The Presumption of Proximate Cause in Exclusions and its Displacement: *Brian Leighton v Allianz*

INTRODUCTION

In the recent case of *Brian Leighton Garages v Allianz* [2023] EWCA Civ 8, the Court of Appeal considered the causative potency needed for a pollution exclusion to apply. The judgment is of wider interest to the market.

This note reviews the decision.

THE FACTS

Brian Leighton ('the Garage') carried on a garage business in Goole. It sold and serviced cars and ran a filling station. There were fuel tanks under the forecourt. Pipes connected them to the pumps.

One of the pipes was punctured by what was inferred to be pressure from a sharp stone under the concrete slab. It caused a serious leak. Fuel contaminated the forecourt and the adjacent shop. Within a week, the premises were said to be at immediate risk of catching fire or exploding. The Garage had to close. It never reopened.

THE POLICY

Allianz ('Insurers') insured the Garage against various risks under a motor traders' policy ('the Policy'). The Garage made a claim under the material damage and business interruption sections. Insurers declined indemnity. They invoked the pollution exclusion. This read:

> *"**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."*
>
> *…*
>
> ***Specified Events***
>
> *Fire, lightning, explosion, aircraft or other aerial devices or articles dropped from them, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious*

> *persons other than thieves, earthquake, storm, flood, escape of water from any tank apparatus or pipe or impact by any road vehicle or animal."*

It was common ground that there had not been a Specified Event within the meaning of the write-back.

THE PROCEEDINGS

The Garage brought proceedings. Insurers successfully applied to strike the claim out. The Garage appealed.

THE APPEAL

The Garage argued that the Judge had been wrong to treat pollution or contamination as the *cause* of the damage. The cause, it argued, was the puncturing of the pipe by the stone. Pollution or contamination was not the cause but the *effect*. Insurers initially argued that this was a flawed analysis.

The issues narrowed in oral argument. It became common ground that pollution or contamination was part of the causative chain but that the rupture of the pipe was the proximate cause. Insurers maintained that this was enough to trigger the exclusion. The Garage contended that the exclusion would not apply unless pollution or contamination was the proximate cause.

By a majority (Males LJ dissenting) the Court of Appeal reversed the Judge.

Popplewell LJ

Popplewell LJ began by emphasising three points which he considered of particular relevance to the dispute.

The first was that the risk of fuel leaks was one of the most obvious risks arising from the operation of a filling station, and one which an operator would naturally want cover against. The second was that, contrary to the case advanced by the Garage, the *contra proferentem* principle could have no application to a clause which merely defined the scope of cover. The third was that there is a rebuttable presumption that an insurer is only liable for losses proximately caused by an insured peril. This was reflected in the Marine Insurance Act 1906, section 55, which provided that:

> *"…unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against"*

The presumption applies in reverse to an excluded peril. The Judge referred to the case of *Coxe v Employers Liability Assurance* [1916] 2 KB 629 by way of illustration. The policy there excluded losses *"directly or indirectly caused by, arising from or traceable to war".* An army officer serving in wartime was hit by a train and killed. War was not the proximate cause but the court found that the death was *"indirectly caused by…war"* and so the exclusion applied. The form of words adopted had been sufficient to rebut the presumption.

Popplewell LJ indicated that it would have been clear that the presumption applied if the exclusion were unqualified. He did not consider that the write back could displace it unless it were irreconcilable with it. He construed "*caused by… pollution or contamination which itself results from a Specified Event"* as applying where pollution was the proximate cause and the Specified Event the more remote cause.

However, "caused by…*any Specified Event which itself results from pollution or contamination"* could not, he concluded, apply where pollution was the more remote cause as, in that case, it would not be excluded in the first place. He thought that it applied where there was more than one proximate

cause, as in the well-known case of *Wayne Tank and Pump Co Ltd v Employers Liability Assurance* [1974] QB 57,

He concluded that the appeal should be allowed.

Males LJ

Males LJ was of the view that the question which should be asked is whether the clause, read as a whole, would demonstrate to the reasonable reader an intention to displace the presumption. He agreed that the exclusionary words would, without more, clearly apply only to losses proximately caused by pollution or contamination. However, he considered that it was going too far to say that the presumption could only be rebutted if the write-back were irreconcilable.

He accepted that Popplewell LJ's construction of the write-back was a possible reading, but he did not think it a probable one.

He considered it notable that the write-back applied equally to pollution or contamination resulting from a Specified Event and to a Specified Event resulting from pollution or contamination. This suggested to him that the write-back was not concerned with the proximate cause of the damage. Rather, its purpose was to ensure that, where a Specified Event causes or is caused by pollution or contamination, there will be cover regardless of whether the Specified Event or the pollution was the proximate cause.

It followed from this, he concluded, that the second use of the words *"caused by"* in the clause were not to be read as meaning proximately caused. On the basis that parties who repeat a form of words in the same clause are presumed to attach the same meaning to them, *"caused by"* in the exclusionary words should also be read in the wider sense.

He was of the view that the appeal should be dismissed.

Nugee LJ

Nugee LJ indicated that he had found it difficult to reach a conclusion. He had inclined towards the same view as Males LJ but was ultimately persuaded that Popplewell LJ had the right answer. Nevertheless, he considered that Males LJ was right in saying that the question for the court was whether, when read as a whole, the clause would demonstrate to the reasonable reader an intention to displace the presumption. He also thought that he was justified in saying that it went too far to say that the presumption could only be displaced if the write-back were irreconcilable.

His interpretation was that the write-back was intended to preclude Insurers from invoking the *Wayne Tank* principle to deny cover in the case of a Specified Event. The first limb, he concluded, applied to a scenario such as an earthquake rupturing a nearby sewage pipe resulting in contamination of the premises; the second applied where, for example, leaking fuel resulted in a fire which damaged the premises.

He agreed with Popplewell LJ that the appeal should be allowed.

DISCUSSION

From the perspective of commercial certainty, it is a little dismaying that the court was divided, that each Judge read the clause differently and that one of the majority wavered over which side to come down on. It might be questioned what advice a reasonable broker can be expected to give a client, in the circumstances.

What is clear, however, is that where a policy adopts the formulation "*caused by*," the court will start from the presumption that the parties meant this to be a reference to proximate cause.

As the facts of the present case demonstrate, this can mean that a loss which, at first glance, might be thought to fall squarely within an exclusion on closer analysis does not.

Policy draftsmen who intend an exclusion to have wider ambit ought to say so clearly. Popplewell LJ suggested that this is *"typically"* done by using the words "*directly or indirectly caused*". Caution should be exercised in selecting other seemingly expansive wording. For instance, the common formulation *"arising from"* (or *"out of"*) has been given different meanings depending on the context in which it is used but when used in an exclusion, authority suggests that it is to be equated with proximate cause.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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Changing Perceptions

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