

CILA Technical conference 2009
“Fortuity; C A Blackwell -v- Gerling;
Gross Negligence. An update”
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KENNEDYS

Fortuity Revisited

1. **Destination** - the first instance decision in *CA Blackwell (Contracts) Limited -v- Gerling Allgemeine Versicherungs-AG (2007)* and considerations as to fortuity in an All Risks policy.
2. **Point of departure** - a liability claim under a householders' policy involving a boy messing around in the loading bay of a warehouse.
3. **The loading bay claim**
 - 3.1 The boy was involved various "fire activities". He claims to have attempted to put out the fire. He ran off and a fire spread from the loading bay to the warehouse causing substantial damage.
 - 3.2 The boy was acquitted of arson.
 - 3.3 Two main lines of thought in respect of the claim made under the policy.
 - First, was it a "wilful" or "reckless" act within the meaning of the standard exclusion?
 - Secondly, do the circumstances trigger cover at all? In other words, was what occurred indeed "accidental" damage to third party property?
 - 3.4 Focus on second aspect, that of fortuity, an issue that was re-visited in *Blackwell -v- Gerling*.
4. **Porter -v- Zurich 2009**

- 4.1 The recent case of *Porter -v- Zurich 2009* looked at both issues. On the facts it seems a foregone conclusion that insurers ought to succeed as, indeed, they did.
- 4.2 Mr Porter had had a very difficult year involving loss of his business, attempted suicide and marital problems.
- 4.3 On the day in question, probably after a drinking session, he woke up, let out the dog and decided to kill himself by setting fire to the house. As preparation, he put newspaper on the sofa and under the curtains.
- 4.4 Having set fire to it all he changed his mind and escaped to safety but leaving the house and contents to sustain severe fire damage.
- 4.5 There are two strands to this:
- 4.5.1 Setting aside issues as to Mr Porter's mental state, clearly he had engaged in arson, a crime and, as a matter of public policy, the Court will not assist a criminal in benefiting from his crime.
- 4.5.2 Of relevance to us is the insurers defence that an Insured cannot, by his own deliberate, wilful or malicious act, bring about the event upon which the insurance money is payable as a policy does cover that kind of loss but only a loss occasioned by a fortuitous peril.

5. **Beresford -v- Royal 1938**

- 5.1 These strands come out of several much older cases and, in particular, a case called *Beresford -v- Royal 1938* which has a set of rather sad facts and which culminated in what might be described "as a sane suicide" where it was clearly intended to provide financial benefit to those to whom Mr Beresford owed money.

5.2 In *Beresford* the principal of a fortuitous peril was said to be a rule of construction of an insurance contract. The sense being not the strict words of that contract but the starting point for insurance.

[Note Judge Coulson comments in *Porter* that a particular insurance contract may be capable of being construed in a way that is not in accordance with the rule.]

5.3 At the time suicide was a crime and thus, while in *Beresford* the court confirmed the policy should be construed to cover suicide, as it was a crime, the contract was not enforceable.

6. *Gray -v- Barr (1971)*

6.1 Shift to another of this older line of cases *Gray -v- Barr (1971)*, a case in the liability context. It involved a husband who in a state of extreme agitation over his wife's affair with a neighbour that he thought she had renewed, headed over to the neighbour with a loaded shotgun. There was a struggle, the gun discharged and the neighbour was killed.

6.2 The widow of Mr Gray sued Mr Barr and, in third party proceedings, Mr Barr sought indemnity under the liability section of his household policy.

6.3 Court of Appeal, in an analysis of what was the proximate cause of the death of the neighbour, identifies that for the injury to be other than accidental it suffices that Mr Barr embarked upon a deliberate course of conduct when the occurrence of injury or loss was, objectively viewed, a natural and probable consequence of his action.

6.4 Court also reiterates public policy argument

7. *CA Blackwell (Contracts) Limited -v- Gerling Allgemeine Verisicherungs-AG (2007)*

7.1 *Blackwell -v- Gerling* is a first instance decision of Judge Mackie QC (it went to Appeal but not on the fortuity issue).

- Blackwell's had excavated a section of the M60
- During 1998/1999 bad weather affected progress of the works leading to the spreading of the capping layer taking place later in the year than planned. Further, with the approval of the engineers, shale was used as the capping material despite it being known that it degrades as the moisture content increases ultimately turning into slurry
- Damage occurred on two occasions
- The expert evidence was there was nothing exceptional about the weather - it rains in Manchester in winter.

7.2 Insurers took the point that the cover, a Contractors All Risks, required the loss to be fortuitous and that the losses experienced in this instant were inevitable.

