



Neutral Citation Number: [2023] EWCA Civ 1484

Case No: CA-2023-000949

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT
HHJ Bird (Sitting as a High Court Judge)
[2023] EWHC 630 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2023

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE SNOWDEN

Between:

The University of Exeter
- and -
Allianz Insurance PLC

Appellant
Respondent

David Pliener KC (instructed by **Fenchurch Law Ltd**) for the **Appellant**
Isabel Hitching KC (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 7 November 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON :

1. Introduction

1. The issue in this appeal is whether the loss and damage caused in 2021 by the controlled detonation of a hitherto undiscovered World War II bomb was “occasioned by war” and therefore excluded by the applicable insurance policy. “Unguided gut feeling” (as it is called in one of the authorities) may suggest that the damage caused by a controlled detonation 79 years after the bomb was dropped, and 76 years after the war ended, was not “occasioned by war”. But those same authorities make clear that the approach to legal causation is more nuanced than that, and subject to specific rules and principles. At first instance, HHJ Bird (sitting as a High Court judge in the TCC) (“the judge”) applied those principles and concluded that the, or at least a, proximate cause of the damage was the dropping of the bomb during World War II, such that the exclusion applied. The central issue on this appeal is whether he was right to do so.
2. I should note that, although the issue in this case is primarily one of law, leading counsel on both sides referred to the authorities in a measured and controlled way, and spared the court the incontinent citation of numerous vaguely relevant causation authorities, all too common in appeals of this type. We are very grateful to them.

2. The Agreed Facts

3. In April and May 1942, Exeter suffered a series of devastating bombing raids. They were the first of the so-called “Baedeker raids”, in which historic British cities, rather than larger industrial centres, were deliberately targeted by the Luftwaffe. The name came from a popular series of German guidebooks. The bomb in the present appeal was dropped during one such raid. It was a 1000Kg/2200lb SC1000 thin-cased high explosive bomb. It fell onto farmland on the outskirts of the city, in an area adjacent to what are now some of the appellant’s halls of residence. It did not explode.
4. On 26 February 2021, contractors working on what was by then a construction site unearthed the bomb. The Emergency Services were immediately contacted and a safety cordon was established around it. This zone was initially of a 100 metre radius but, due to the size of the bomb, that was subsequently extended to 400 metres. The appellant’s halls of residence at Birks Grange Village (Blocks A-E) and Clydesdale Rise (Block B), built in around 2012, were approximately 200 metres from the bomb. They therefore fell within the safety cordon and had to be evacuated.
5. An Explosive Ordnance Disposal team from the Royal Logistics Corps were called in, and the events thereafter were described in detail in their contemporaneous Incident Report (“the Report”). The fuse was carefully excavated. The excavation revealed a single, very degraded transverse fuse. No identification markings were visible. The metal had deteriorated to a point where the electrical contacts of the fuse were exposed, and fragments of the fuse were being dislodged from the bomb when brushed. The Disposal team determined that the condition of the bomb (due to age and rusting), the uncertainty as to whether it was booby trapped or not, and the impracticability of moving the bomb through built up areas to a disposal site, meant that the bomb would have to be dealt with on site.

6. One potential way of dealing with the bomb, known as ACE, would have involved the steaming out of the explosive. However, ACE was noted in the Report as having been “temporarily removed from service due to a lack of contractor safety inspections”. In addition, because of the ongoing pandemic and lockdown, the police were understandably anxious to return people to their homes as soon as safely and reasonably practical. Since it was estimated that the ACE procedure may have taken several days, that was another reason why it was not a viable option.
7. In consequence, the intention was to carry out a “Low Order Technique” (“LOT”), a methodology which endeavours to blow open the casing of the bomb to expose the internal high explosive, without actually setting off that high explosive. There was of course always the risk that the LOT would not work and that the whole bomb would be detonated: the Report said that “it was highly likely that a high-order detonation would occur”. Although the bomb could not be moved away from the site altogether, because of the difficulties created by the sloping site on which the contractors were working, it was moved a short distance, about 25 to 30 metres from where it had originally been discovered. Safety measures were adopted which were designed to reduce, as far as possible, the consequences of any high-order detonation. To that end, a sand box was created, involving the erection of a metal fence round the bomb, which was then packed with 400 tonnes of sand, and the digging of trenches to limit the ground shock caused by any explosion.
8. The controlled detonation took place at 18.10 on 27 February 2021. The LOT did not limit the explosion to the casing, and instead resulted in the high-order detonation of the bomb and the consequent release of its full explosive load. The dramatic nature of the explosion can be seen in the footage on YouTube. The Report noted that the bomb contained between 520Kg and 630Kg of high explosive and that, unavoidably, when it detonated, damage was caused to some buildings in the immediate vicinity of the site. These included the appellant’s halls of residence noted above.

