Reasonable care and recklessness in insurance policies - proceed with caution!

Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd **[2016] NSWCA 67**

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Claire MacMillan (Special Counsel) and Thomas O'Connor (Solicitor) consider the recent NSW Court of Appeal decision in *Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd,* which provides useful guidance on the construction and application of conditions and exclusions in an insurance policy.

OVERVIEW

The Court of Appeal's decision highlights the importance of careful policy drafting, particularly of conditions and exclusions. Specifically, insurers must be mindful that:

+ Courts will look at insurance policies as commercial contracts and apply a businesslike interpretation.
+ Courts will prefer to use a construction that gives congruent operation to different parts of a policy.
+ Unless there is clause that says otherwise, headings in a policy may be taken into account as a general description of the clause which follows.
+ If insurers want to impose an absolute duty on an insured to comply with statutory obligations, that requirement must be clearly stated.
+ Depending on policy wording, insurers may bear the onus of proving that a condition has not been met, or that an exclusion has been triggered.

WHAT HAPPENED?

An excavator was being transported on a prime mover and low loader when it struck and significantly damaged the Hexham Bridge near Newcastle. The vehicle was owned and operated by Barrie Toepfer Earthmoving and Land Management Pty Ltd.

Shortly prior to striking the bridge the prime mover was stopped at an RTA weigh station, where it was deemed to have an impermissible weight distribution. An RTA inspector directed that the excavator be repositioned. As a consequence, the highest point of the excavator's boom increased by almost one metre. The driver believed that the RTA inspector had been satisfied with the height of the vehicle and its load.

The Hexham Bridge has a low clearance of 4.8m. The driver did not consider that the vehicle and its load may exceed the minimum clearance and thought that there was no risk of the excavator hitting the bridge.

PROCEEDINGS AND INDEMNITY

The RTA brought proceedings against Barrie Toepfer for $12.8 million for reparation of the damage to the bridge.

Barrie Toepfer sought indemnity under a commercial motor vehicle policy, which was denied for the following reasons:

1. Barrie Toepfer had not taken reasonable care when driving onto the bridge, in breach of a condition of the relevant policy which required that it "*exercise reasonable care and precautions to prevent loss or damage to the Motor Vehicle, and comply with all statutory obligations…*"

2. Barrie Toepfer had been reckless, which triggered an exclusion for loss, damage or liability caused by recklessness or "*by reckless failure to comply with statutory obligations*…"

Barrie Toepfer challenged the denial and was unsuccessful at first instance, but succeeded on appeal.

REFUSING OR REDUCING LIABILITY

The policy provided that insurers may refuse to pay a claim (or may reduce the amount payable) for breach of any condition that caused or contributed to the loss.

The Court of Appeal said that such a condition operated to limit the insurers' liability by conferring on it the right to reduce, or deny, a claim to the extent that Barrie Toepfer's breach of the condition caused or contributed to loss, damage or liability. The Court of Appeal confirmed that in those circumstances, the insurer bears the onus of proving the limitation on its liability.[1] In other words, the insurers had to prove Barrie Toepfer's breach of the condition and that the breach was causative of loss, damage or liability.

Here, insurers were unsuccessful in proving that Barrie Toepfer failed to exercise reasonable care. Consequently, no breach of the condition was made out and insurers were unable to avoid (or reduce) liability on that basis.

RECKLESSNESS

The policy included an exclusion which provided that insurers would not pay for loss, damage or liability caused by recklessness.

The Court of Appeal confirmed that recklessness requires more than a failure to take precautions to avoid an accident. It requires that the failure to take precautions is made with actual recognition by the insured that a danger exists and not caring whether it is averted.[2]

Here, the Court of Appeal found that the driver was not reckless. Relevant to that finding was:

- There was consistent evidence that neither of the two men in the prime mover thought the excavator would exceed the minimum clearance height for the bridge and would hit the bridge.

1 See also *Wallaby Grip Limited v QBE Insurance (Australia) Limited* [2010] HCA 9 at [35] – [36].
2 *Fraser v B N Furman (productions) Ltd* [1967] 1 WLR 898 at (906).

- There was evidence that one man, when interviewed by police following the accident, said that he did not think there was a problem (with the excavator hitting the bridge) because the excavator had just been repositioned at the direction of the RTA.
- The prime mover was driven onto the bridge at 60 km/hour without slowing. This was consistent with the driver's belief that the load was within the required parameters to safely travel across the bridge.
- There was no evidence that the driver failed to take reasonable steps to avoid the risk.

LOOKING AHEAD

Careful policy drafting, particularly of conditions and exclusions, can avoid lengthy and costly coverage litigation. Please contact the authors for more information.

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