

NEW ZEALAND INSURANCE LAW ASSOCIATION ANNUAL CONFERENCE

3 NOVEMBER 2000 - CASE NOTES

1.0 *Tevcorp Holdings Ltd v QBE Insurance (International) Ltd*

1.1 The claim involved 3 Dunedin buildings known as Taunton Mews. The three buildings were known as blocks A, B and C and had been erected in 1981. The Plaintiff company, Tevcorp owned blocks B and C.

1.2 Block B had recently been effected by subsidence and as a result Tevcorp made a claim against QBE.

1.3 QBE declined Tevcorp's claim on the basis that the exclusion relating to faulty design, workmanship etc applied.

1.4 Two issues required determination in the High Court. These were:

1. Whether the cause of the subsidence was within the exceptions specified in exception 7 of the policy;
2. If exception 7 did apply, was the ground floor slab part of the defective work or part of the consequential loss.

1.5 Exclusion 7 of the policy stated:

"In respect of the property or part immediately affected, this Section does not insure:-

- (1) the cost of repairing or replacing faulty materials;
- (2) the cost of putting right faulty workmanship;
- (3) the cost of putting right work performed to a faulty or defective design plan or design specification;

- (4) the cost of putting right faulty or defective work where the fault or defect results from an error or omission in design plan or design specification;

but this exclusion does not apply to any loss or damage occurring as a result of the faulty or defective materials, workmanship, or work”.

- 1.6 QBE maintained that the cause of the subsidence was the faulty workmanship or the faulty design in connection with the foundation beams and concrete floor slab for block B.

- 1.7 Justice Young considered the key phrases in exclusion 7 and stated:

“The courts have tended to treat “faulty workmanship” as, in effect, synonymous with “negligent workmanship” but “faulty design” as meaning a design which “will not answer the purpose for which it was intended” irrespective of whether the designer was guilty of negligence. The cases proceed on the basis that when the work “faulty” is applied to a human process (eg workmanship) it implies fault on the part of the workman, ie negligence. Where, however, it is applied to something which is inanimate (eg a design) it instead has the connotation of “defective”. This is perhaps most clearly explained in the judgment of Windmeyer J in Manufacturers Mutual Insurance Ltd v Queensland Government Railways (1968) 118 CLR 314 at 323. The Manufacturers Mutual Insurance approach has been followed in New Zealand, see for instance Barnaby v South British Insurance Co (1980) 1 ANZ Insurance Cases 60-401”.

- 1.8 He also said that there are sometimes difficulties in distinguishing between design and workmanship. He referred here to Legal and General Assurance Society Ltd v Commonwealth of Australia (1985) 3 ANZ Insurance Cases 60-621 and Beavers v Westhaven Boatyard Ltd (1987) 4 ANZ Insurance Cases 60-809.

- 1.9 Justice Young found he could see no reason to conclude with this policy that the concepts of “faulty workmanship” and “faulty design” are mutually exclusive. He found that there was “*faulty or defective design plan or design specification*” in relation to the mass site concrete as built on the north side of block B. He further found that there was an “*error*

or omission in design plan or design specification". He went on to state:

"A design decision was required as to what was to sit under the foundation beams. This was quintessentially a design decision. As well, it follows from what I have said that the design was "faulty or defective" and that there was an "error or omission" in it".

1.10 Justice Young also found that the construction of the floor slab over the top rubble could be regarded as both faulty workmanship and as work performed to a faulty or defective design plan or design specification. For these purposes, the design plan or specification which is faulty or defective was not the plan as prepared by the engineer for rather the design plan formulated on site by the builder, probably in conjunction with the engineer, in terms of which it was decided that the floor slab would be placed over the rubble. In any event, it was faulty workmanship (i.e negligence) to lay the sand directly on top of the rubble as it was always likely that this sand would migrate into voids in the rubble thus leaving the floor slab unsupported.

1.11 On the basis of the above judgment was entered for QBE.

Tevcorp Holdings Ltd v QBE Insurance (International) Ltd (unreported, High Court, Dunedin, CP 3/00, 8 September 2000, Young J).