3. The Insurance Policy

9. On 1 April 2020, the respondent had issued a policy of insurance to the appellant with a term of 1 year. The general insuring clause of that policy provided that the respondent would:

“Indemnify or otherwise compensate the insured against loss, destruction, damage, injury or liability (as described in and subject to the terms, conditions, limits and exclusions of this policy or any section of this policy) occurring or arising in connection with the business during the period of insurance or any subsequent period for which the insurer agrees to accept a renewal premium.”
10. What has been called the ‘War exclusion’ clause was set out at general exclusion 2 in the following terms:

“**War** (Not applicable to the Computer, Engineering Machinery Damage, Engineering-Business Interruption, Employers’ Liability, Personal Accident, Business Travel, Terrorism, Fidelity Guarantee, Cyber and Directors and Officers Sections) 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.” (Emphasis added)

11. As the judge noted at [17] of his judgment, the structure of the general insuring clause was such that no liability to indemnify in respect of loss occasioned by war ever arose. The exclusions were therefore part of the definition of the scope of the cover, not exemptions from liability for cover which would otherwise have existed.

4. The Claim and the Proceedings

12. The appellant made a claim under the insurance policy relating to the physical damage to the halls of residence and the business interruption caused by the need to temporarily rehouse the students. On 28 April 2021, the respondent declined the claim on the basis that the loss fell within the scope of the War exclusion clause, being loss and damage occasioned by war.
13. On 26 January 2022, the respondent issued proceedings, seeking declarations to the effect that it was entitled to decline the appellant’s claim on the policy. The parties agreed to proceed on the basis that the claim was a Part 8 claim, as recorded by the judge at [7] of his judgment.

5. The Judgment Below

14. The judge’s judgment is at [2023] EWHC 630 (TCC). Having set out various preliminary matters, the judge identified at [18] that the central question was the “proximate cause” of the loss. Having identified some of the cases, including *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UK SC 1 [2021] AC 649 (“*Arch*”), the judge analysed that issue at [22]-[46] of his judgment. His conclusions were as follows:

“41. Applying the guidance set out in *Arch*, I remind myself that the test of “proximate cause” is a matter of judgment based on common sense rather than over-analysis. It is open to me to conclude that one or other of the dropping of the bomb and the detonation of the bomb was “the” sole proximate cause or that each was “a” proximate cause. No further potential candidate for “proximate cause” is proposed.

J. Can the human intervention (detonation) be ignored?

42. If I leave out of account the reasonable human act of detonating the bomb (on the basis of the general guidance set out in *Arch*), I am driven to the conclusion that the dropping of the bomb was the proximate cause of the loss. It is the only remaining option.

43. *Arch* however does not set down a firm and fixed rule that human intervention is to be ignored. Human actions are simply “*not generally*” regarded as new causes. To determine if the general guidance applies, I need to consider what part if any the detonation played in the causal “net”.

K. If the human intervention (detonation) is not simply ignored

44. If, rather than simply ignoring the human intervention, I consider the “*net of causation*” and look 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 I would in any event conclude that the dropping of the bomb was the proximate (dominant or efficient) cause of the loss.

45. The common sense analysis is 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. In my view, the dropping of the bomb was the obvious proximate cause of the damage.

46. If the bomb had exploded when it landed (and if the damaged buildings had been there) the conclusion that the bomb was the proximate cause of the damage would have been inevitable. Does the reasonable and necessary human act of detonating the bomb change that analysis? In my view it does not. It is the presence of the bomb that leads to both the need for the detonation and the inevitability of the damage. As a matter of common sense, the dropping of the bomb and its consequent presence at the site, was the proximate cause of the damage.”

15. At [47]-[49] the judge rejected the appellant’s suggestion that the passage of time provided an answer to the question of proximity, and found that there was no suggestion that the passage of time had reduced the potency of the explosive load of the bomb. He therefore concluded that the passage of time had no relevant or material impact on the danger posed by the bomb. At [50], the judge also rejected the appellant’s reliance on whether the detonation was the “agency of change”, noting that that was not a new or different test on causation. Thus, at [51] the judge concluded that “the dropping of the bomb is an act of war and so the loss suffered is excluded from cover”.
16. At [52]-[68], the judge considered the position if he was wrong, and the dropping of the bomb was not *the* proximate cause of the damage. This was because the judge concluded that, as a matter of law, it was only necessary for the respondent to demonstrate that the dropping of the bomb was *a* proximate concurrent cause for the exclusion clause to take effect. He was in no doubt that it was. He said:

“54. If I am wrong to conclude that the dropping of the bomb was the proximate cause of the loss then, applying the *Arch* guidance, the combined effect of the detonation and the bomb made the damage inevitable. If the analysis that led me to conclude that the dropping of the bomb was “the” concurrent cause was wrong, 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. If my conclusions above are wrong

then I am driven to the conclusion that the detonation and the presence of the bomb were “*equal, or at least nearly equal*” in their efficiency.

...

56. As a result of my alternative finding that the dropping of the bomb is “a” proximate cause of the damage, it follows that (subject to Mr Pliener’s argument that the rule is ousted by the policy) by operation of the concurrent proximate causes rule, the exclusion applies.”

