Neutral Citation Number: [2023] EWCA Civ 8

Case No: CA-2022-001148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
Ms Clare Ambrose (sitting as a Deputy High Court Judge)
[2022] EWHC 1150 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2023

Before:

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

- -

Between:

BRIAN LEIGHTON (GARAGES) LIMITED	**Appellant/ Claimant**
- and –	
ALLIANZ INSURANCE PLC	**Respondent /Defendant**

- -
- -

Nicholas Davidson KC (instructed by **Adie Pepperdine Ltd**) for the **Appellant**
Jason Evans-Tovey (instructed by **Clyde & Co Claims LLP**) for the **Respondent**

Hearing date: 15 December 2022

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Approved Judgment

This judgment was handed down remotely at 2:00pm on 11 January 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 Popplewell :

Introduction

1. This is an appeal by Brian Leighton (Garages) Ltd ('BLG') against a decision of Ms Clare Ambrose, sitting as a deputy judge of the High Court ('the Judge'). Until June 2014 BLG ran a garage business in Goole, East Yorkshire, trading and repairing vehicles and operating a 24 hour petrol filling station. The Respondent ('Allianz') was its insurer under a Motor Trade Policy ('the Policy') covering various risks under 15 sections. BLG has brought a claim under Section 1 (material damage) and Section 8 (business interruption) arising out of a fuel leak in early June 2014, which resulted in the garage being shut down for health and safety reasons. Allianz has declined liability.

2. The Judge was determining various issues in a summary judgment application brought by Allianz. The decision under appeal was that damage to the forecourt and shop building was damage "caused by pollution or contamination" so as to be excluded from cover under Exclusion 9 of the Policy.

The facts

3. Because the issue arose in a summary judgment application by Allianz, and by reason of the procedural history, the issue of the construction and application of Exclusion 9 fell to be decided on the basis of facts which were disputed by Allianz but were to be assumed to be true for the purposes of the application. Those assumed facts are as follows.

4. A leak occurred from a section of pipe connecting one of the underground fuel tanks to six of the forecourt fuel pumps. It was caused by the pressure of an object such as a sharp stone on the pipe, under pressure and movement from the weight of the concrete slab under the forecourt. The fuel leak started shortly before 4 June 2014 and within a matter of days contaminated the forecourt, yard, paved area and forecourt pad and ducting ('the forecourt') and the lower parts of the floors, walls and skirtings of the adjacent shop building ('the building'). The contamination reached the electrical conduits connecting the pumps to the building. The contamination was such that by 9 June 2014 those parts of the premises were at immediate risk of catching fire or exploding, and the business had to be closed. Allianz did not agree to indemnify BLG and it could not afford to effect the necessary repairs itself, with the result that the business never reopened and was ultimately sold.

The Policy

5. The Policy was a renewal for 12 months at 31 December 2013 of cover which Allianz had provided to BLG for a number of years on its "Headlight Motor Trade Policy Wording". Section 1 covers Material Damage, Damage being defined as "accidental loss, destruction or damage to Property Insured". It is common ground that the forecourt and building were Property Insured.

6. Section 1 is structured in five parts. The first part sets out definitions which are to apply to the Section, in addition to "Policy definitions" set out immediately before the Section which are applicable to all sections of the Policy. The second part comprises unnumbered sections addressing "Cover". The third part comprises 26 numbered "Extensions". The fourth part contains 15 numbered "Exclusions". The fifth part contains 5 "Conditions".

7. The first clause in the second part under the heading **Cover** provides:

> "**Indemnity**
>
> We will pay You for damage to Property Insured at The Premises shown in the Schedule by any cause not excluded occurring during the Period of Insurance…"

8. In the third part, Extension 26 provides:

> "**Trace and Access**
>
> In the event of Damage in consequence of escape of water or fuel oil from any tank, apparatus or pipe, or leakage of fuel from any fixed oil heating installation, We will pay costs necessarily and reasonably incurred by You in locating the source of such Damage, and in the subsequent making good of Damage caused as a consequence of locating such source, up to an amount of £10,000 any one claim."

9. In the fourth part, Exclusion 9 provides:

> **"Exclusions to Section 1**
>
> The General Exclusions of this Policy apply to this Section and in addition it does not cover:
>
> …..
>
> 9. **Pollution or Contamination**
> Damage caused by pollution or contamination, but We will pay for Damage to the Property Insured not otherwise excluded, caused by:
> a pollution or contamination which itself results from a Specified Event
> b any Specified Event which itself results from pollution or contamination."

10. Specified Events are defined in definition 9 in the first part of the section as follows:

> "9. **Specified Events**
>
> Fire, lightning, explosion, aircraft or other aerial devices or articles dropped from them, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious persons other than thieves, earthquake, storm, flood, escape of water from any tank apparatus or pipe or impact by any road vehicle or animal."

11. It is common ground that no Specified Event occurred in this case.

12. The indemnity clause in Section 8 covers gross profit lost for business interruption which is a consequence of damage insured under Sections 1, 2 and 3.

The Judgment

13. BLG argued before the Judge that the point was not suitable for summary determination and/or that the way in which it had been raised and argued by Allianz was procedurally unfair. It further argued that the effect of the leak may have been pollution or contamination, but that was merely to define the damage; the cause of the damage was the sharp object which punctured the pipe; and further that Exclusion 9 only applied to

environmental pollution of groundwater and subsoils. Allianz argued that the damage was clearly caused by pollution and contamination by the fuel, and relied on *Legg v Sterte Garage* [2016] EWCA Civ 97 [2016] Lloyd's Rep I.R. 390.

14. The Judge recorded at paras [24] and [47] that the material damage for which BLG was claiming an indemnity (in the respect relevant to the issue under appeal) was the immediate contamination of the forecourt and building, making them susceptible to the immediate risk of fire and explosion. She recorded BLG's expert evidence as to the cause of the rupture of the pipe, and Allianz's willingness for its summary judgment application to proceed on the basis that the cause was accepted notwithstanding that the evidence was disputed. She rejected BLG's overarching submission that none of the issues which arose were suitable for summary determination.

