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POLICYHOLDER AGAIN RECOVERS LOSS CAUSED BY ITS OWN NEGLIGENCE

09 September 2016 | Australia
Legal Briefings – By **Mark Darwin** and **Guy Narburgh**

IN BRIEF

A policyholder has successfully appealed against a decision from last year in which an insurer denied coverage on grounds that the damage was not 'accidental',[1] and in doing so re-emphasised some key principles favourable to policyholders which should be considered before claims are declined, namely:

- Courts will tend to give a broad construction to coverage clauses in insurance policies;
- negligence on the part of a policyholder will not, without more, prevent a policyholder availing itself of 'accidental damage' cover; and
- demonstrating that an event was not accidental must be done by reference to all relevant circumstances, and can be a difficult hurdle to overcome.

The decision at first instance (*Matton v CGU*) was trumpeted by insurers as a warning that policyholders will not succeed in claims for losses caused by their own negligence, so the Court of Appeal decision is a welcome reminder to policyholders of the strength of their position in claims and the high bar for insurers seeking to deny them.

DECISION

The claim arose from damage to a crane boom in circumstances where the crane toppled over while it was operating on a slope. The policyholder claimed cover under an accidental overload clause. The insurer declined the claim alleging that the policyholder chose to negligently operate the crane on the slope contrary to the manufacturer's guidelines (and so alleged the loss was not 'accidental').

The Court of Appeal unanimously decided in the policyholder's favour that the term 'overloading' encompassed both physical overloading (carrying a load exceeding the weight capacity of the crane) and structural overloading (carrying an acceptable load, but at an angle which caused the load to exert excessive force on the crane boom - which was the mechanism of overloading in this case).

In reaching this conclusion, the Court emphasised that the meaning of the policy must be determined by reference to the text, the surrounding circumstances, the purpose of the policy and the object of the transaction. The policy covered accidental overload to a mobile crane both at rest and at work. This suggested that:

- the meaning of the term 'overload' was unlikely to be answered without reference to the dynamic and structural forces which might be encountered by the crane moving around the worksite; and
- the various exclusions (relating to the use of the crane in breach of relevant Australian Standards and the manufacturer's guidelines) had to be read down, because otherwise the cover provided by the 'accidental overload' extension would have been illusory.

Despite the insurer's arguments that a broad interpretation of 'overloading' effectively negated the exclusions, the Court of Appeal was comfortable that the extension and the exclusions could operate consistently given the requirements of the extension for the damage to be sudden and unforeseen and the overloading itself to be non-deliberate and clearly unintentional (described by the Court as 'significant requirements').

A 2:1 majority of the Court of Appeal also determined that the structural overloading was 'accidental … non-deliberate and clearly unintentional' and the resulting damage was 'accidental sudden and unforeseen', overturning the decision of the trial judge.

The majority proceeded on the basis that the relevant perspective for determining whether overloading or damage was accidental was the individual crane operator associated with the policyholder (subjective) as well as the perspective of a reasonable person in the positon of the crane operator (objective).

Numerous factual findings were ultimately key to the conclusion reached by the majority. The crane operator and his colleague had agreed that the crane and its load could not get into the required position due to the ground quality, and that the appropriate approach (which was common in the industry) was to place concrete rubble on the area to a level higher than the ground on the basis that it would compress once the crane was on it. While the colleague questioned whether the rubble level was too high, the crane operator, who was ultimately responsible for the final decision to proceed, judged that the rubble should sufficiently compress. When he began to operate the crane, he only had approximately 12 seconds to determine that the rubble was not crushing as expected before the crane toppled over.

The majority considered whether the judgment of the crane operator and his colleague involved such a level of recklessness or risk taking that it could not be found to be accidental, and concluded it did not.

Some of the reasoning for their conclusion included:

- the method used to advance the crane to its position was appropriate and not risk taking – however, the individuals' judgment that the rubble would compress when the combined weight of the load and crane were applied was incorrect;
- in determining whether the event is accidental, or accidental, sudden and unforeseen, the actual driving of the crane and its load onto the rubble cannot be divorced from the decision as to how to do so;
- the conclusion that rubble would crush was negligent but, as the trial judge stated *"it is well established that an accident can occur as a consequence of the insured's negligence, even negligence that may attract a certain degree of criticism"*; and
- the trial judge placed too much significance on the implicit conclusion that the operator continued when it was obvious that the rubble was not compressing, and gave too little significance to the limited time involved. By the time the operator realised, the damage was imminent and unavoidable.

Taken together, the judgment that the rubble would compress and the crane could therefore be driven onto it and the failure to realise in time that the rubble was not compressing meant the damage was an "unlooked for mishap or an untoward event which was not expected or designed" i.e. accidental.

LESSONS LEARNED

One of the primary purposes of insurance policies is to protect policyholders against fortuitous events. An event can be fortuitous even where it involves negligence on the part of the policyholder or its employees. While on first blush the facts of a claim may suggest recklessness (which may negate cover), this decision shows yet again the high bar that an insurer must overcome if it seeks to decline claims based on a lack of care by the policyholder to avoid its own loss.

Policyholders should of course take precautions to avoid loss, but when oversights and even negligence leads to losses occurring, policyholders should not be afraid to press their insurance claims and contest any decision by the insurer to decline or discount the claim for the policyholder's own role in the loss.

ENDNOTES

1. *Matton Developments Pty Ltd v CGU Insurance Limited* [2016] QCA208.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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