FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Interpreting insurance policies

Allianz Insurance Plc v University of Exeter

[2023] EWHC 630 (TCC)

In 1942, a bomb was dropped on Exeter. The bomb did not explode but lay undiscovered until 2021 when it was unearthed during building works. Bomb disposal experts were called in who determined that the bomb should be exploded as it could not be safely transported away. UoE submitted an insurance claim in relation to the damage caused by the controlled detonation. The issue before HHJ Bird was whether the damage in respect of which the claim was made fell within the scope of the War Exclusion Clause being loss or damage "occasioned by war"? If it did, there would be no liability to indemnify. The "war" exclusion clause said this:

"War ... 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."

To answer whether, or not, the loss was occasioned by war, the Judge needed to consider what the "proximate cause" of the loss was. Allianz said that the proximate cause of the loss was the dropping of the bomb. That was an act of war. UoE said that the proximate cause was the deliberate act of the bomb disposal team in detonating the bomb, not the dropping of the bomb. Further, the parties cannot have intended that the policy exemptions would apply to historic wars.

HHJ Bird said that the test of "proximate cause" was a matter of judgment based on common sense rather than over-analysis. If the Judge left out of the account the reasonable human act of detonating the bomb, then he would be driven to the conclusion that the dropping of the bomb was the proximate cause of the loss. If, the Judge looked at the "*influences, forces and events*" which converged at the point of loss, concentrating on the character of those events rather than the chronological order in which they occurred, then he would still conclude that the dropping of the bomb was the proximate (dominant or efficient) cause of the loss.

The common sense analysis was this: the loss was caused by an explosion. The explosion was triggered by the reasonable (and, indeed, obviously correct) decision to detonate the bomb. That decision was necessitated by the presence of the bomb. If there had been no bomb, there would have been no explosion. The bomb provided both the explosive payload and the absolute need for the detonation. Therefore, the dropping of the bomb was the obvious proximate cause of the damage.

Did the passage of time mean that this conclusion was wrong? The bomb was dropped in 1942. Almost 80 years passed before the damage was caused. The detonation occurred, to all intents and purposes, at the same time as the damage. It was natural that an "*unguided gut feeling*" would strongly lean towards the conclusion that the detonation was the relevant, dominant, or proximate cause. But such an approach would, in the view of the Judge, be wrong. The passage of time did not of itself provide an answer to the question of "proximity".

Whilst the bomb as an object had degraded over time, there was no suggestion that the explosive load of the bomb had become any less lethal over time. The passage of time had no relevant or material impact on the danger posed by the bomb. The Judge noted that, if he was wrong and the dropping of the bomb was not "the" proximate cause, then it was "a" proximate cause. He referred to the case of *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (the Miss Jay Jay)* [1987] 1 Lloyds Rep 32 where a yacht sank as a result of a combination of causes which were "*equal, or at least nearly equal, in their efficiency*", namely, adverse sea conditions and design defects. Here, the combined effect of the detonation and the bomb made the damage inevitable. The alternative analysis must be that the damage was (as a matter of common sense) caused by the combined effect of the detonation and the presence of the bomb. The detonation and the presence of the bomb were "*equal, or at least nearly equal*" in their efficiency.

Finally, UoE said that the parties could not be taken to have contemplated excluding liability in respect of things that happened more than 75 years ago. The Judge simply said that the parties had agreed that damage occasioned by "war" was excluded and the proximate cause of the loss which was the subject of the claim was war. There was no right of recovery under the policy.

Case update: ADR clauses

Kajima Construction Europe (UK) Ltd & Anr v Children's Ark Partnership Ltd

[2023] EWCA Civ 292

We discussed this case in Issue 268. CAP had entered into a contract with Kajima for the design and construction of the Royal Alexandra Hospital for Sick Children in Brighton Hospital. Disputes arose, and Kajima applied to strike out or set aside a Claim Form issued by CAP saying there had been a failure to comply with a contractual ADR provision (the Dispute Resolution Procedure or DRP), which was said to be a condition precedent to the commencement of proceedings. The proceedings had been commenced just a week before the limitation period expired – the parties having previously agreed a standstill period to see whether a settlement could be reached. CAP issued their own application seeking a stay to try and resolve the dispute through ADR, to obtain further details about the claim from its "upstream claimant" and/or to go through the Pre-Action process.

At first instance, the Judge held that the provisions of the DRP were unenforceable because they were uncertain, but that had they been enforceable, she would have exercised her discretion to stay the proceedings.

The DRP was intended to cover disputes under the project agreement between CAP and the NHS Trust and the construction agreement between CAP and Kajima. It stated that all disputes were to first be referred to the Liaison Committee for resolution and the Liaison Committee's decision should be final and binding. The Liaison Committee was to comprise only of representatives from Brighton and Sussex University Hospital NHS Trust and CAP, not Kajima, although there was a provision for others to be invited to attend.