15. When addressing the issue whether the cause of the damage (other than the damage to the leaking pipeline itself) was within Exclusion 9, she first concluded that the point was appropriate for summary determination, being a short point of construction on assumed facts which did not require any further factual investigation or expert evidence, and that there was no unfair prejudice to BLG in the way it had been raised or argued.

16. Paragraphs 57 to 63 contain her essential reasoning for concluding that the damage was within the exclusion, and can be summarised as follows.

17. Allianz's argument that the damage was caused by pollution and contamination better reflected the ordinary meaning of the clause and its likely scope within a policy covering a garage, since it was unlikely that any exclusion only applied to subsoils and groundwater rather than the property insured. Allianz's construction was also more consistent with the express terms of the carve out in Exclusion 9 and the Track and Trace Extension 26. The wording of Exclusion 9, by reference to the Specified Events, acknowledged that the damage caused by pollution or contamination would be caused by something else including, for example, fire, floods or leak of water from a pipe, but on its express terms the policy would not cover escape of fuel from a pipe. There was no support in the wording or context of the Policy for BLG's argument that the exclusion applied only to environmental contamination of subsoils and groundwaters, which was unworkable since BLG was unable to identify what "the environment" would mean. Although pollution is often associated with harmful substances being released into the natural environment, contamination is more commonly used outside that context and on its ordinary meaning would certainly cover leakage of harmful substances being absorbed within the fabric of a shop or forecourt. On its ordinary meaning pollution would cover leakage of oil from a pipe into something else, whether a beach, river, garage forecourt or shop, and that would extend to the mechanism by which the leak took place (including a pipe failing and leaking oil) rather than solely the condition of being polluted or saturated.

18. BLG's arguments were also inconsistent with the decision in *Legg v Sterte Garage*, in particular paragraph 28 of the judgment of David Richards LJ, which was consistent with Allianz's argument.

The skeleton arguments on appeal

19. Mr Davidson KC, who did not appear below, started from the proposition that the damage for which the claim was made, namely the effect of the fuel on the forecourt and shop, could properly be characterised as pollution or contamination, which were nouns aptly used

to describe such damage. However, the fundamental error of the Judge was in treating pollution or contamination as the cause of the damage, which was the inquiry required by the words "caused by" in Exclusion 9. The cause was the sharp object movement which ruptured the pipe. He relied on *Leeds Beckett University v Travelers Insurance Company Ltd* [2017] EWHC 558 (TCC) [2017] Lloyd's Rep I.R. 417 as illustrating the distinction between contamination being present and contamination being the cause of the damage. Mr Davidson also sought to rely on the wording of a subsequent trade policy issued by Allianz as drawing a clear distinction between damage "consisting of…" and damage "caused by…". He further relied upon the decision of Lawton J in *Burts and Harvey Ltd v Vulcan Boiler and General Insurance Co Ltd* [1996] 1 Lloyd's Rep 161, approved and applied by this court in *Manchikalapati v Zurich Insurance Plc* [2019] EWCA Civ 2163 [2020] Lloyd's Rep I.R. at [180]-[182], and a decision of the Superior Court of Pennsylvania in *Raybestos-Manhattan Inc. v Industrial Risk Insurers* (1981) 289 Pa. Super. 479, 433 A.2d 906, as illustrative, in analogous factual circumstances, of the proximate cause of damage being identified as the occurrence which caused the leak to occur. Moreover, if there were any ambiguity in the meaning of Exclusion 9, it should be resolved against Allianz by application of the *contra proferentem* principle and/or the approach articulated by Lords Hamblen and Leggatt JJSC at [77] of *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 [2021] AC 649 that:

> "In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, para 59). It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting."

20. On behalf of Allianz, Mr Evans-Tovey submitted that the Judge had not conflated damage with the cause of damage. The damage comprised the shop and forecourt being "polluted" or "contaminated" by fuel, but the words "pollution" and "contamination" are apt to describe the process by which such damage is caused. The Judge correctly identified that the process by which the damage to the shop and forecourt occurred in this case was by contamination and pollution, which was what caused it. The argument for BLG therefore presents a false dichotomy between what the damage consists of and what causes it. That the words pollution or contamination in Exclusion 9 refer to a process is supported by (1) the Shorter Oxford English Dictionary ('OED') definition of their meanings; (2) the clause referring to damage being "caused by" those words; and (3) the part of Exclusion 9 which writes back cover in respect of Specified Events, which also makes clear that contamination or pollution is excluded (if not written back) if it forms any part of the chain of causation giving rise to the damage, whether immediate, intermediate or remote.

21. All this is clear from the wording of the Policy and its context. In any event, there is no room for the *contra proferentem* principle because Exclusion 9 is to be read with the Indemnity clause as simply defining the scope of cover. Reliance by BLG on the subsequent Allianz policy wording is impermissible, and anyway irrelevant. *Legg v Sterte Garage* supports this approach, and none of the other authorities upon which BLG relies cast doubt on it.

The oral argument on appeal

22. The argument became more focused in the course of the hearing. It became common ground that the loss was (on the assumed facts) caused by a process of contamination or pollution as part of the causative chain, but that the proximate cause of the loss was the sharp object rupturing the pipe, which was not itself pollution or contamination. Mr Davidson submitted that the exclusion applied only where pollution or contamination was the proximate cause of the damage. Since it was not, the Exclusion had no effect on the claim for the damage to the forecourt and shop. Mr Evans-Tovey submitted that the expression "caused by" connotes something looser than proximate cause, and applies if the words it governs are part of the chain of causation whether more immediate or more remote than the proximate cause. On this interpretation the effect of the exclusionary wording is to exclude cover for damage where the contamination or pollution forms any part of the process in the chain of causation, and the write-back in clauses a. and b. confers cover where a Specified Event plays any part in the chain of causation whether more remotely or more immediately than the pollution or contamination. Although the exclusionary wording would exclude all cases involving leakage of fuel, there was nevertheless substantial cover written back by reason of clauses a. and b., such that the effect of the Exclusion as a whole was akin to providing cover, in the event of fuel leaks, for the Specified Events as the defined perils. In the current case there was a process of contamination and pollution which engaged the exclusion, and no occurrence of a Specified Event to write back cover.

