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CASE SUMMARY: "NO GOOD DEED GOES UNCOVERED": INSURER ORDERED TO INDEMNIFY FLOOR DAMAGE CAUSED BY APPLICATION OF DE-ICER TO PREVENT RISK OF SLIPPING IN FREEZING TEMPERATURES

Manitoba Court of Appeal rules that "direct cause" in an exception to an exclusion clause refers to the "effective or dominant cause" and not the cause immediately preceding a loss.

Insurance law – Builder's risk policy – Subcontractors – Exclusions – Interpretation of policy – Practice – Leave to Appeal

Sher-Bett Construction (Manitoba) Inc. v. Co-Operators General Insurance Co., [2021] M.J. No. 35, 2021 MBCA 10, Manitoba Court of Appeal, February 11, 2021, D.M. Cameron, K.I. Simonsen and L.T. Spivak JJ.A.

The insured appealed the trial decision where the court held in favour of the insurer that an exclusion clause in a builders' risk broad form policy applied to exclude the insured's claim for coverage. The policy specifically excluded loss or damage "caused directly or indirectly…by frost or freezing…unless caused directly by a peril not otherwise excluded in this Form". The words "unless caused directly by a peril not otherwise excluded" constituted an exception to the freezing exclusion.

Damage to a concrete floor arose when the insured applied a de-icer to the recently poured concrete floor to prevent workers from slipping on the floor during freezing temperatures. After the de-icer was applied, there was damage to the areas of the floor only where the de-icer was applied. The property owners made a claim under the policy for damage to the floor. An adjuster retained by the insurer determined there were three possible causes for the damage, including application of the de-icer. The insurer wrote to the owner to deny the claim based on the freezing exclusion. The insured retained an engineer who opined that the application of the de-icer was the probable cause of the floor damage.

The trial judge held that the application of the de-icer caused a freeze-thaw cycle which was the only direct or proximate cause of the floor damage and was excluded from coverage because of the freezing exclusion.

On appeal, the insured argued that the trial judge erred in law by failing to consider the application of the exception to the freezing exclusion, including the meaning of "caused directly". The insured submitted that the exception applied in this case as the application of the de-icer to the floor was a direct cause of the damage. The use of the de-icer was a direct cause of the loss because it played an important continuing role in causing the freeze-thaw cycle, and therefore, the damage. The freeze-thaw cycle would not have occurred without the thaw which resulted from the application of the de-icer. The insurer argued the application of the de-icer was an indirect cause of the loss, at best, as part of a chain of events.

The Court of Appeal found the trial judge erred by failing to consider and interpret the exception to the freezing exclusion. The Court of Appeal held that a “direct cause” means the proximate cause of a loss. In this regard, proximate does not mean “closest in time”. A proximate cause is one which is “proximate in efficiency” or “the effective or dominant cause”. A proximate cause is what is in substance the cause, even though it is more remote in point of time, as determined by common sense. The Court rejected the British Columbia Court of Appeal’s ruling in *Canevada Country Communities Inc. v. GAN Canada Insurance Co.*, 1999 BCCA 339, where “direct cause” was interpreted to mean the cause immediately preceding the loss. Interpreting “directly” in an exception to mean immediately preceding the loss could lead to arbitrary results.

The Court further held that its interpretation of “caused directly” was supported by the reasonable commercial expectations surrounding builders’ risk insurance policies. It was not within the reasonable contemplation of the parties that the freezing exclusion would apply where the damage is clearly linked to the actions of one of the plaintiff’s employees.

The Court found the freezing exclusion applied to the facts of the case. Applying the findings of fact by the trial judge, the Court found freezing and the application of the de-icer were two concurrent, interdependent causes of the floor damage. The significance of the application of the de-icer was demonstrated by the important ongoing role of the de-icer to the freeze-thaw cycle and the fact that areas of the floor where the de-icer was not applied sustained no damage. The Court concluded that the insured proved that the damage to the floor was “caused directly” by the application of the de-icer. The application of the de-icer was an effective or dominant cause of damage, and without it, there would not have been damage to the floor.

The Court allowed the appeal and declared that the insured was entitled to coverage under the policy and ordered the insurer to indemnify the insured for the loss.

This case was digested by Dominic Wan, and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Dominic Wan at dwan@harpergrey.com.