This last reference was to an argument as to the construction of the exclusion clause advanced by Mr Pliener KC at first instance, but not pursued on appeal.

17. None of the grounds of appeal seek specifically to challenge the judge’s alternative analysis, beyond the argument that, on the facts, if the judge was wrong to conclude that the dropping of the bomb was the proximate cause, then he must also have been wrong about it being a concurrent cause too. This argument was based on precisely the same submissions as to causative potency and the like advanced in support of the appellant’s primary argument. It follows that, as Mr Pliener accepted, in order to succeed, the appellant needed to persuade this court that the dropping of the bomb was not only not the proximate cause of the loss and damage, but was also not a concurrent cause of that damage either.

6 The Law Concerning Causation

6.1 Proximate Cause: General Principles

18. The starting point is the proper interpretation of the insurance policy in question. The policy is to be interpreted objectively, as it would reasonably be understood by an ordinary policy holder, in this case an educational establishment owning purpose-built residential blocks for its students. The usual rule is that an insurer is only liable for loss proximately caused by a peril covered by the policy: see *Brian Leighton (Garages) Ltd v Allianz Insurance PLC* [2023] EWCA Civ 8 at [27] (“*Brian Leighton*”). Although that principle is based on the presumed intention of the contracting parties, and can therefore be subject to contrary agreement, it is not suggested that such contrary agreement existed here.
19. Proximate cause does not mean the last in time. It means that which is proximate in efficiency; what matters is the dominant, effective or efficient cause of the loss: see *Brian Leighton* at [27] – [30], summarising the principles to be derived from *Reischer v Borwick* [1984] 2QB 548 (“*Reischer*”); *Leyland Shipping Co v Norwich Union Fire and Insurance Society* [1918] AC 350 (“*Leyland*”); *Yorkshire Dale Steamship Co. v Minister of War Transport* [1942] AC 691 (“*Yorkshire Dale*”); and *Arch*.
20. One passage from the joint judgment in *Arch* of Lord Hamblen and Lord Leggatt was particularly emphasised during the hearing of this appeal, concerned with the equation of ‘proximate’ with ‘efficient’:

“165. During the 19th century, however, a different concept derived from Aristotle’s notion of an “efficient” cause, meaning something that is the agency of change, became increasingly influential. Ultimately, this concept supplanted the idea that the law is concerned with the immediate cause of

loss, although in insurance law the expression “proximate cause” was retained.”

They then referred to both *Reischer* and *Leyland* and, at [166], said this:

“166. This decision [*Reischer*] was approved by the House of Lords in the leading case of *Leyland*... The facts were materially similar to those of *Reischer*... A ship torpedoed by a German submarine was towed to the nearest port but had to anchor in the outer harbour exposed to the wind and waves. After three days the ship sank. The ship was insured against perils of the sea but there was an exception in the policy for “all consequences of hostilities or warlike operations”. The House of Lords affirmed the decision of the lower courts that the loss was proximately caused by the torpedo, which was a consequence of hostilities, and was therefore not covered by the insurance. By far the fullest discussion of the concept of proximate cause is contained in the speech of Lord Shaw of Dunfermline. He made it clear, first of all, that the test of causation is a matter of interpretation of the policy and that “[t]he true and the overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant” (see p 369). He went on to say:

“What does ‘proximate’ here mean? To treat proximate cause as if it was the cause which is proximate in time is ... out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.””

21. It is often said that causation issues should be decided on ‘common sense’ principles: see Lord Dunedin in *Leyland* at page 362, and Lord Wright in *Yorkshire Dale*, where he said that “causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view.” But, as can often be the way when the expression ‘common sense’ is used by judges, some care is needed to prevent the analysis from becoming too unmoored from principle. As Lord Hamblen and Lord Leggatt pointed out at [168] of *Arch*:

“168 The common-sense principles or standards to be applied in selecting the efficient cause of the loss are, however, capable of some analysis. It is not a matter of choosing a cause as proximate on the basis of an unguided gut feeling. The starting point for the inquiry is to identify, by interpreting the policy and considering the evidence, whether a peril covered by the policy had any causal involvement in the loss and, if so, whether a peril excluded or excepted from the scope of the cover also had any such involvement. The question whether the occurrence of such a peril was in either case the proximate (or “efficient”) cause of the loss involves making a judgment as to whether it made the loss inevitable - if not, which could seldom if ever be said, in all conceivable circumstances - then in the ordinary course of events. For this purpose, human actions are not generally regarded as negating

causal connection, provided at least that the actions taken were not wholly unreasonable or erratic.”

22. It is sometimes said that the right test for causation is the ‘but for’ test: asking whether, but for event X, would the accident have happened? As Lord Hamblen and Lord Leggatt make plain at [177]-[185] that test is not always helpful, not because it returns false negatives, but because it returns a countless number of false positives. It is over-inclusive: in any case with more than one potential cause, the ‘but for’ test can be relatively easy to fulfil in respect of each competing cause.