Discussion

23. The principles applicable to the construction of contractual documents have been the subject of an abundance of recent high authority, and are too well known to need extensive exposition here. In *FCA v Arch* Lords Hamblen and Leggatt JJSC said at [47]:

> "The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean."

24. I would, however, emphasise three matters which are of particular relevance to the present dispute.

25. First, the relevant commercial context is that this was a policy for a small or medium sized enterprise whose business included a petrol filling station. The risk of leakage of fuel from pipes, tanks and apparatus is amongst the most obvious risks arising from such an operation, and one against which the operator of the business would naturally desire cover. Mr Evans-Tovey relied on Extension 26 for the purpose of establishing that the parties would have had in mind fuel leaks as a likely hazard. In my view that is obvious without needing to refer to Extension 26.

26. Secondly, there is no room for any presumption that Special Exclusion 9 is to be narrowly construed or construed against the insurer. The scope of cover in Section 1 is defined by the Indemnity in the second part of the Section as being "any cause not excluded", followed in the fourth part by "Exclusions to Section 1", in which Exclusion 9 is to be found. Those exclusions are part of the definition of the scope of cover, not some exemptions from liability for cover which would otherwise exist. This is reinforced in the case of Exclusion 9 itself by the fact that it includes provisions conferring or preserving cover, in relation to

Specified Events, as a write-back to the scope of cover excluded in the opening words. There is therefore no room for the application of the relevant aspect of the *contra proferentem* principle, which applies to a clause exempting a party from a liability which would otherwise arise by operation of law or under a contractual term which defines the benefit which it appears it was the purpose of the contract to provide. If authority were needed for such an approach, it is to be found in the judgments of Lord Hodge JSC at [5]-[7] and Lord Toulson JSC at [35] in *Impact Funding Solutions Ltd v Barrington Services Ltd* [2016] UKSC 57 [2017] AC 73.

27. Thirdly, it is a general principle of insurance law, codified in s. 55 of the Marine Insurance Act 1906 but equally applicable to non-marine insurance, that the insurer is liable, and only liable, for losses proximately caused by a peril covered by the policy. Because of its historical origins, the expression proximate cause is apt to mislead. The proximate cause of the loss is not the last cause of the loss, but that which is proximate in efficiency, being the dominant, effective or efficient cause: *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350; *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691; *FCA v Arch* at [163]-[170]. There may be more than one proximate cause of a loss. Where there are concurrent proximate causes, one an insured peril and the other excluded, the exclusion prevails: *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd* [1974] QB 57, at pp. 67B-F, 69B-D, 74E-75D; *Atlasnavios-Navega LDA v Navigators Insurance Co Ltd* [2018] UKSC 26 [2019] AC 136 at [49]; *FCA v Arch* at [174].

28. It is a commonplace in human experience, and therefore insurance claims, that a loss may result from a combination of causes, either operating independently of one another, or, often, in a chain where each would not have arisen but for that preceding it in the chain. Of these causes, the search is for the, or a, proximate cause and it is generally irrelevant if a cause is either more remote in the chain than the proximate cause, or more immediate.

29. This is subject to an important qualification. The requirement of proximate causation is based on the presumed intention of the contracting parties; it is a presumption capable of being displaced if, on its proper interpretation, the policy provides for some other connection between loss and the occurrence of an insured or excepted peril. This is reflected by the words in s. 55 of the Marine Insurance Act "unless the policy otherwise provides". The parties may expressly provide that losses which result from causes which are more immediate or more remote than the proximate cause are to be included or excluded. Typically this is done by a clause referring to losses caused "directly or indirectly" by the insured or excepted peril. So in *Coxe v Employers Liability Assurance Corporation Ltd* [1916] 2 KB 629, a soldier was insured against death accidentally caused by violence due to accidental and visible means. The policy excepted losses "directly or indirectly caused by, arising from or traceable to war." During the First World War the soldier was killed by a train whilst walking alongside the railway to visit guards and sentries posted along the line. Scrutton J upheld the finding of the arbitrator that his death was indirectly caused by war because his military duties consequent upon the war put him in special danger. In doing so he held that the proximate cause principle is to be applied in all cases if possible unless the language dictates otherwise; but that the word "indirectly" did so in that case because there could be no such thing as an indirect proximate cause.

30. In *FCA v Arch* it was expressed in this way at [163]:

> "The requirement of "proximate" causation is based on the presumed intention of the contracting parties….But it is a presumption capable of being displaced if, on its proper interpretation, the policy provides for some other connection between the loss and the occurrence of an insured peril."

31. Against this background I turn to the wording of Exclusion 9.

32. The OED definition of pollution includes: "the action of polluting", "the condition of being polluted" and "a thing that pollutes". The definition of contamination includes "the action of making impure or polluting", "something which contaminates" and "an impurity". Each is therefore capable of describing three separate things, namely (1) the damage to property; (2) the process by which such damage is caused; and (3) the state of affairs or occurrence which gives rise to that process.

33. It is common ground that the words are not used in the first sense, namely as a description of the damage. The Exclusion is concerned with the cause of that damage. Whether they are used in the second sense or third sense is a question which itself turns upon whether the clause is concerned with proximate causes. If it is, it will generally only be contamination or pollution as a state of affairs or occurrence which will be engaged, not the process of contamination or pollution which forms part of that chain by which it leads to the damage.

