

## COURT OF APPEAL DECISION ON CONCURRENT CAUSES AND WAR EXCLUSION

The Court of Appeal has upheld the first instance decision in *University of Exeter v Allianz* that an exclusion for "loss occasioned by war" applied to exclude from an insurance policy damage caused by the controlled detonation of a WWII bomb, nearly 80 years after it was dropped. The Court of Appeal found that the dropping of the bomb, and the actions to detonate it were concurrent causes of loss. However, contrary to the finding of the High Court, the bomb was not the sole cause of the loss.

The appeal centred in some part around the application of the Supreme Court's judgment in *FCA v Arch*<sup>1</sup>. Although the fact pattern involved in the case is quite specific, it is helpful to see how the comments of Hamblen LJ and Leggatt LJ in *Arch* should be applied.

### Background

In February 2021, contractors working on a site in Exeter unearthed a WWII bomb. The disposal team called in determined that it was not possible to move the bomb due to its condition, and the best way to deal with it was to carry out a so-called Low Order Technique ("LOT"), a controlled detonation to blow the casing off. It was known that there was a risk that this would cause the bomb to fully detonate and so various safety measures were taken such as erecting barriers around the site and digging trenches. The controlled detonation did result in the release of the full explosive load and despite the precautions, damage was caused to the claimant University's halls of residence in the immediate vicinity.

The claimant sought to recover the cost of the physical damage and business interruption loss under its insurance policy. However, insurers declined the claim on the basis that an exclusion for "any consequential loss occasioned by war" applied.

### First instance judgment

HHJ Bird in the High Court found that the proximate cause of the loss was the dropping of the bomb and its consequent presence at the site, which was an act of war, and so the loss fell within the exclusion to the policy.

In the alternative, the Court found that the dropping of the bomb was a proximate concurrent cause of the loss, along with the acts of detonation in 2021, and so again, applying the principle in *Wayne Tank*<sup>2</sup> (ie where two concurrent causes are of equal efficiency and one is insured and the other is excluded, the exclusion prevails) it was excluded from cover.

### Court of Appeal judgment

Judgment in the Court of Appeal was given by Lord Justice Coulson with which the other two judges agreed.

In the appeal hearing the claimant focussed on the judgment of Lord Hamblen and Lord Leggatt in *Arch* and sought to argue that the approach to causation set out there, properly applied to these facts, meant that the dropping of the bomb was not a cause of the loss. Coulson LJ began by setting out the general principles. The policy is to be interpreted objectively, as would reasonably be understood by an ordinary policy holder, in this case an educational establishment owning purpose built blocks for students. The insurer is liable only for loss proximately caused by the

---

<sup>1</sup> [2021] UK SC 1

<sup>2</sup> [1974] QB 57

peril (unless the contrary is agreed). Proximate does not mean last in time, it means proximate in efficiency, or the dominant, effective or efficient cause of the loss.

Coulson LJ considered the meaning of the words "*occasioned by war*". It was agreed that this gives rise to the proximate cause test. Therefore it did not matter that, as submitted by the claimant, the clause did not refer to losses "*directly or indirectly caused*". It was also agreed that the dropping of the bomb was an act of war.

Further, it was accepted by the parties that the mere fact that the bomb was detonated after the end of the war did not rule out the operation of the war exclusion<sup>3</sup>, and this being the case the Judge held that there was no reason to draw any sort of line arising out of the passage of time – as it was unclear at what point in time this would be drawn. Coulson LJ noted that issues could have arisen, such as whether the term "*war*" in the policy could mean a war that had ended at the time the buildings were built and the policy incepted, or whether the damage did not result from a "*war-like desire to damage and destroy, but from a controlled explosion which had been an attempt to eliminate or at least minimise any damage at all*" but these issues had not been raised by the parties.

## Concurrent causation

The Judge agreed with the first instance alternative finding that the loss and damage resulted from two concurrent causes of approximately equal efficiency – the dropping of the bomb and its controlled detonation 80 years later. The combination of both made the loss inevitable or in the ordinary course of events, and neither would have caused the loss without the other.

The claimant had made two arguments that the detonation was a more potent cause:

- the effluxion of time since the dropping; and
- the fact that other methods of detonating the bomb might have been available and that the LOT technique was not intended to cause any damage at all

However, these arguments were rejected by Coulson LJ.

The authorities show that the proximate cause may not be the last in time, and the fact that one cause was much earlier in time does not of itself provide an answer, especially where the passage of time had no effect on the potency of the bomb. Inevitably, the discovery of a large unexploded bomb would always involve decisions as to the best way to neutralise it, and the network of the individual decisions could not have relevance to causation unless something broke the chain of causation (such as an act of negligence in the way in which the bomb was detonated or neutralised).

Further, the claimant's admission that if the bomb had exploded on discovery it would have been a more difficult case for it to argue was a telling weakness – the happenstance that the bomb did not explode at that point could not elevate subsequent events to become a proximate cause of the damage.

Therefore, applying the *Wayne Tank* principle, as there were two concurrent causes of the loss, one of which was insured and the other excluded, then the exclusion prevailed and there was no cover.

## Inevitability

The claimant argued that although the judge identified the need to consider whether the loss was made inevitable in the ordinary course of events by dropping the bomb, he did not apply that test correctly in deciding the proximate cause of the loss.

This derived from *Arch*, which, it was held, identified the question for the court as whether the initial event led inexorably to the loss through an ordinary series of events, or if there was a subsequent abnormal event that negated the causal connection. In this context Lords Hamblen and Leggatt made the remark that human actions do not generally negative a causal connection so long as they are not wholly unreasonable or erratic. This concept was illustrated in the well-known cases of *Reischer*<sup>4</sup> and *Leyland*<sup>5</sup>.

Coulson LJ held that there was force in the argument that the damage to the buildings did not flow inexorably and in the ordinary course of events from dropping the bomb (eg it could have detonated instantly and the buildings would not have been damaged as they were not yet there). However, it was two concurrent causes, the dropping of the bomb and the attempted LOT that caused the loss, and that combination did make the damage inevitable or in the ordinary course of events.

---

<sup>3</sup> It was noted that in *Colinvaux* it is said that a loss that has occurred after the suspension of hostilities cannot be said to have been proximately caused by war, although only one of the cited authorities, according to the court, appeared to support this.

<sup>4</sup> *Reischer v Borwick* [1984] 2 QB 548

<sup>5</sup> *Leyland Shipping v Norwich Union Fire and Insurance Society* [1918] AC 350

## Agency of change

The claimant argued that it was the decision to attempt detonation that was the "*agent of change*", phraseology again taken from *Arch*. Coulson LJ agreed that the "*agency of change*" idea may be a useful way to look at causation, but it should not be elevated to a principle, and it is still necessary to correctly identify the correct *status quo*. The claimant argued that the bomb in the ground was the status quo, but it could be farmland near Exeter was the status quo, and the dropping of the bomb, the building of the halls of residence and the need to attempt detonation were all agents of change. Arguments that sought to exclude the dropping of the bomb as a concurrent cause were all seeking to minimise the effect of a critical event.

## Sole cause

Although it was not necessary for the Court of Appeal to consider this in detail, it accepted that there was force in criticism of the Judge's primary finding that the bomb was the sole proximate cause. The Supreme Court had not said or intended it to be the appropriate approach that if there are two competing causes you take one out of consideration, and you will inevitably find that the other is the proximate cause.

For more information, please contact the author(s) of this alert



**ADAM STRONG**

Partner, London

**T** +44 (0)20 7264 8484

**E** adam.strong@hfw.com