A blast from the past: an explosion caused uninsured damage

***The University of Exeter v. Allianz Insurance PLC* [2023] EWCA Civ 1484**

During the grim *Baedeker* raids in 1942, a German bomb was dropped on farmland near Exeter. It did not explode. It became buried, and went unobserved for many decades. It was still unseen as buildings were constructed nearby, including Halls of Residence for Exeter University. Almost 79 years after the bomb was dropped, it was discovered, in the course of some construction works. It had to be the subject of a controlled explosion without being removed any distance from its location. The explosion damaged buildings, among them buildings owned by the University. It is impressive to read what the bomb disposal experts had to face. There is the rarity that a decision of the Court of Appeal may lead one to Youtube, to watch the explosion: https://www.youtube.com/watch?v=lVpETCS6tss

The University had an insurance policy with Allianz. The immediately relevant clauses were these:

> The general insuring clause provided for the insurers to
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> "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."
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> General exclusion 2 excluded
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> "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."

Read together, the clauses had the effect that the policy did not provide cover for loss or

destruction or damage *occasioned by war*.

Allianz said that the damage was occasioned by war. The parties therefore litigated the question whether the damage to the University's buildings was covered, and both the trial Judge and the Court of Appeal held that it was not.

The parties had confined their disputes to a limited number of points, and the case was argued within the parameters of their agreement as to the extent of the dispute. One of the points agreed was that on the proper interpretation of the policy the insurer would only be liable for loss proximately caused by a peril covered by the policy (cf. *Brian Leighton (Garages) Ltd v Allianz Insurance PLC* [2023] EWCA Civ 8 at [27]; the Exeter parties' agreement to this basis appears particularly clearly from the first instance decision [2023] EWHC 630 (TCC) [at paragraph 28]). Section 6.1 of the judgment is a useful summary of the general principles about this.

The insurer's central arguments were that:

(a) the proximate cause of the damage was war; alternatively

(b) (i) there were two concurrent proximate causes, of approximately equal efficacy, war and the explosion, and

(ii) there being those two concurrent proximate causes, of approximately equal efficacy, one of which was expressly excluded, the damage was not covered.

The University's central arguments were that:

(a) the proximate cause of the damage was the controlled explosion; alternatively

(b) if there were two concurrent proximate causes, they were not of approximately equal efficacy, the controlled explosion being the substantially more important one.

The trial Judge decided that there was only one proximate cause of the damage, viz., war.

The Court of Appeal's view was that there were indeed the two suggested concurrent proximate causes, war and the explosion, that they were of approximately equal efficacy, and that the normal principle applicable to cases where one of the causes was expressly excluded applied, so that the damage was not covered. As to the latter point, Coulson L.J explained [at paragraph 26] that:

> "By contrast, 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: see *Wayne Tank & Pump Co. Ltd v Employers Liability Incorporation Ltd* [1974] QB 57 at 67B-F, 69B-D and 64E-75D. That principle was restated in *Arch*:
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> > "174. This situation is to be contrasted with one where there are two proximate causes of loss, of which one is an insured peril but the other is expressly excluded from cover under the policy. Here, although it is always a question of interpretation, the exclusion will generally prevail: see *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd* [1974] QB 57; *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042; [2004] 2 Lloyd's Rep 604; *Atlasnavios-Navegação, LDA (formerly Bnavios-Navegação, LDA) v Navigators Insurance Co Ltd (The B Atlantic)* [2018] UKSC 26; [2019] AC 136, para 49."'"

In section 9 of the judgment the Court of Appeal decided not to express an opinion about the reasoning which had led the trial Judge to conclude that there was a single proximate cause, war.

What should the practitioner take from the case? Reminders, really - but important reminders.

1. The decision involves no new principle of law. As *Colinvaux and Merkin* point out at B-0345, decisions on proximate cause points are generally fact-sensitive.

2. Authorities are to be cited because of their relevance, rather than because of the industriousness of lawyers. The Court of Appeal congratulated counsel on their understanding of this, the choice of words showing that others have been less helpful in their advocacy:

> "I should note that, although the issue in this case is primarily one of law, leading counsel on both sides referred to the authorities in a measured and controlled way, and spared the court the incontinent citation of numerous vaguely relevant causation authorities, all too common in appeals of this type. We are very grateful to them." [paragraph 2]

3. The starting point is interpretation of the particular policy [paragraphs 18 and 39], paying due heed to the decision in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 [2021] A.C. 649.

4. The general principles about the concept of proximate cause have been restated recently, and are summarised at paragraphs 18 to 22.

5. The *Wayne Tank* decision is firmly embedded in English law.

6. A question for another day and case may be the interpretation in a particular policy of "war" (or, indeed, other words used in General Exclusion 2). The case had been argued on the footing that in the particular policy "occasioned by war" did include the dropping of a bomb during the Second World War, but in other cases different questions might arise, e.g. as to whether the "war" being referred to could mean a war that had ended before either the time that the buildings were built or the time that the policy was incepted.

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