34. In this case the chain of causation leading to the damage included the process of pollution or contamination, but that was not its proximate cause. The proximate cause of the damage was the puncturing of the pipe by the stone or sharp object (on the assumed facts). It is critical to the outcome, therefore, whether the exclusion is concerned with pollution or contamination as a proximate cause or merely as an intermediate process in the chain of causation.

35. Exclusion 9 consists of an exclusion in the first six words ("[this Policy…does not cover] Damage caused by pollution or contamination") which I will call the exclusionary wording, followed by a write-back of cover in the rest of the Exclusion, which I will call the write-back wording. It is a write-back in the sense of providing for cover in circumstances where it would otherwise be excluded by the exclusionary wording. This follows from the word "but"; and from the fact that the structure of cover is for all risks not excluded, so that where it is intended that there should be cover there is no need for any wording granting such cover unless it addresses circumstances which would otherwise be excluded.

36. If the exclusionary wording were taken on its own, it would be tolerably clear that it was concerned with pollution and contamination as a proximate cause. This follows from the presumption arising from the general law of insurance that clauses concerned with defining the scope of insured or excepted perils are concerned with damage proximately caused by those perils. It is reinforced in this case by the use of the simple expression "caused by" which has historically and uniformly been interpreted in this context as importing the concept of proximate cause.

37. It is further reinforced in this case by the contrast with two other policy terms where wider language is used in connection with pollution and contamination. Section 2 of the Policy covers third party liability risks for death, personal injury or damage arising from use of the insured vehicles. Exclusion 7 to that Section excludes liability for:

> "death, injury, loss or damage *directly or indirectly caused by* pollution or contamination unless the pollution or contamination is directly caused by a sudden identifiable unintended and unexpected incident which occurs in its entirety at a specific time and place during the Period of Insurance." (my emphasis)

38. Section 3 covers third party liability in respect of the use of self-drive rental vehicles in similar terms to that for insured vehicles in Section 2 and has an Exclusion 8 in the same terms as Exclusion 7 in Section 2.

39. Some caution must be exercised in relying on this contrasting wording. Normally it is a legitimate canon of construction that where the parties have chosen different language in relation to related subject matter in different parts of their contract, it suggests that they intended different meanings. However the Policy Wording in this case contemplates that it can be used by assureds selecting cover under some but not all of the Sections. The meaning of Exclusion 9 in Section 1 must be the same for an assured who has not selected cover under Sections 2 and 3 as for one, like BLG, who has. Nevertheless the contrasting wording in the Exclusions in Sections 2 and 3 shows that the drafter had well in mind the distinction between "caused by" meaning proximately caused, and "directly or indirectly caused by" connoting a looser connection between the Damage and pollution or contamination, a distinction which is well established by judicial authority.

40. For these reasons I would regard the presumption that the exclusionary wording is concerned only with proximate causes to be a strong one. It is reasonable to attribute this presumed intention to these parties. Assureds such as BLG have brokers who can advise them, and brokers are to be taken to be familiar with the basic insurance principle of proximate causation, and language which reflects it or, by contrast, modifies it. Both assured and broker have access to legal advice which would involve no pedantry in advising on the presumptions involved in the use of such language. This is part of "the background knowledge which would reasonably have been available to the parties". I do not take what was said in [77] of *FCA v Arch* as suggesting that the reasonable person in an SME's shoes should not be taken to be familiar with the basic principles of insurance law and the meaning which has been put on phrases used in insurance contracts by consistent judicial authority. Many policies of insurance in many fields contain terms of art which have acquired their meaning by consistent use and judicial interpretation, which it is the duty of brokers to understand and, if necessary, advise on.

41. It is trite that Exclusion 9 is to be read as a whole, but I would not regard that strong presumptive meaning of the exclusionary words as displaced unless the wording of the write-back cannot be reconciled with it. The reasonable reader of the clause would expect the scope of the exclusion to be determined by the language employed to express the exclusion, namely that in the exclusionary words, rather than by what follows. If it is to be displaced in what follows, it can only be on the basis that what follows is inconsistent with the presumption.

42. The write-back wording does not, to my mind, displace this presumption because it is capable of being given meaning consistently with it. The write-back wording is also introduced by the words "caused by" which govern the written back circumstances set out in clauses a. and b. Again the natural presumption is that they connote proximate cause for the reasons already given in relation to the exclusionary wording, and for internal

consistency within the clause: where parties use the same language within the same clause the presumption is that they mean the same in each case.

43. Clause a. writes back cover where pollution or contamination is the proximate cause but a Specified Event is a more remote cause in the chain of causation. Clause b. cannot be construed as writing back cover where pollution or contamination is a more remote, non-proximate, cause of a Specified Event as the proximate cause, because that would not be a write-back: the pollution or contamination would not be excluded by the exclusionary words unless it was, on this construction, the proximate cause. However content can be given to clause b. as covering the possibility of two concurrent proximate causes. In such a case the exclusionary wording would bite and prevail under the *Wayne Tank* principle which I have identified were it not for the write-back in clause b.

44. Instances in reported cases of concurrent proximate causes are not common, but are not as rare as might at first be supposed. MacGillivray on Insurance law 15th Ed. goes as far as to say at 19-005 that it "often happens that the insured's loss is attributable to at least two proximate causes acting concurrently". The *Atlasnavios* case is a recent example, in which smugglers affixing cocaine to a ship, and consequent detention by the port authorities upon its discovery, were treated as concurrent proximate causes. Lord Mance DPSC said at [43] in that case that while the general aim in insurance law is to identify a single real, effective or proximate cause of any loss, the correct analysis is in some cases that there are two concurrent causes and this is particularly so where an exceptions clause takes certain perils out of the prima facie cover. Another recent example, and a striking one, is *FCA v Arch*, in which it was held that each and every case of Covid-19 in the United Kingdom, approaching or even exceeding a million in number, was to be treated as a concurrent proximate cause of the national response to the pandemic; and that it was not necessary for such a proximate cause to satisfy a but for test of causation. It is not, therefore, fanciful to suppose that the drafter of Exclusion 9 had concurrent proximate causes in mind, consistently with the language used elsewhere in the Exclusion.