On appeal, Coulson LJ was clear that this was not a case where a standstill agreement was reached because of a failure to get on with the underlying dispute. He also noted that, wherever possible, the court should endeavour to uphold the agreement reached by the parties. Here, Coulson LJ explained that, at first instance, the reasons why the Judge concluded that the DRP was not certain enough to be enforceable included that there was no meaningful description of the process to be followed. There was also no unequivocal commitment to engage in any particular ADR procedure. In circumstances where Kajima was not obliged to take part in the process, and had no right to do so, it was impossible to see how the process could be said to: "*provide a means of resolving disputes or disagreements between the parties amicably*". It was further unclear how a dispute between CAP and Kajima should be referred to the Liaison Committee and also when the process of referral to the Liaison Committee would come to an end. Finally, it was unclear what impact any decision of the Liaison Committee had on Kajima: could decisions be final and binding?

Kajima said that the result of the DRP could never be binding on Kajima because of their lack of representation on the Liaison Committee. However, the process was sufficiently clear to be enforceable. The clear procedure identified was the referral of the dispute to the Liaison Committee which would convene and seek to resolve it within 10 days. It would be obvious whether or not the dispute had been referred to the Liaison Committee. The correct approach was to concentrate on the utility of the process, instead of determining whether or not it was sufficiently certain. The process came to an end once the 10 day period had elapsed. There was a complete DRP procedure, with a beginning, a middle and an end.

Coulson LJ disagreed. The underlying problem with the DRP, insofar as it related to the construction contract, was that Kajima was forced to argue that the DRP somehow involved the NHS Trust and CAP, not Kajima, despite the fact that the Trust were not a party to the construction contract and Kajima were. A particular difficulty was that, on the face of it, the DRP would impose a final and binding decision on Kajima, made by the Liaison Committee, on which Kajima had no representative, whose meetings Kajima had no right to attend, to which Kajima was not entitled – at least according to the DRP – to make representations, and whose documents Kajima were not entitled to see. In the view of Coulson LJ, this suggested: "*a pointless and an unenforceable process*."

There was also some force in the suggestion that actual, or at least perceived, bias would be inherent in the whole structure of the DRP if it was extended to a dispute between CAP and Kajima. The Liaison Committee was, for the purposes of the construction contract, a "*fundamentally flawed*" body which could neither resolve a dispute involving Kajima amicably, nor could fairly provide a decision binding on Kajima in any event. Kajima had no right to attend the Liaison Committee or to make representations to it. That too suggested an unenforceable process. Whilst it was not entirely clear how the process was intended to commence, there was no contractual commitment to engage in any particular procedure either covering the referral, or the process to be followed once the dispute had been referred.

There was no clear procedure to be followed. The Liaison Committee would have to try and resolve the dispute within 10 days of the referral, but they were also allowed 10 days' notice before they even held a meeting; so, the process could, on one view, be over before it even began. When there is a contractual dispute resolution procedure and one party cannot commence court proceedings until that process has been concluded, if it is not clear when that might be, the process is not enforceable.

Then there was the related question of the status of any resolution of the dispute. The provisions anticipated a resolution of any dispute through the decision of the Liaison Committee. That made complete sense amongst representatives from the two parties to the project agreement. If those representatives reached an agreed decision, then it is easy to see why it was also agreed that that would be final and binding. However, under the construction contract, the Liaison Committee could, on the face of it, reach a decision binding on Kajima.

At first instance, the Judge indicated that, even if the DRP had been enforceable, she would have exercised her discretion to stay the proceedings. CAP's decision to issue proceedings so as to avoid expiry of the limitation period, and thereafter to seek an extension of time to facilitate compliance with the Pre-Action Protocol and with the contractual DRP, represented what she called "*an entirely sensible approach*." Striking out the claim form would be a "*draconian remedy, wholly unsuitable for the circumstances of this case*." The loss to Kajima of the limitation defence was an important element of the balancing exercise, but was not, by itself, decisive.

Coulson LJ agreed that the matters taken into account by the Judge in the exercise of her discretion were all relevant. In particular, CAP had acted reasonably throughout. This was a case where limitation was at the forefront of everybody's mind. The reason why such a long time had elapsed since the original construction works was because of the tragedy at Grenfell, the consequential survey, the discovery of alleged defects, and the ongoing remedial works. There was no dispute that potential claims could not be fully quantified until the end of the remedial works, which were still on going in early 2022. Neither the Trust nor Kajima wanted to take any action until the remedial works had been completed. Indeed, the negotiations had been delayed at Kajima's request so as to allow Kajima to focus on the remedial works. That was sensible, but was again an important factor relevant to the exercise of the Judge's discretion to order a stay. The appeal was accordingly dismissed.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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