6.2 Concurrent Causes: General Principles

23. “It is no answer to a claim under a policy that covers one cause of a loss that the loss was also due to another cause that was not so covered”: see Lord Buckmaster in *Board of Trade v Hain Steamship C. Ltd* [1929] AC 534 at 539. In modern times, the leading case on concurrent causes is *JJ Lloyd Instruments Ltd v Northern Star Insurance Co. Ltd (The Miss Jay Jay)* [1987] 1 Lloyd’s Rep 32. There, the yacht was lost due to adverse sea conditions (which fell within the scope of the insurance) and unseaworthiness due to design defects (which was not covered by the policy, but was not excluded). It was held that that combination of causes were “equal, or at least nearly equal, in their efficiency” and that, in those circumstances, the loss was proximately caused by a peril insured against, and was therefore covered by the policy.
24. *Arch* was a case about business interruption cover in the light of the restrictions imposed by the UK government in response to the coronavirus pandemic. Some of the policies covered the outbreak of disease in particular defined geographical areas or locations. The insurers sought to argue that the losses were outside the policies, because the government response to coronavirus was caused by the multitude of cases of the infection, not a particular case or cases, so it could not be said that the presence of the infection within a particular geographical area was a ‘but for’ cause of the loss.
25. The Supreme Court found that, although in the vast majority of cases, for an event to be a cause or a proximate cause, it was likely that the ‘but for’ test would be satisfied, there was nothing in principle that precluded an insured peril which, in combination with many other similar uninsured events, had brought about a loss with a sufficient degree of inevitability, from being regarded as a proximate cause of the loss. That was so “even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself” [191]. Thus, each of the cases of coronavirus was a concurrent proximate cause of the Government restrictions of approximately equal efficacy which resulted in the business interruption losses. The losses did not fall to be reduced or excluded on the basis that they were caused by other, uninsured consequences of the coronavirus pandemic. In this way, *Arch* was an application of the principle set out in *The Miss Jay Jay*, and the losses were covered because the uninsured concurrent cause was not excluded by the policy.
26. By contrast, where there are concurrent causes of approximately equal efficiency, and one is an insured peril and the other is excluded by the policy, the exclusion will usually prevail: see *Wayne Tank & Pump Co. Ltd v Employers Liability Incorporation Ltd* [1974] QB 57 at 67B-F, 69B-D and 64E-75D. That principle was restated in *Arch*:

“174. This situation is to be contrasted with one where there are two proximate causes of loss, of which one is an insured peril but the other is expressly excluded from cover under the policy. Here, although it is always a question of interpretation, the exclusion will generally prevail: see *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd* [1974] QB 57; *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042; [2004] 2 Lloyd’s Rep 604; *Atlasnavios-Navegação, LDA (formerly Bnavios-Navegação, LDA) v Navigators Insurance Co Ltd (The B Atlantic)* [2018] UKSC 26; [2019] AC 136, para 49.”

27. Finally on concurrency, Lord Hamblen and Lord Leggatt summarised the position as follows:

“175. In none of the cases in either of these categories that were cited in argument could it be said that either cause which was characterised as a proximate cause on its own rendered the loss inevitable in the ordinary course of events. In each case it was the combination of the two causes which together made the loss inevitable. Neither would have caused the loss without the other.

176. There is, in our view, no reason in principle why such an analysis cannot be applied to multiple causes which act in combination to bring about a loss....”

6.3 Potentially Analogous Cases

28. It is not easy to identify any directly analogous cases to the present one. There is no authority where potential cause X occurred almost 80 years before the damage it was said to have caused, or where it was in fact impossible for the loss and damage now the subject of the claim to have been caused when potential cause X occurred (because the buildings that were damaged had not even been built in 1942). There are, however, a number of cases in which the proximate cause was found to be the first event in time, even when the later event might have been said to trigger the damage complained of. These loomed large in both *Arch* and in the judge’s judgment.
29. The first of these is *Reischer*. There, the ship collided with an object floating in the river, which caused a leak. Loss or damage from such a collision was covered by the insurance policy. The ship was anchored, and the leak was temporarily repaired. A tug was sent to tow the ship to the nearest dock but, as it was being towed, the motion through the water reopened the leak and the ship began to sink. To save the lives of the crew, the ship was run aground and abandoned. The insurers claimed that it was the intervening event (namely the towing of the repaired ship) which was the proximate cause of the loss and that that was not an insured peril. The Court of Appeal held that, despite those intervening events, the loss of the ship was proximately caused by the collision and was therefore covered by the policy.
30. As Lord Hamblen and Lord Leggatt explain at [160] of *Arch*, the original collision would inevitably have led to the sinking of the ship if the leak had not been repaired.

The plugging of the leak therefore delayed the occurrence of the loss caused by the collision, rather than anything else. Moreover, the leak was reopened not because of any unusual weather conditions or any negligent act on the part of the crew, but simply through the ordinary motion of the water when the ship was under tow.