2.0 Rogers v HIH

2.1 It is perhaps a little unusual to report on a case where one acted for an insurer and was unsuccessful (the insurer did win in the High Court but then lost in the Court of Appeal). However, *Rogers v HIH* is a good example of some of the difficulties insurers face.

2.2 Mr Rogers was the owner of a Ferrari motor vehicle insured with HIH. On 30 March 1999 he wrote it off while driving down the back straight of the Pukekohe racetrack. He was going approximately 200kms per hour when his brakes faded and he crashed.

2.3 The policy contained the following exclusion:

Cover is not available while the car is being used

“Either practising for or taking part in any race, time trial, rally, sprint or drag race, or similar motor sport event, demonstration or test”.

2.4 HIH contended that the insured was involved in a “similar motor sport event, demonstration, or test”.

2.5 At the commencement of the day a programme was handed out to the participants which described the event as a “Ferrari Test Day”. The programme included the opening words:

“We hope that you enjoy this opportunity to test your skills on the track as our guests”.

2.6 The day included a number of track sessions. The third session involved approximately 10 laps of the circuit with the cars going down the back straight at speeds of between 140 and 170 kms per hour. The fourth session again involved approximately 10 laps of the circuit. During this session cars were going down the back straight at speeds of between 180 and 200kms per hour.

2.7 Mr Rogers argued that the wording of the policy relied on by HIH should be construed ejusdem generis with preceding words i.e as the preceding words involved competitive events, the words relied upon by HIH should be similarly construed. HIH on the other hand argued that applying ejusdem generis rule saw the common elements were high speed and increased risk. This was on the basis that “practising” for the events mentioned in the exclusion and taking part in a “demonstration or test” did not necessarily involve competition.

2.8 Mr Rogers also argued that the exclusion was ambiguous and relied on the contra proferentum rule.

2.9 The High Court was satisfied that the exclusion was not ambiguous and that by applying the ejusdem generis rule the common elements were high speed and high risk. Judgment was therefore entered for HIH.

- 2.10 Mr Rogers appealed to the Court of Appeal. It was clear from the outset that the Court of Appeal did not agree with the High Court and it overturned the High Court judgment in every respect.
- 2.11 It considered that as a matter of ordinary language the word “motor sport” qualified each of the succeeding words namely “event, demonstration, or test”. Further if there was any ambiguity, the contra proferentum rule produced the same conclusion.
- 2.12 It did not consider that the events of the day were a “demonstration” or a “test”, let alone a “motor sport demonstration or test”. It considered that the day was advanced driving instruction and no more.
- 2.13 It further said that apply the ejusdem generis rule clearly required an element of competition. It said all proceeding events mentioned namely racing, time trials, rallies and others are competitive and that was an essential requirement. It further says that that includes practising for a competitive activity.
- 2.14 It concluded:

“What the insurer needed to do was to word the exclusion so as to shut out activity which while not sporting competition, and not reckless, posed heightened risk. The insurer did not go so far and can not strain this policy wording to do so.”

- 2.15 In particular this case illustrates two points namely:
1. Insurers popularity in the Courts has not increased. As mentioned above the day itself was promoted as a “Ferrari Test Day”. It involved the cars going at speeds of up to 200 kms an hour down the back straight of Pukekohe race track. Notwithstanding this the Court of Appeal still considered that it was simply advanced driving instruction;
 2. If an insurer wishes to exclude a particular risk it must do so very clearly. Any hint of ambiguity will be pounced on by the Courts. For example, here it is difficult to see what a “similar motor sport test” covers in the context of the

exclusion. A more sensible interpretation is that “motor sport event”, “demonstration”, “test” stand alone. The Court of Appeal however was not prepared to accept this.

Rogers v HIH Casualty & General Insurance (NZ) Ltd (unreported, Court of Appeal CA281/99, 11 April 2000, McGeechan J).

Frank Rose
Partner

KEEGAN ALEXANDER
TEDCASTLE & FRIEDLANDER
Barristers & Solicitors
P O Box 999
AUCKLAND

TELE: 303 1829
FAX: 307 2622
Email: frose@keegan.co.nz

fwr\doc\case note