45. This construction involves giving the words "results from" a meaning which is not necessarily that of proximate cause, but I see no difficulty in doing so. Although the expression has been interpreted as connoting proximate cause when applied to the link between insured/excepted perils and damage (*Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2001] EWCA Civ 1643 [2002] Lloyd's Rep I. R. 113 at [42] (CA); [2003] UKHL 48 [2003] Lloyd's Rep. I.R. 623 at [45] (HL)), there is no reason to do so where, as here, it is being applied to a causative relationship between insured/excepted perils in a chain. Mr Evans-Tovey argued, initially at least, that the words "results from" did connote proximate cause, but this was, in my view, untenable on his construction of the clause. It would involve inconsistent meanings for "pollution or contamination": it has to treat pollution or contamination in b. not merely as part of a process, as he contends it means in the exclusionary words, but as something which gives rise to the process. The further difficulty with such submission from his point of view is that it would suggest that "caused by" in the introductory words of the write-back connote proximate cause: if the Specified Event must be the proximate cause of the (process of) contamination or pollution which causes the damage (clause a.), it is difficult to see how it will not be the proximate cause of the damage itself.

46. Mr Evans-Tovey relied on the omission of any reference to fuel leak escape in the list of Specified Events, suggesting that it was a careful and deliberate omission in the light of the contrast with the inclusion of water escape, and as thereby indicating that the parties did

not intend to cover damage resulting from fuel leaks. There are a number of reasons why I cannot accept this submission. First there is a logical flaw in relying on the list of Specified Events to aid construction of the exclusionary words in Exclusion 9. The Specified Events are only engaged by the write-back wording, and the write-back wording only arises if the exclusionary wording bites. The fact that the write-back only applies to some perils tells one nothing about the scope of the exclusion before the write-back becomes operative (or not). There is no blanket write-back for all damage involving fuel leaks, but that does not mean they are all excluded in the first place, so as to need writing back, if there is to be cover. Secondly, Exclusion 9 falls to be construed by reference to all potential forms of contamination or pollution, not merely fuel leaks. Thirdly, and in any event, the definition of Specified Events contains a miscellaneous list of events (or in the mystifying case of "aircraft", an object) some of which may be the cause or the result of fuel leaks (e.g. fire and explosion). It is not the case that the consequences of fuel leaks are all excluded from Specified Events and therefore not within the write-back. As Mr Evans-Tovey accepted, if on the assumed facts of this case the escaped fuel had caught fire or exploded, there would have been cover even on his case. He suggested that this would be because the fire or explosion would be the proximate cause but that is not so; there would be cover, on his construction of the clause, because it would be written back by clause a.

47. Mr Evans-Tovey argued that BLG's construction involved treating the write-back wording as an extension of cover rather than a write-back, which was therefore inconsistent with the word "but" and the fact that the structure of the policy is one of all risks other than excepted perils and therefore an extension would be superfluous. However this is not the effect of the construction which I have suggested is the correct one. Both clauses a. and b. bite in circumstances where cover would otherwise be excluded by the exclusionary words because in each case they are engaged where, but only where, pollution or contamination is a proximate cause.

48. It may be objected that BLG's construction gives a narrow scope to the exception, and an even narrower scope to the write-back. Circumstances in which pollution or contamination would be a proximate cause of material damage to BLG's business, or that of any other assured likely to take out cover on the terms of this "Motor Trade" Policy, will not be common. Mr Davidson suggested as an example red dust which sometimes occurs from windborne sand in the atmosphere emanating from foreign deserts. Others which come to mind are chemical pollutants/contaminants from historical use of the land or neighbouring land, for example for waste or mining, where the historical source of the problem renders it impossible to investigate or ascertain whether there was any fault, and if so what, in the pollutants/contaminants seeping into the ground. No doubt there are others, but I would accept that they are unlikely to be common. However, the fact that BLG's interpretation gives a narrow scope to the Exclusion is not, to my mind, a reason for rejecting it. This is a policy covering all risks of material damage unless excluded, and it is not inherently surprising in such a policy that an exception should have a narrow scope of application. Moreover, as I have observed, the risk of leakage of fuel from pipes, tanks and apparatus, is amongst the most obvious risks arising from a business like that of BLG, and one against which the operator of the business would naturally desire cover. A narrow interpretation of the exclusion is consistent with such desire.

49. Mr Evans-Tovey also argued that if BLG were correct in its construction, there would be cover for the pollution or contamination of the forecourt by the gradual effect of the daily occurrence of motorists carelessly allowing fuel to spill from the nozzle whilst filling their

vehicles. I do not know whether the frequency of such occurrences and the composition of forecourts makes it realistic to posit material damage from such a cause. But assuming that they do, I do not find it self-evident that the parties cannot have intended that there should be cover in such circumstances, in what is in structure an all risks policy with defined exceptions.