31. It is, I think, relevant to the present appeal that, in *Reischer*, Lindley LJ contemplated the possibility that the ingress of water when the vessel was under tow, once the leak had been originally repaired, was a concurrent proximate cause, but that this did not prevent the loss from being covered by the policy, because that policy did not require the loss to be exclusively caused by the collision. That is a point expressly made at [171] of *Arch*.
32. *Reischer* was approved in *Leyland*. The facts were broadly similar, although this time the terms of the policy worked against the shipowners. A ship torpedoed by a German submarine was towed to the nearest port but had to anchor in the outer harbour. There it was exposed to the wind and waves. After three days in such conditions, the ship sank. The ship was insured against perils of the sea but there was an exception for “all consequences of hostilities or war-like operations”. The House of Lords said that the loss was proximately caused by the torpedo which was a consequence of hostilities, and the loss was therefore not covered by the policy. Lord Shaw of Dunfermline confirmed that the test involved a consideration of the proximate cause, in the passage cited in *Arch* and set out in paragraph 20 above.
33. It seems to me that the decision in *Leyland* was unsurprising. The first causation event was the torpedoing of the ship, which was obviously a consequence of hostilities. Whether or not that was the proximate cause of the loss then involved a consideration of whether the torpedo damage led inexorably to the loss of the ship, or whether anything that occurred after it was torpedoed was sufficiently abnormal to justify treating it as negating the causal connection. As Lord Hamblen and Lord Leggatt noted at [170] of *Arch*, it was clear that the subsequent events did not displace the damage inflicted by the torpedo as the proximate cause of the casualty.
34. There are certainly similarities between those two authorities and the case under appeal. On behalf of the respondent, Ms Hitching KC relied on the fact that, in both cases, the first event in time was said to be the overarching cause of the subsequent damage. Since what happened after, respectively, the collision and the torpedo were events which were reasonable and foreseeable, the intervening events did not amount to a competing proximate cause of the loss. She argued (and the judge agreed) that, by analogy, the proximate cause of the damage in the present case was the dropping of the bomb, and the subsequent events (and in particular the decision to undertake a controlled detonation) were immaterial, all the more so because that decision to undertake the LOT has not been criticised by anyone.
35. However, as Mr Pliener noted, there are also some potentially material differences between this case and those authorities. In both *Reischer* and *Leyland* significant damage had already been caused by the relevant event. The damage caused by the collision would have caused the ship in *Reischer* to sink; although not quite so clear from the report, that may also have been the consequence of the damage caused by the torpedo in *Leyland*. In those cases, the proximate cause of the loss was that which caused the initial damage. That is different to the present case: the buildings were not damaged when the bomb was dropped, because they had not been built in 1942.

36. Furthermore, the time gap between the first and second events in *Reischer* and *Leyland* was very short. Indeed, in *Leyland*, Lord Finlay at page 358 described the time gap as “merely an interlude which may be disregarded”. Here the time gap was almost 80 years.
37. We were shown various extracts from the leading textbooks on insurance. These included extracts from *Colinvaux’s Law of Insurance* 13th Edition, Chapter 26. At paragraph 26-010 of *Colinvaux*, the learned author writes:

“There has to be a close link between the loss and the fact of war, and damage arising from dislocation which has been facilitated by the war would be too remote to be regarded as having been caused by war. *A loss which has occurred after the suspension of hostilities cannot be said to have been proximately caused by war*”. (My emphasis)

Two authorities are cited in the footnote as supporting this italicised passage: *Shneiderman v Metropolitan Casualty Co.* 220 N.Y.S.947 (1961) and *Pan American World Airways Inc v Aetna Casualty and Surety Co.* [1975] 1 Lloyd’s Rep 77. I derive no assistance from *Pan American World Airways* because the principal reason that the claim failed in that case was because the hijacking was not connected to anything that could be described as a “war”. In *Schneiderman*, the insured was a photographer/journalist who was covering the Suez crisis in 1956. Hostilities ceased on November 6 1956. The insured was killed 4 days later, attempting to cross from the British-French lines to the Egyptian side with a party exchanging wounded. The court concluded that the exclusion clause in respect of war did not apply because the cessation of hostilities was synonymous with the cessation of war.

38. However, on behalf of the appellant, Mr Pliener accepted that there was no “bright line” rule, as *Shneiderman* might suggest, preventing this kind of exclusion clause from operating after the end of the war that had generated the potential cause in the first place. Whilst he said that that did not detract from his reliance on the period of nearly 80 years since the bomb was dropped, he accepted that he could not say that the mere fact that the war had ended provided him with a complete answer on causation.

7. Ground 3: The Proper Interpretation of the Policy

39. The usual starting point in a case like this is a consideration of the terms of the policy: how should the words “occasioned by war” be interpreted? That is why I take Ground 3 of the Appeal first: the appellant suggests that the judge failed to have regard to “the likely intent of the parties” in interpreting the War exclusion clause.
40. Mr Pliener’s skeleton argument made two points. First, he said that, in contrast to other parts of the policy, the War exclusion did not seek to exclude losses “directly or indirectly caused”. He suggested that the parties’ decision not to adopt that kind of wording was significant and intended to limit the remit of the War exclusion clause to “direct” causes only. He argued that the only direct cause for the damage was the controlled detonation. His second argument was that it was not “plausible” that the parties objectively intended that this clause applied to what he called “long-ended

historic wars”. He drew colourful analogies with loss and damage caused by a spear left over from the Battle of Hastings or a trench built during the English Civil War.

