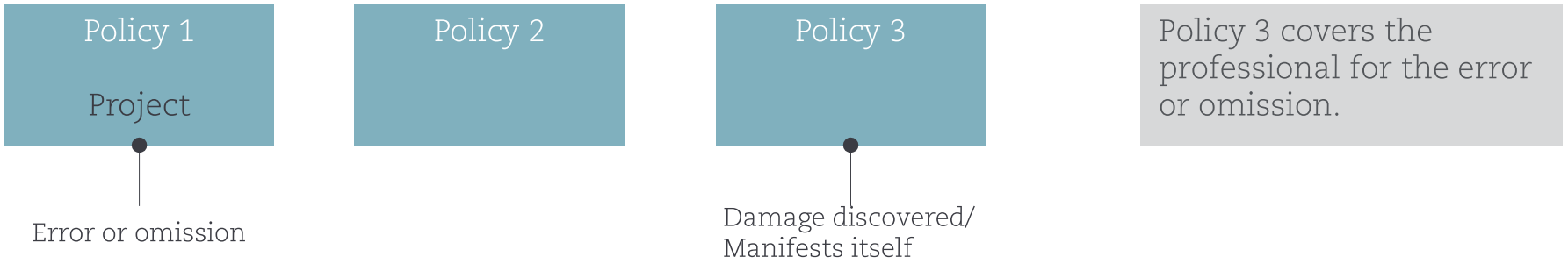
- Single project-specific policy covering all parties' liability
- Insures owner, contractor, subcontractors and consultants
- Usually applies during construction and for specific period afterward
- Provide consistency in coverage and avoids
  cross-claims

Exclusions (what it does not cover)

- Like CGL policies, excludes 'your work product', 'workmanship', 'resulting damage' coverage is narrower than CGL, since the whole project is the work product

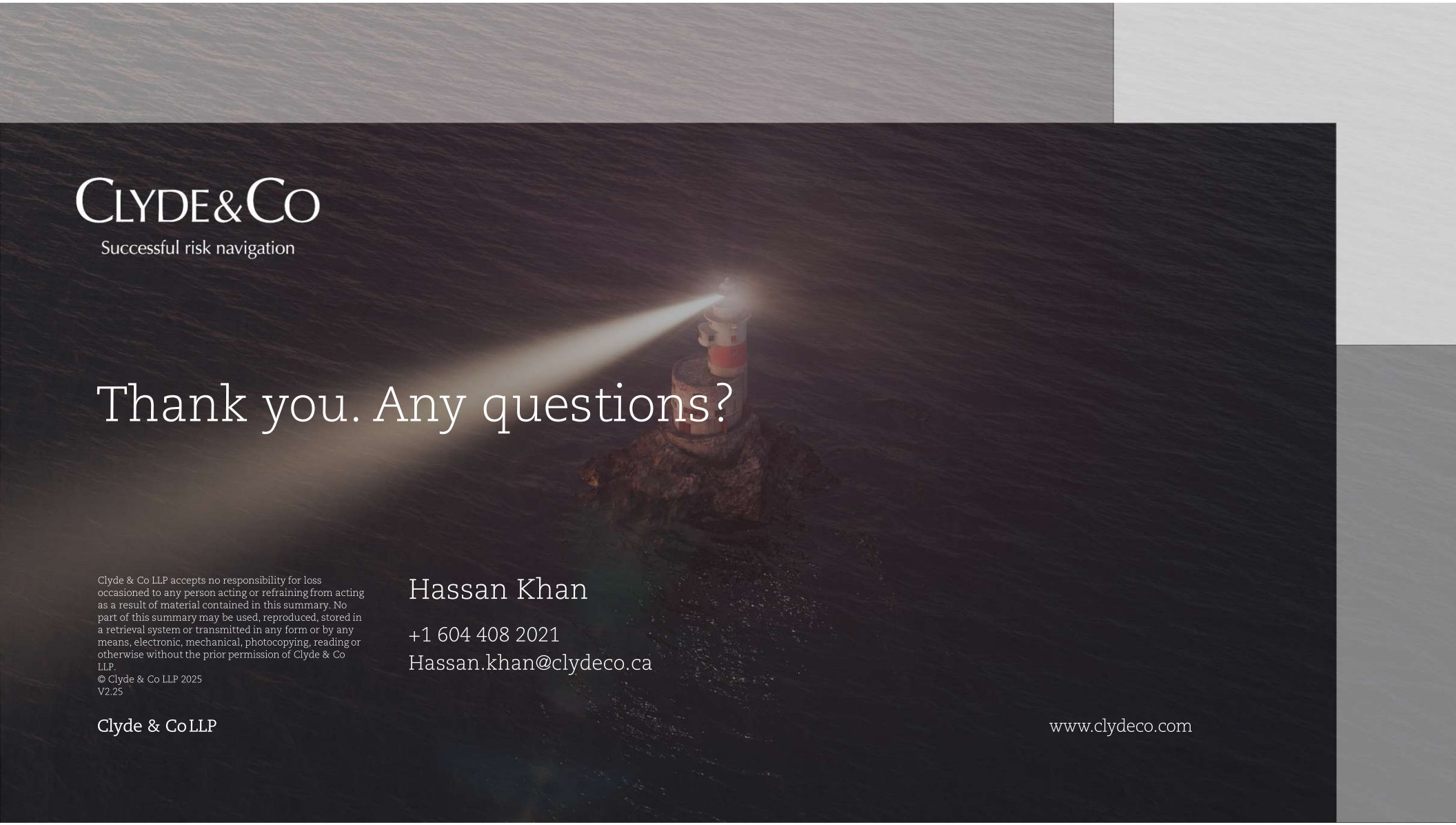
Professional liability insurance (E&O)

- This coverage is excluded from most other policies
- Covers negligent acts or omissions by professionals
- Provides defence and indemnity
- ‘Claims made’ policies respond to claims for work done in the past
- Must report ‘claims’ you know about to the policy in force when the claim is made



Professional liability insurance (E&O) (continued)

- Material non-disclosure voids insurance
- All employees, officers, directors are usually insured also
- A ‘claim’ can be:
  - Your discovery of an error, despite no actual claim being made
  - Advice that someone hold you responsible for a loss
- If in doubt – report
- You may have a professional obligation to tell others if you discover you have made a mistake; work with your insurer
- ‘Practice’ E&O policies are not specific to the project and limits may be eroded by these claims



CLYDE&CO

Successful risk navigation

Thank you. Any questions?

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.
© Clyde & Co LLP 2025
V2.25

Hassan Khan

+1 604 408 2021
Hassan.khan@clydeco.ca

Clyde & Co LLP

www.clydeco.com