CAUSATION IN EXCLUSION CLAUSES

It is a fundamental principle of insurance law that policies provide cover for loss caused by the insured peril, and exclude losses caused by an excluded cause. In recent times the English Courts have grappled with the interpretation of causal language in exclusion clauses, and reached results that the insureds would probably have found surprising when taking out the insurance.

In *The University of Exeter v Allianz Insurance Plc* [2023] EWCA Civ 1484 the Court of Appeal addressed whether a 'war' exclusion applied to a claim in respect of property damage caused by the controlled detonation of a Second World War bomb many decades later. In *Brian Leighton (Garages) Limited v Allianz Insurance Plc* [2023] EWHC 1150 Civ 8 the Court of Appeal considered the effect of a 'pollution' exclusion on a claim for losses resulting from the contamination of premises by a fuel leak.

"The decisions are significant in that they make clear that, unless the policy expressly states otherwise, parties to an insurance contract will be presumed to have intended that proximate cause applies." This can lead to results that might seem surprising including that the dropping of a bomb in 1942 can invalidate an insurance claim for property damage occurring in 2021.

The decisions are a reminder that when reviewing proposed policy exclusions policyholders and their brokers should consider carefully whether the causal language used accurately describes how the policyholder intends the exclusion to apply.

Brian Leighton (Garages) Limited V Allianz Insurance PLC

Brian Leighton (Garages) Limited (the "**Insured**") operated garages, which were insured under a 'Headlight Motor Trade' policy (the "**Policy**") written by Allianz Insurance Plc (the "**Insurers**"). There was a fuel leak caused by a sharp object perforating a pipe. The leak led to contamination of the premises and the business had to close. The Insured brought a claim under the Policy for material damage and business interruption losses.

The Insurers refused cover by reference to a 'pollution' exclusion (the "**Exclusion**") in the Policy, which read as follows:

> *"The General Exclusions of this Policy apply to this Section and in addition it does not cover:*
>
> *9.* ***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."*

Key issues

1. The parties to a policy will generally be presumed to have intended that proximate cause applies unless the policy indicates otherwise.
2. Where words denoting proximate causation are used and the policyholder can be taken to be familiar with the principle of proximate causation and the words that reflect it (e.g. because a broker is involved), the presumption will not be displaced.
3. In the usual way identifying the proximate cause(s) will require an enquiry into the dominant, effective or efficient cause(s) of the loss.
4. It is important to be clear in the policy wording not just about the nature and scope of the excepted peril but also how the loss must be caused by the peril in order to be excluded.
5. When reviewing policy exclusions, policyholders and their brokers should consider carefully the causal language used (e.g. "caused by" or "directly or indirectly arising from").

Court of Appeal decision

On appeal it was common ground that on the facts assumed by the parties for the purposes of the hearing (i) the losses had been caused by a process that had contamination or pollution as part of its causative chain but (ii) the proximate cause of the loss was the sharp object rupturing the pipe, which was not pollution or contamination. The Court of Appeal explained that the proximate cause of the loss is not simply the last cause of the loss, but that which is proximate in efficiency, being the dominant, effective or efficient cause.

The issue for the Court of Appeal was whether, on the proper construction of the Exclusion, it was engaged:

1. only where the proximate cause of the loss was pollution or contamination (the Insured's case); or
2. where pollution or contamination form part of the chain of causation but are not necessarily the proximate cause of the loss (the Insurers' case).

In a decision split 2:1, the Court of Appeal held that the Exclusion did not apply. In the leading judgment, Popplewell LJ held that the Exclusion was engaged only where the proximate cause of the loss was pollution or contamination. The requirement for proximate causation is based on the presumed intention of the contracting parties (as was made clear in the Supreme Court's judgment in *FCA v Arch* [2021] UKSC 1). Further, it was tolerably clear that the words "*caused by*" in the Exclusion denoted proximate cause, and in other parts of the Policy different words (e.g. "*directly or indirectly caused by*") had been used to make clear that proximate cause was not to apply. In light of these points, there was a strong presumption that the Exclusion required that the losses be proximately caused by pollution or contamination.