41. These points had some superficial force. But, as a result of a number of specific agreements between the parties, addressed below, I am driven to conclude that there is really no point of difference between them as to the proper interpretation of the War exclusion clause. In consequence, there can be nothing in Ground 3 of the Appeal. There are three particular points to note.
42. First, it is agreed that “occasioned by” gives rise to the proximate cause test. So it does not matter that the clause did not refer to “directly or indirectly occasioned by”: the parties agree that the proximate cause test, explained above, must be applied. Secondly, it is agreed that the dropping of the bomb was an act of war. Thus it was agreed that the War exclusion clause would apply unless the appellant could show that the dropping of the bomb was not the proximate cause, or a concurrent proximate cause of approximately equal efficiency, of the loss and damage.
43. Thirdly, as I have already noted, it is accepted that the mere fact that the detonation of the bomb occurred after the end of the war in which it was dropped does not automatically rule out the operation of the War exclusion clause. Of course, it must be recognised that there was a lifetime between the dropping of the bomb in 1942 and its detonation in 2021. But if (as the parties have agreed) the mere fact that the relevant war has ceased is immaterial, it becomes impossible to draw any sort of line arising simply out of the passage of time. Where would the line be drawn? Four years but not forty? Eight years but not eighty? The judge concluded that, in all the circumstances, the passage of time made no difference to his analysis. In the light of the appellant’s concessions, and for other reasons explored further below, I have reached the same view.
44. Potential issues which might have arisen, such as i) whether the “war” being referred to could mean a war that had ended at the time that the buildings were built and the policy was incepted; or ii) 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; did not arise between the parties, either at first instance or on appeal. On the basis of the agreements about the proper interpretation of the War exclusion clause, I therefore conclude that Ground 3 of the Appeal must fail. In this way, the issue between the parties again comes back to a consideration of the proximate cause(s) of the loss.

8. Concurrent Causes of the Loss and Damage

8.1 Introduction

45. The thread that ran through Ms Hitching’s submission was that, even if she was wrong about the dropping of the bomb being *the* proximate cause, it was *a* concurrent proximate cause of the loss and damage, and therefore, in accordance with the principle in *Wayne Tank*, as reiterated in *Arch*, the loss was excluded. Mr Pliener rejected that, arguing that, if the court was persuaded that the proximate cause of the damage was the controlled detonation in 2021, there was no other cause of “approximately equal efficacy” (*Arch* at [172]), and so the alternative position could

not succeed. I therefore take that argument next. A number of sub-issues arise, although I consider that the ultimate answer to the question is straightforward.

8.2 The Procedural Point

46. Ms Hitching had a preliminary procedural point, which was to the effect that, because Mr Pliener had expressly said in his skeleton argument (at footnote 8) that he was not challenging the section of the judgment in which the judge concluded that, in the alternative, the two causes were both proximate causes of approximately equal efficacy, he was bound to lose on that aspect of the appeal, and therefore bound to lose the appeal itself. Mr Pliener submitted that the footnote, and the paragraph in the skeleton argument to which it attached, were in error, but he maintained that it was always clear that the point about concurrent causes was in issue on the appeal.
47. In my view, Mr Pliener's skeleton argument on this issue was not entirely clear, and the position had not been clarified in the run-up to the hearing, as it should have been. That explains why, at the very outset of the appeal hearing, my Lord, Lord Justice Lewison, raised the issue expressly. Despite that, on balance, I consider that this was always part of the appellant's challenge. Moreover, I consider that Ms Hitching was aware of that, because in her skeleton argument, particularly at paragraphs 8 and 52 onwards, she expressly dealt with this very point. I therefore conclude that there is no procedural bar to the argument being raised by the appellant on appeal.
48. That said, I certainly agree with Ms Hitching that the concurrent cause analysis, which - if she is right - is fatal to this appeal, was not addressed by Mr Pliener in any detail in his skeleton argument. Nor was it in his oral submissions. As she noted, this may be a hangover of the fact that, at trial, Mr Pliener had an alternative argument, not pursued on appeal, that envisaged that the two causes might be held to be of approximately equal efficacy, but that *Wayne Tank* did not apply. Be that as it may, the argument that they were not concurrent causes was at least in principle open to the appellant on appeal.