50. The cases to which we were referred do not address or shed light on the issue of construction which arises in this case. In *Legg v Sterte Garages* a claim was made against liability insurers for Sterte's costs of defending proceedings brought by neighbours claiming loss from fuel leaking from Sterte's garage premises. The claim succeeded both on the basis that the judge had correctly exercised his discretion under s. 51 of the Senior Courts Act 1981 to render the insurers liable for the costs as non-parties to the proceedings; and that the terms of the liability insurance provided coverage for such costs. There was no claim against the insurers for liability for the damage itself. That was because the policy excluded liability "arising from pollution and contamination" …. "other than caused by a sudden identifiable unintended and unexpected incident which occurs in its entirety at a specific time and place during the period of insurance." There had been such an incident resulting in a spill of 300 litres of diesel from an above ground tank in August 1997. Proceedings were only commenced by the claimants against Sterte in November 2008, which gave rise to a limitation defence in respect of the spill incident which had occurred well before November 2002, by which time the diesel had finished migrating to the claimants' land. The claimants' expert introduced the possibility of a different cause of the contamination/pollution, namely gradual and long term leaks from underground storage tanks and/or associated pipework. In referring to this evidence as part of the history of proceedings David Richards LJ, giving the leading judgment, said at [28]:

> "This raised, for the first time, as a possible cause of the damage to the claimants' land, long-term leaks from underground storage tanks or associated pipework on Sterte's property. Damage resulting from such leakage would fall outside the public liability cover for pollution damage in section E of the policy."

51. Mr Evans-Tovey relies on the paragraph as demonstrating that the damage in question in that case fell within the pollution and contamination exception and that the same reasoning applies in this case. However the dictum is of no assistance in the present case. The policy wording was different, using the epithet "arising from", in respect of which there are conflicting authorities as to whether it connotes proximate cause. In that case the court was not concerned with the liability of Sterte to the claimants for the damage itself because it formed no part of the claim against insurers, which was limited to costs. David Richards LJ made the passing reference to such liability in paragraph 28 but without having to address either whether the pollution or contamination were the proximate cause, or whether that mattered for the purposes of the exclusion clause. Moreover the case was concerned with liability insurance where the cause of the loss was determined not by the cause of the material damage but by the cause of the liability, which arose in negligence, nuisance and the rule in *Rylands v Fletcher*, which were the causes of action asserted by the claimants against Sterte. Liability under those causes of action is not determined by the insurance concept of proximate cause.

52. Mr Davidson sought to derive support from the decision of Coulson J in *Leeds Beckett University v Travelers*, in which a policy covering material damage contained at exclusion 5 a pollution/contamination exclusion in similar, although not identical, terms to Exclusion 9. Coulson J found, in an obiter section of his judgment at [262]-[266], that the exclusion

was not engaged by the escape of water containing ochreous and ferruginous material. This was because although there was evidence of such material in the observed damage to the blockwork to the buildings which had led to the damage, it had played no part in the causation of the damage, which had occurred by the inevitable and non-accidental effect of a separate underground watercourse. Coulson J held that contamination or pollution from the mineshafts did not satisfy a but for test of causation. Mr Davidson argued that by addressing the question, Coulson J must have assumed that, had the contamination been causative, it would have engaged the exception in exclusion 5. However there is no suggestion that there was any argument as to the construction or scope of the exclusion, and in particular whether it was engaged if the contamination were a cause, or only if it were the proximate cause. Coulson J did not have to consider such questions or make any assumptions about them in order to reject the application of the exclusion on the grounds that the escape of water from the mineshafts played no causative part in the damage.

53. In conclusion, therefore, whilst I would readily accept that Allianz's construction of Exclusion 9 is one which the parties might perfectly sensibly have chosen as their bargain, it faces the insuperable difficulty that it does not give effect to the language they have used, which gives rise to the presumption that they intended the exclusion to apply to pollution or contamination as a proximate cause, a presumption which is not displaced by the wording of the write-back or any other wording in the policy.

Conclusion

54. For these reasons I would allow the appeal.

Lord Justice Nugee :

55. I have had the great advantage of reading in draft not only the judgment of Lord Justice Popplewell above but that of Lord Justice Males below. Each of them is well reasoned but they reach different conclusions. Faced with persuasive but divergent judgments written by eminent judges with long experience of construing insurance policies, I have not found it easy to settle on a conclusion. For much of the time I have been inclined to the same view as that of Lord Justice Males. But I am ultimately persuaded that Lord Justice Popplewell's is the better view and that the appeal should be allowed for the reasons he gives.

56. Since we are concerned with the construction of one particular policy, I do not intend to give my reasons at any length but will shortly state why I have come to this view.

57. I too agree with the various points set out by Lord Justice Males at [65] below. And I agree that the essential question, as he says at [68] below, is whether Exclusion 9 as a whole would demonstrate to the reasonable reader to whom it is addressed an intention to displace the general rule. I am inclined to think that he is also justified in saying (in the same paragraph) that it is going too far to say that the presumption in favour of reading the opening words as referring to damage proximately caused by pollution or contamination can *only* be displaced if the write-back provisions are inconsistent, and cannot be reconciled, with that meaning, and that the intention to displace the general rule may be demonstrated, even if it is possible to give some meaning to the write-back provisions which does not render them redundant. In *FCA v Arch*, the way in which Lords Hamblen and Leggatt JJSC expressed it (at [163]) was that "The requirement of "proximate" causation is based on the presumed intention of the contracting parties … But it is a

presumption capable of being displaced if, on its proper interpretation, the policy provides for some other connection between loss and the occurrence of an insured peril." That seems to me to allow for the general rule to be displaced whenever it appears on the proper interpretation of the policy to be what the parties intended.

58. The question however is whether paragraphs [a] and [b] do require such an interpretation here. I accept that they have to be read with the list of Specified Events, as almost the only role of this list is to provide content to these paragraphs in Exclusion 9. (We were told after the hearing that it does have one other role which is in connection with General Exclusion 9A which excludes damage caused by a computer failing to recognise a date correctly, with a write-back for damage which results from a Specified Event, but I do not find this of any assistance to the present question). Most of the Specified Events are by their very nature likely to be relevant only to paragraph [a] rather than [b]: one can envisage for example lightning or earthquake resulting in pollution or contamination (for example if a fuel tank was damaged), but it is not really possible to imagine a case where lightning or earthquake results from pollution or contamination. The same is no doubt true of such miscellaneous events as articles dropped from aircraft, riot, civil commotion, and malicious persons other than thieves. Indeed the only Specified Events which one might think of as potentially likely to result from pollution or contamination are perhaps fire and explosion.

