FOIL
FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 16th January 2023

Essex CHAMBERS

Hawkins
Leaders in forensic investigation
40 YEARS 1980 • 2020

CROWN OFFICE CHAMBERS

Interpreting an exclusion clause: Pollution or Contamination

Brian Leighton (Garages) Limited v Allianz Insurance Plc (2023) EWCA Civ 8

The claimant/appellant held a policy of insurance with the defendant/respondent, Brian Leighton (Garages) Limited (BLG). It brought a claim under Section 1 (material damage) and Section 8 (business interruption) of the policy arising out of a fuel leak in early June 2014, which resulted in the garage being shut down for health and safety reasons. The respondent declined liability. A Deputy High Court Judge determined various issues in a summary judgment application brought by the respondent and the decision under appeal was that damage to the forecourt and shop building was damage "caused by pollution or contamination" so as to be excluded from cover under Exclusion 9 of the policy.

The issue of the construction and application of Exclusion 9 fell to be decided on the basis of facts which were disputed by the respondent but were to be assumed to be true for the purposes of the application. Those assumed facts were as follows:

A leak occurred from a section of pipe connecting one of the underground fuel tanks to six of the forecourt fuel pumps. It was caused by the pressure of an object such as a sharp stone on the pipe, under pressure and movement from the weight of the concrete slab under the forecourt.

IN BRIEF

The Court of Appeal set aside an order for summary judgment on the basis that it was arguable that an exclusion clause was concerned only with the proximate cause of pollution and not pollution as a consequence.

The fuel leak started shortly before 4 June 2014 and within a matter of days contaminated the forecourt, yard, paved area and forecourt pad and ducting ('the forecourt') and the lower parts of the floors, walls and skirtings of the adjacent shop building ('the building'). The contamination reached the electrical conduits connecting the pumps to the building. The contamination was such that by 9 June 2014 those parts of the premises were at immediate risk of catching fire or exploding, and the business had to be closed. The respondent did not agree to indemnify BLG and it could not afford to affect the necessary repairs itself, with the result that the business never reopened and was ultimately sold.

It was common ground that the forecourt and building were Property Insured under the policy. Exclusion 9 stated:

Pollution or Contamination

Damage caused by pollution or contamination, but We will pay for Damage to the Property Insured not otherwise excluded, caused by:

a pollution or contamination which itself results from a Specified Event

b any Specified Event which itself results from pollution or contamination."

It was common ground that no Specified Event occurred in this case.

At first instance, BLG argued that the effect of the leak may have been pollution or contamination, but that was merely to define the damage; the cause of the damage was the sharp object which punctured the pipe; and further that Exclusion 9 only applied to environmental pollution of groundwater and subsoils.

Allianz argued that the damage was clearly caused by pollution and contamination by the fuel.

The judge below accepted the respondent's argument that the damage was caused by pollution and contamination better reflected the ordinary meaning of the clause and its likely scope within a policy covering a garage, since it was unlikely that any exclusion only applied to subsoils and groundwater rather than the property. On its ordinary meaning pollution would cover leakage of oil from a pipe into something else, whether a beach, river, garage forecourt or shop, and that would extend to the mechanism by which the leak took place (including a pipe failing and leaking oil) rather than solely the condition of being polluted or saturated.

Allowing the appeal by a majority, the Court of Appeal held that the principles applicable to the construction of contractual documents had been the subject of an abundance of recent high authority and three matters were of particular relevance to the present dispute.

First, the relevant commercial context was that this was a policy for a small or medium sized enterprise whose business included a petrol filling station. The risk of leakage of fuel from pipes, tanks and apparatus was amongst the most obvious risks arising from such an operation, and one against which the operator of the business would naturally desire cover.

Secondly, there was no room for any presumption that Special Exclusion 9 was to be narrowly construed or construed against the insurer. There was therefore no room for the application of the relevant aspect of the *contra proferentem* principle, which applied to a clause exempting a party

from a liability which would otherwise arise by operation of law or under a contractual term which defined the benefit which it appeared it was the purpose of the contract to provide.

Thirdly, it was a general principle of insurance law, codified in S55 of the Marine Insurance Act 1906 but equally applicable to non-marine insurance, that the insurer was liable, and only liable, for losses proximately caused by a peril covered by the policy. There might be more than one proximate cause of a loss. Where there were concurrent proximate causes, one an insured peril and the other excluded, the exclusion prevailed. It was a commonplace in human experience, and therefore insurance claims, that a loss might result from a combination of causes, either operating independently of one another, or, often, in a chain where each would not have arisen but for that preceding it in the chain. Of these causes, the search was for the, or a, proximate cause and it was generally irrelevant if a cause was either more remote in the chain than the proximate cause, or more immediate.

This was subject to an important qualification. The requirement of proximate causation was based on the presumed intention of the contracting parties; it was a presumption capable of being displaced if, on its proper interpretation, the policy provided for some other connection between loss and the occurrence of an insured or excepted peril. This was reflected by the words in S55 of the Marine Insurance Act "unless the policy otherwise provides".

In this case the chain of causation leading to the damage included the process of pollution or contamination, but that was not its proximate cause. The proximate cause of the damage was the puncturing of the pipe by the stone or sharp object (on the assumed facts). It was critical to the outcome, therefore, whether the exclusion was concerned with pollution or contamination as a proximate cause or merely as an intermediate process in the chain of causation.

The appellate court regarded the presumption that the exclusionary wording was concerned only with proximate causes to be a strong one. It was reasonable to attribute this presumed intention to these parties.

It was trite that Exclusion 9 was to be read as a whole, but the majority did not regard that strong presumptive meaning of the exclusionary words as displaced unless the wording of the write-back could not be reconciled with it. The reasonable reader of the clause would expect the scope of the exclusion to be determined by the language employed to express the exclusion, namely that in the exclusionary words, rather than by what followed. If it was to be displaced in what followed, it could only be on the basis that what followed was inconsistent with the presumption.

Accordingly, whilst the respondent's construction of Exclusion 9 was one which the parties might perfectly sensibly have chosen as their bargain, it faced the insuperable difficulty that it did not give effect to the language they had used, which gave rise to the presumption that they intended the exclusion to apply to pollution or contamination as a proximate cause, a presumption which was not displaced by the wording of the write-back or any other wording in the policy.

The full judgment is available at: Brian Leighton (Garages) Ltd v Allianz Insurance Plc [2023] EWCA Civ 8 (11 January 2023) (bailii.org)