8.3 The Substantive Point

49. For the reasons noted below, I agree with the judge's alternative analysis that, on the application of the relevant law to the agreed facts, the loss and damage in February 2021 resulted from two concurrent causes of approximately equal efficacy. One was the dropping of the bomb in 1942. The other was its controlled detonation almost 80 years later. It was the combination of these two causes which made the loss inevitable, or at least in the ordinary course of events. Neither would have caused the loss without the other.
50. The bomb that was dropped during WWII contained the explosive that did the damage to the appellant's halls of residence. The bomb did not explode when it landed. It buried itself into the earth. It remained there, with a large payload of live explosive. Although it may never have exploded as it deteriorated, it may have done: we simply do not know. But we do know, from the subsequent events, that the effluxion of time did nothing to reduce the potency of the bomb. Following its discovery, the relevant authorities had no sensible option but to attempt a LOT, in order to minimise any potential damage. The decision to attempt a LOT would

obviously never have been made if the bomb had not been there, and remained live, in 2021. It might be said that, at that point, the bomb did what it was always meant to do.

51. Mr Pliener had two arguments in support of his case that the detonation resulting from the attempted LOT was a much more potent cause of the damage to the buildings than the dropping of the bomb. The first was the effluxion of time between the two events. The obvious difficulty with that argument is that, as the authorities show, the proximate cause is not necessarily the last in time: on the contrary, it can often be the first in time. In a case of potentially concurrent causes, the fact that the first concurrent cause was so much earlier in time than the second does not, of itself, provide any sort of answer. Moreover, as the judge found, the passage of time had no effect on the potency of the bomb.
52. Secondly, Mr Pliener argued that the details surrounding the decision to detonate, such as the unavailability of the ACE methodology, and the fact that the LOT was intended not to cause any damage at all, emphasised the importance of the events in 2021 rather than the earlier dropping of the bomb. Those arguments, which did not appear to feature before the judge, do not advance his case. Inevitably, the discovery of a large, unexploded bomb is going to involve a number of individual decisions as to the best way in which to neutralise it. From a causation perspective, that network of individual decisions cannot have any relevance to causation unless something was done which broke the chain of causation (such as an act of negligence). That is not the case here.
53. During the course of his submissions on proximate cause, Mr Pliener volunteered that, if the bomb had exploded at the moment it was discovered by the contractors in 2021, then this would have created a more difficult case for him to argue. In my view that submission revealed an important weakness in his case. On this scenario, the passage of time between the dropping of the bomb and the explosion would have probably become irrelevant, even on his case. Moreover, it was complete happenstance that the bomb did not explode on being discovered. That happenstance cannot somehow elevate the events that followed its discovery, and which led to the controlled detonation, to become the proximate cause of the damage. That would not be a common sense answer to causation; it would instead wrongly emphasise the last events in time, such as the decision to use a LOT, over all that had gone before. That would be contrary to the principles I have noted above.
54. In my view, this is a classic case where there were two concurrent causes of the loss and damage: the act of war in 1942 and the detonation of the bomb as a result of the attempted LOT in 2021. They were of approximately equal efficacy. One of those concurrent causes was expressly excluded from cover under the policy. In those circumstances, the rule in *Wayne Tank* is that the exclusion will generally prevail. Mr Pliener advanced no argument on appeal that that rule did not apply. For that straightforward reason, if my Lords agree, I would dismiss this appeal.
55. I go on to deal briefly with Grounds 1 and 2 of the Appeal. These are concerned with aspects of the causation test, taken from the particular language used in *Arch*. They do not affect the analysis of concurrent causes set out above; in my view, they serve only to confirm it.

8.4 Ground 1: “Inevitability”

56. Ground 1 of the Appeal complains that, although the judge correctly identified the need to consider whether the loss was made inevitable in the ordinary course of events by the dropping of the bomb, “he failed to apply that test, correctly or at all, in deciding *the* proximate cause of the loss”.
57. The concept of asking whether a particular event “made the loss inevitable ... in the ordinary course of events” derives from [168] of *Arch*, where it was primarily postulated as a means of identifying *the* proximate cause of a loss. *Arch* also makes it clear that this “inevitability” approach does not require the court to view matters from the perspective of the initial event and to speculate whether the loss claimed for would happen in every conceivable situation that might have occurred. Rather, the question for the court is whether the initial event led inexorably to the loss through an ordinary series of events, or whether there was a subsequent abnormal event that negated the causal connection between the original event and the loss. It is in this context that Lords Hamblen and Leggatt made the remark in [168] of *Arch* that human actions are not generally regarded as negating a causal connection, provided that they are not wholly unreasonable or erratic.
58. The concept was illustrated at [169] and [170] of *Arch* by reference to the facts of *Reischer* and *Leyland*. In both those cases the question was whether human actions taken and other events occurring after the initial damage caused by the collision or the torpedo were the proximate cause of the subsequent loss of the ship. In both cases the intervening acts and events were held to be normal and reasonable responses to the initial event so as not to negative the causal connection.
59. Applying this approach to the instant case, there is force in Mr Pliener’s argument that applying this test, the damage to the appellant’s buildings cannot be said to have flowed inexorably and in the ordinary course of events from the dropping of the bomb alone. One obvious course of events would have been that the bomb would simply have exploded on impact as it was designed to do, with the result that the appellant’s buildings would not have been damaged, because they were not there at the time. Another obvious possibility is that even if the bomb failed to detonate in 1942, but remained potent until discovered subsequently, it might have been successfully rendered safe by the team from the Royal Logistics Corp.
60. As I see it, however, the problem with Mr. Pliener’s analysis, both in his skeleton argument at paragraphs 12 - 19, and his oral submissions, was that his analysis focused almost exclusively on the judge’s finding that the dropping of the bomb was *the sole* proximate cause. Mr Pliener did not separately address the different issues arising out of the judge’s finding of concurrency. But in *Arch* at [175]-[176], Lords Hamblen and Leggatt indicated that the “inevitability” principle could be applied to multiple causes that acted in combination to make the loss inevitable (or, as I think must be added, in the ordinary course of events).
61. In that respect, and for the reasons that I have already given at [49]-[50] above, I consider that the judge was right to reach his alternative conclusion that there were two concurrent proximate causes of the loss. These were the dropping of the bomb in 1942 and the attempted LOT to make the bomb safe in 2021. Neither would have caused the loss without the other. It was the combination that made the damage inevitable, or at least in the ordinary course of events.