59. In these circumstances I find it helpful to consider the question of construction by imagining a particular case. Suppose there were an earthquake which damaged a sewage pipe in the vicinity which then contaminated the petrol station. Lord Justice Males says that in such a case the earthquake would be the proximate cause, and that there is overall very limited scope to the write-back provisions (see [69] below). I agree that the earthquake would be at least a proximate cause. But I think it possible that the resulting spill of sewage into the petrol station could also be regarded as *a* proximate cause of the resulting pollution damage, or at any rate that this might be thought to be an argument that the insurer might otherwise seek to deploy and hence deny cover (under the *Wayne Tank* principle). Seen in this light the effect of paragraph [a] is to ensure that even if the escape of sewage might be capable of being characterised as a proximate cause, it does not matter. There is still cover provided that the escape of sewage itself results from a Specified Event, in this case an earthquake. That seems to me to make perfectly good sense. The reasonable reader of the policy (being conscientious but not pedantic) would on this view understand that provided that the pollution or contamination itself resulted from a Specified Event, one would not even need to ask the question whether the pollution or contamination was a proximate cause. There would still be cover even if it were.

60. Once one sees paragraph [a] in this light, paragraph [b] also to my mind makes sense. In practical terms most Specified Events, as already said, are most unlikely to result from pollution or contamination, the only real contenders being fire or explosion. If there were an escape of fuel which caused a fire which burned down the petrol station, I think the reasonable reader would expect the fire to be regarded as a proximate cause of the resulting damage. What paragraph [b] does in such a case is prevent the argument being run that because the fire was caused by an escape of fuel, that was pollution or contamination that was itself a proximate cause of the damage and hence that cover was denied by Exclusion 9. Again it makes it unnecessary to ask the question whether the pollution was also a proximate cause of the damage, because there would be cover even if it were.

61. Since practical content can in this way be given to paragraphs [a] and [b] without having to rewrite the meaning of "caused by" to include non-proximate causes, I have come to the

view that on the true interpretation of Exclusion 9 there is insufficient to displace the presumption that "Damage caused by pollution or contamination" refers only to the case of proximate causation.

62. I add as a footnote that although I agree that provisions in other sections of the policy, being optional, are not to be taken into account on the question of construction of Exclusion 9, we were referred by Mr Davidson in a post-hearing submission to the fact that General Exclusion 9A (the computer date recognition exclusion) does itself use the expression "directly or indirectly caused by". This provision as I understand it does apply to the relevant section of the policy and might be thought to provide support for the view I have preferred on the basis that it shows that the drafter knew how to extend causation to non-proximate causation when required. But we have heard no opposing submissions on the point and it is unnecessary to place any reliance on it.

63. For the reasons I have sought to express I therefore agree with Lord Justice Popplewell that the appeal should be allowed.

Lord Justice Males :

64. I agree with much of Lord Justice Popplewell's judgment, including his approach to the issue of construction arising in this case, but (with respect and some hesitation) I have reached a different conclusion on the particular wording of Exclusion 9.

65. Thus I agree that:

(1) The policy is to be interpreted objectively, as it would reasonably be understood by an ordinary policyholder, in this case the owner of a petrol garage, albeit with the benefit of advice from a broker familiar with basic principles of insurance law.

(2) One such principle is that an insurer is only liable for loss proximately caused by a peril covered by the policy, from which it follows that policy language such as "caused by" must generally be taken to refer to the proximate (or efficient) cause of the loss.

(3) However, that principle is based on the presumed intention of the contracting parties, and is therefore subject to contrary agreement.

(4) On the facts assumed for the purpose of this appeal, the proximate or efficient cause of the damage to property in this case was the penetration of the fuel pipe by a sharp object under pressure from the weight of the concrete slab under the forecourt.

(5) Accordingly the critical issue for decision is whether the opening words of Exclusion 9 (the exclusion of "Damage caused by pollution or contamination") refer only to the proximate cause of the damage; if so, the appeal must be allowed; if not, it must be dismissed.

(6) That question must be answered without any presumption that Exclusion 9 is an exemption clause which requires to be narrowly construed (rather, it defines the scope of the cover), but giving proper weight to the general rule that causation language in an insurance policy refers to the proximate cause.

(7) Cases such as *Legg v Sterte Garage Ltd* [2016] EWCA Civ 97, [2016] Lloyd's Rep IR 390 and *Leeds Beckett University v Travelers Insurance Company Ltd* [2017] EWHC 558 (TCC), [2017] Lloyd's Rep IR 417 provide no real assistance in answering the critical issue.

(8) Exclusion 9 consists of two parts, the exclusion of damage caused by pollution or contamination, followed by the write-back of cover in the two cases dealt with in paragraphs (a) and (b), which it is necessary to construe as a whole.

66. My reasons for concluding that the opening words of Exclusion 9 are not limited to damage proximately caused by pollution or contamination are as follows.

67. First, it is necessary to construe Exclusion 9 as a whole, including the "write-back" provisions, in order to arrive at the meaning of the opening exclusion of cover. While I agree that, if the opening exclusion were taken on its own, it would be clear that the exclusion was of damage proximately caused by pollution or contamination (cf. [36] above), that is because there would then be nothing to displace the general rule. But the exclusionary wording does not stand on its own. It must be considered together with the write-back of cover which immediately follows, so that Exclusion 9 is considered as a whole.

68. Second, considering the Exclusion as a whole, it is going too far in my view to say that the presumption in favour of reading the opening words as referring to damage proximately caused by pollution or contamination can *only* be displaced if the write-back provisions are inconsistent, and cannot be reconciled, with that meaning (cf. [41] above). Rather, the question is whether Exclusion 9 as a whole would demonstrate to the reasonable reader to whom it is addressed an intention to displace the general rule. That intention may be demonstrated, even if it is possible to give some meaning to the write-back provisions which does not render them redundant.