7.3 The logic for fortuity, "an accident", being required in this context is that the insured does not have, under an All Risks policy, to prove his loss was caused by an insured peril. A balance is therefore struck between insurers and the insured by giving the insured the burden of showing:

- That the loss occurred during the policy period and
- Is the result of an accident

- 7.4 The burden then shifts to the insurer to show it was not fortuitous or was caused by an excepted peril.
- 7.5 The argument Blackwells pursued was that the requirement for fortuity arises from the construction of the contract and that the wording “*against all Damage...of whatsoever nature*” made no reference for the need for the fortuity.
- 7.6 The Judge reached the view that the requirement of fortuity derived from the nature of the risks insured by an All Risks policy rather than the precise words of the policy. In other words look at the intent of the insurance, namely of “a risk not a certainty” [*British & Foreign Marine -v- Gaunt 1921*].
- 7.7 The Judge concluded it was the coming together of several different factors - delay - poor drainage - rain - that led to the losses and that, in that sense, the losses were “fortuitous”.

8. Summary

- 8.1 The consequences of a criminal act are, as a matter of public policy, not insured whether in the first party property or liability context.
- 8.2 In the liability context a deliberate course of conduct may lead to the conclusion damage is not accidental if, objectively viewed, the damage was the likely result of that conduct.
- 8.3 Fortuity is still a necessary prerequisite for an All Risks cover to be triggered.
- 8.4 Likewise, a specified perils cover is triggered by perils that occur fortuitously.

Negligence, Gross negligence- does it matter?

1 Context

- 1.1 This issue often arises in appointment contracts where parties agree to limit liability for negligence (for example to a specified sum) but agree that liability arising out of fraud, gross negligence or illegal / unlawful acts is unlimited.
- 1.2 Fraud and illegal / unlawful acts are well defined and normally would be excluded under the terms of any insurance policy. However the meaning of gross negligence is not that clear cut.
- 1.3 Potential relevance to insurers - ordinarily claims in negligence would be covered under their insurance policy whilst a claim in gross negligence may not.

2 Negligence - definition

- 2.1 Negligence is the **failure** to observe a legally recognised standard of care to another party such that material damage results. In order to prove negligence, a party would need to show that;
 - (i) they were owed a duty of care,
 - (ii) that duty of care was breached; and
 - (iii) the loss which followed was foreseeable.
- 2.2 The test is objective, namely what a hypothetical reasonable person would be expected to adhere to.

3 Gross Negligence

- 3.1 Term commonly used in criminal cases to establish a certain level of criminal responsibility.
- 3.2 Surprisingly no clear consensus as to what gross negligence means in civil cases.
- 3.3 Courts originally held the view that any distinction between gross negligence and negligence was meaningless - a person is either guilty of negligence or not.
- 3.4 Modern position 'clarified' in 1997 (*Armitage v Nurse CA*) where the court stated that whilst there was a difference in kind between fraud and

negligence (including gross negligence) the difference between negligence and gross negligence is 'merely one of degree'.

- 3.5 Despite no great distinction between negligence and gross negligence it is clear that when the parties use the term gross negligence the Court will try and give effect to the intention of the parties and therefore seek to distinguish between the two.

4 *Red Sea Tankers Limited v Papachristidis & Others 1997 ("the Hellespont Ardent")*

- 4.1 Court held that the distinction here (namely between negligence and gross negligence) was potentially material as the contractual term was clearly intended to represent something more fundamental than a failure to execute reasonable skill and/or care which would constitute negligence.

- 4.2 Mance J stated that the concept of gross negligence appeared to embrace;

"serious negligence amounting to reckless disregard without any necessary implication of consciousness of the high degree of risk or the likely consequences of conduct on the part of the person acting or omitting to act."¹

- 4.3 Clear from the above definition that gross negligence includes not only conduct undertaken with serious disregard of or indifference to an obvious risk but also an actual appreciation of the risks involved.

- 4.4 In considering this issue a Court is likely to apply a higher threshold to a finding of gross negligence.

5 **Relevance to insurers**

- 5.1 When claims are advanced in gross negligence against the insured then potentially insurers may be able to avoid cover on the following grounds:

- (i) The loss was not fortuitous.
- (ii) Breach of any reasonable precautions clause - entitle insurers to decline the claim.

Practical Tips

- (i) Keep a look out for claims where there are allegations of gross negligence / recklessness.

¹ Whilst this was in relation to agreements which were subject to New York law, Mance J stated that had this matter been viewed according to purely English principles of construction he would have reached the same conclusion.

- (ii) Simply because a claim is framed in such terms clearly doesn't necessarily mean that the conduct has been grossly negligent/ reckless.
- (iii) Where there are allegations of gross negligence / recklessness consider reserving your position under the policy whilst they are investigated.
- (iv) If insurers decide to avoid, then unless conduct is so blatant likely to rest on a court determination. Clear courts will apply a higher threshold to a finding of gross negligence / recklessness than ordinary negligence.
- (v) Whilst technically only that part of the loss attributable to the gross negligence /recklessness would be excluded a court is unlikely to get involved in such a debate, but simply decide what the proximate cause was i.e. was it due to negligence or gross negligence.
- (vi) Finally - obvious point- but simply because a party is entitled to bring a claim for a loss under a contract doesn't necessarily mean the claim is covered by the scope of the insurance policy. Liability assumed solely under contract is often expressly excluded.

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