Popplewell LJ went on to consider whether it was reasonable to attribute to the parties a presumed intention that proximate cause was to apply. He held that it was. Though the Insured was an SME, it would have been advised on the Policy by its broker, who can be taken to be familiar with the basic insurance principle of proximate causation and language which reflects or modifies it.

Allianz Insurance PLC V the University of Exeter [2023] EWCA CIV 1484

In the course of carrying out building works the University of Exeter (the "**University**") discovered on its premises an unexploded Second World War bomb. The University determined that the bomb could not be transported away and chose instead to detonate it on site. The detonation resulted in property damage for which the University sought cover under its policy.

The policy contained an insuring clause that provided broad cover. In particular Insurers agreed to:

> *"Indemnify or otherwise compensate the insured against loss, destruction, damage, injury or liability (as described in and subject to the terms, conditions, limits and exclusions of this policy or any section of this policy) occurring or arising in connection with the business during the period of insurance or any subsequent period for which the insurer agrees to accept a renewal premium."*

The policy also contained a "war" exclusion which read as follows:

*"**War** (Not applicable to the Computer, Engineering Machinery Damage, Engineering-Business Interruption, Employers' Liability, Personal Accident, Business Travel, Terrorism, Fidelity Guarantee, Cyber and Directors and Officers Sections) Loss, destruction, damage, death, injury, disablement or liability or any consequential loss occasioned by war, invasion, acts of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power."*

Insurers denied cover by reference to the "war" exclusion and sought a declaration from the Court that they were entitled to do so. They argued that the "war" exclusion applied because the damage had been "*occasioned by war*".

Proximate cause

It was accepted by the parties that, in order to determine whether the loss was "*occasioned by war*", it was necessary to ascertain the proximate cause of the loss.

The Insurers argued that the dropping of the bomb was the proximate cause of the loss; or alternatively was *a* proximate cause of the loss. The University argued that the proximate cause of the loss was not the war but rather the deliberate act of the bomb disposal team in detonating the bomb.

On appeal Lord Coulson agreed with the lower Court's concurrent cause analysis: the dropping of the bomb was at least a proximate cause of the loss given that the loss had been caused by an explosion, which had been triggered by the reasonable decision to detonate the bomb. The decision to detonate was necessitated by the presence of the bomb, and the fact that there had been a significant passage of time between the dropping of the bomb and its causing damage did not alter the analysis. He held that "*the judge was right to conclude that there were two concurrent causes of the loss and damage: the dropping of the bomb and its detonation. Those two causes were of approximately equal efficacy.*" Lord Coulson was not attracted by the lower Court's analysis of the dropping of the bomb as *the* proximate cause which was based on ignoring – artificially - the other cause. In arriving at his decision Lord Coulson relied on the well-known principle established by *Wayne Tank Pump Co. Ltd v Employers Liability Incorporation Ltd* [1974] QB 57 that where there are concurrent causes of approximately equal efficiency, and one is an insured peril and the other is excluded by the policy, the exclusion will usually prevail.

Comment

It may have come as a surprise to the University that a claim under its insurance could be invalidated by the dropping of a bomb some 80 years ago. But that was the conclusion reached in light of the words used in the exclusion clause.

Both decisions are a reminder of the need to consider carefully the words used to describe not only the excepted peril – which, in the *University of Exeter* case, was simply "war" rather than, for example, "ongoing war" - but also the causal connection between the excepted peril and the losses. In relation to the latter point, the Court will apply the proximate cause doctrine unless there is an indication that the parties did not intend it to apply.

CLIFFORD

CHANCE

Christopher Ingham
Partner
London
T: +44 207006 4518
E: christopher.ingham@cliffordchance.com

Alex Gabriel
Senior Associate
London
T: +44 207006 1169
E: alex.gabriel@cliffordchance.com

JOB0000026234