69. On that point, in agreement with Lord Justice Popplewell at [42] and [43], I would accept that some meaning can be given to the write-back provisions even if the opening exclusion of "Damage caused by pollution or contamination" is to be read as referring only to damage proximately so caused. On that reading, paragraph (a) writes back cover for damage proximately caused by pollution or contamination when that pollution or contamination results from (i.e. is caused by) a Specified Event which is not itself a proximate cause of the damage. But the nature of the Specified Events is such that this is only rarely likely to apply. For the most part the Specified Event would itself be the proximate cause of the damage in question. Paragraph (b) then writes back cover for damage caused by pollution or contamination, but only when both the pollution or contamination and the Specified Event are proximate causes of the damage. However, while this may be a possible reading of Exclusion 9, it affords very limited scope to the write-back provisions and does not seem to me to be a probable reading, or (in other words) to be what would reasonably be understood by the policyholder to whom the clause is addressed.

70. While I recognise the force of the point (at [46]) as a matter of logic that the list of Specified Events cannot aid construction of the exclusionary wording in Exclusion 9, because the write-back provisions are only engaged if the exclusionary wording applies, language is not always used (even in insurance policies) with full logical rigour. In my judgment the ordinary reader of the policy would be assisted in interpreting the exclusionary wording by the write-back provisions, including the list of Specified Events, and would draw three

important conclusions from them. The first is that "escape of water from any tank apparatus or pipe" is covered as a Specified Event, but that escape of fuel (which I agree is an obvious risk for the owner of a petrol garage) is not. That suggests a deliberate contrast. Second, fire and explosion are also covered. These are the obvious harmful consequences which may result from an escape of fuel, about which a policyholder would rightly be concerned. Accordingly the fact that damage caused by pollution or contamination is excluded is less significant commercially than would otherwise be the case. The third conclusion to be drawn from the write-back provisions is that, when they apply, it does not matter whether damage is caused by pollution or contamination which itself results from a Specified Event (paragraph (a)) or the Specified Event is the result of pollution or contamination (paragraph (b)). This suggests, to my mind, that the write-back provisions are *not* concerned with the proximate cause of the damage. Rather, their purpose is to ensure that, where there is a Specified Event which either causes or is caused by pollution or contamination, there will be cover regardless of whether the Specified Event or the pollution/contamination is the proximate cause of the damage.

71. This third conclusion suggests in turn that the words "caused by" in the write-back provisions ("We will pay for Damage to the Property Insured not otherwise excluded, caused by: …") do not (or do not necessarily) mean "proximately caused by". If that is so, the principle that where parties use the same language within the same clause, it is presumed that they mean the same thing in each case (cf. [42] above), would suggest that the same applies to the use of the words "caused by" in the opening exclusionary wording.

72. Third, in my view the meaning of Exclusion 9 has to be derived from the terms of Section 1 of the policy, without regard to the language of other clauses contained in other Sections of the policy. That is because an insured is entitled to select cover under some but not all of the Sections. As Lord Justice Popplewell points out at [39], the meaning of Exclusion 9 must be the same for an insured who has not selected cover under Sections 2 and 3 as for one, like the claimant in this case, who has. The reasonable policyholder who has selected cover under Section 1 but not Sections 2 or 3, and who is seeking to understand the cover which he has purchased, could not be expected to scrutinise Sections 2 or 3 in search of contrasting wording which might or might not throw light on the meaning of clauses contained in Section 1. Accordingly I do not accept that any reliance can be placed on the use of the term "directly or indirectly caused by pollution or contamination" in Exclusion 7 of Section 2 and Exclusion 8 of Section 3 (cf. [37] and [38] above). I acknowledge that there may be a point to be made that the words "directly or indirectly caused by" are also used in General Exclusion 9A, as Lord Justice Nugee points out at [62] above. However, this was not a point made at the hearing. I think it fair, therefore, to place no reliance on it.

73. Finally, while I have so far been considering the meaning of Exclusion 9 by reference to textual analysis of the particular language used, without (I hope) trespassing too far into the world of the "pedantic lawyer" deprecated by the Supreme Court in *FCA v Arch* at [77], it is striking that it was only in this court, and even then only in oral submissions, that the argument clearly emerged that "Damage caused by pollution or contamination" meant damage proximately so caused. Until then BLG's case was that the only cause of the damage was the penetration of the pipe; that the damage *consisted of* but was not *caused by* pollution or contamination; and that the exclusion of pollution and contamination referred only to environmental contamination of sub soils and groundwaters. It does not appear to have occurred to BLG, or to its legal team or the judge (whom I would count as non-pedantic lawyers), to contend that the exclusion was limited to a situation where

pollution or contamination was the proximate cause of the damage. Standing back from the detail, to my mind that is powerful confirmation that the judge's construction accorded with the natural meaning of Exclusion 9 as that would be objectively understood by an ordinary policyholder, suitably advised by a broker or lawyer familiar with basic principles of insurance law.

74. There can in my view be no doubt that, as a matter of ordinary language, it makes perfect sense to say that the damage in this case was "caused by pollution or contamination". Although the pollution and contamination was not the proximate cause of the damage as that term would be used by an insurance lawyer or broker, it was the pollution and contamination which resulted from the penetration of the fuel pipe which caused the damage to the property and meant that the business had to be shut down.

75. For these reasons, I would hold that the terms of Exclusion 9 do sufficiently demonstrate an intention to displace the general rule that causation language must be taken to refer to the proximate cause of damage, and that the damage in this case was caused by pollution or contamination within the meaning of the Exclusion. I would therefore dismiss the appeal. However, as my Lords take a different view, the appeal will be allowed.