62. I therefore reject Ground 1 of the Appeal.

8.5 Ground 2: “Agency of Change”

63. The last of Mr Pliener’s arguments was to submit that the decision to attempt a LOT, not the dropping of the bomb, was the “agent of change”. He accepted that this phraseology, derived from [165] of *Arch*, was not a new test but a useful way of looking at proximate causation. He said that there was a settled status quo for almost 80 years with the unexploded bomb in the ground, and the agent of change was the decision to attempt a LOT in 2021.

64. The problem with this argument is that paragraphs 20 - 24 of Mr Pliener’s skeleton argument, and his oral submissions, again focussed on *the* proximate cause of the loss, and failed to address the alternative position, namely that the dropping of the bomb was a concurrent cause of the loss of approximately equal efficacy to the subsequent decision to attempt a LOT.

65. As a matter of generality, I agree that the “agency of change” comment should not be elevated into a principle or slavishly followed as some sort of freestanding causation test. It may be a useful way to look at causation, but inherent within it is the need correctly to identify the *status quo ante*. In many cases that will not present a difficulty: in *Reischer* and *Leyland* the obvious *status quo* was an undamaged ship. On the facts here, I consider that the problem with this argument is that it treats the bomb buried in the ground close to the appellants’ buildings as part of the *status quo*. In my view, one could equally consider that the *status quo* was that, immediately before the bomb was dropped, this was farmland on the outskirts of Exeter. The bomb that fell in 1942 was the first change to the *status quo*, because it introduced a mass of high explosive into the ground where previously it had not been. The potency of that explosive did not dissipate over the years. The second change to the *status quo* was the construction of the appellants’ halls of residence close to where the bomb lay undiscovered. The third change to the *status quo*, following the subsequent discovery of the bomb, was the perceived need to attempt a LOT. All events might fairly be described as “agents of change”.

66. Accordingly, each of the arguments which sought to exclude the dropping of the bomb as a concurrent cause of the loss and damage was artificial: each sought to exclude or minimise the causative effect of a critical event which ultimately led to the explosion, namely the dropping of the large high explosive bomb in 1942.

8.6 Ground 4: No Reasonable Judge Could Have Reached The Concurrency Conclusion

67. Ground 4 of the appeal is a catch-all, to the effect that the judge reached a conclusion on proximate cause which no reasonable judge could have reached. It follows from all that I have said already that I do not agree. Moreover, there was some force in Ms Hitching’s forensic point that, since one of Mr Pliener’s alternative arguments before the judge positively accepted concurrency, it was a bit much for him to argue that no reasonable judge could have reached such a conclusion.

8.7 Summary

68. For all these reasons, therefore, I consider that the judge was right to conclude that there were two concurrent causes of the loss and damage: the dropping of the bomb and its detonation. Those two causes were of approximately equal efficacy. The former was excluded; the latter was not; the rule in *Wayne Tank* therefore dictates that the claim must fail.

9. The Judge's Analysis of Sole Cause

69. In those circumstances, it is unnecessary for me to say anything in detail about the judge's analysis as to why the dropping of the bomb was the sole proximate cause of the loss and damage. I thought there was force in some of the criticisms made by Mr Pliener of the judge's approach, in particular his decision at [42] to take as his starting point the theoretical position if there had been no human intervention in 2021. I am not sure that that is what the Supreme Court said or intended to be the appropriate approach in *Arch*: if there are two competing causes and you take one out of consideration, you will inevitably find that the other is the proximate cause. But it is unnecessary for me to say anything more about this aspect of the case: because I consider that the judge was right in his alternative reasoning, nothing can turn on his analysis of the dropping of the bomb as the sole cause of the loss and damage.

10. Conclusion

70. For these reasons, if my Lords agree, I would dismiss this appeal.

LORD JUSTICE SNOWDEN

71. I agree.

LORD JUSTICE LEWISON

72. I also agree.