BRIEFING NOTE

Business Interruption Insurance Claims – Understanding the Doctrine of Proximate Cause and the Principles of Concurrent Causes

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Introduction

Business interruption insurance is complex, both in terms of identifying the obligation to indemnify (that is the trigger for cover) as well as quantifying the amount of the indemnity (that is the covered financial loss). In this briefing note, we look at the obligation to indemnify. That obligation is triggered by establishing that the business interruption resulted from property damage that is insured and not excluded. Frequently, insurance policies will exclude property damage resulting from certain excluded perils. So to determine whether the damage is insured or excluded, how do we identify the peril or perils that caused the loss?

Doctrine of Proximate Cause

Many policies stipulate that a loss would be excluded only if it results 'solely', 'exclusively' or 'directly' from an excluded peril. Proceeding on that basis, the function of the Court is to identify the proximate cause of the damage. Whilst this may seem relatively simple, determining the proximate cause is not straightforward. Identifying the proximate cause is not as simple as looking at the last event that occurred immediately before the loss happened.

It is a complex exercise hinged on a case-by-case analysis of the factual matrix. That was highlighted in the case of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 in which the House of Lords was divided 3:2 in identifying what, by reference to common sense, was the dominant cause of the loss of a vessel after it was torpedoed.

Generally, the Courts have not been willing to oust the doctrine of proximate cause even if such express words such as "directly or indirectly", "arising out of" or "in connection with" are used to expand the search for any peril that causes or contributes to the damage: see *Vastgrand Industrial Ltd v Hong Kong and Shanghai Insurance Co Ltd* [2002] HKCU 475 and *Lasermax Engineering Pty Ltd v QBE Insurance (Australia) Ltd* [2005] NSWCA 66.

However, the case law is not entirely consistent. All or a combination of such phrases have been accepted as permitting the Court to look beyond the proximate or dominant cause of the loss for perils that played some part, but not necessarily the dominant part, in the loss: see *Coxe v Employers' Liability Insurance Corporation* [1916] 2 KB 629.

Concurrent Causes

In some cases, and not for the want of trying, it will not be possible to identify a single proximate cause of the loss. Although the Courts will always look for the dominant cause, it is now recognised that a loss may have more than one proximate cause: see *Hagedorn v Whitmore* [1816] 1 Stark 157. And this is where it gets even more complex.

First, there is the situation in which two perils of equal efficiency cause the loss. In other words, each peril acting on its own would have caused, or been capable of causing, the loss. Here, the doctrine of concurrent causes comes into play: see *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2003] Lloyd's Report LR 262.

The difficulty relating to concurrent causes arises when not all of the concurrent causes are insured perils. For example, where there are two concurrent causes, one of which is insured and the other is not insured, what would be the liability of the insurer?

- Where one peril is insured and the other is uninsured, the cover holder is permitted to recover on the basis that the loss was the result of the operation of the insured peril: see *Reischer v Borwick* [1894] 2 QB 584 and *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Report 32.

- Where one peril is insured and the other is excluded, the position is different. The excluded peril will prevail over the insured peril: see *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp* [1974] QB 57 and *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] 2 Lloyd's Report 604.

Second, there is the situation in which two perils, each of which would have been unable to cause the loss, come together or combine to cause the loss. Here we have interdependent concurrent causes of the loss. The first difficulty is in identifying that the causes are truly interdependent. It is far more likely that one cause is the dominant cause whereas the other is a contributory cause. The second difficulty is that the case law is inconsistent as to the application of cover. That is because the case law is fact specific. In other words, whether damage that follows Peril B which is occasioned by the happening of Peril A results from Peril B (which is covered) or Peril A (which is excluded) or a combination of the two will turn on the facts of each case. Hence whether that damage is covered or not is also fact specific.

How We May Assist

Business interruption insurance coverage is a complex area of law. It is regrettable that despite the availability of such coverage, there has been insufficient literature to provide guidance to cover holders on the legal principles surrounding the obligation to indemnify. Particularly, those on the doctrine of proximate loss and identification of the cause (or concurrent causes) of loss, which are crucial to determining the insurer's liability to indemnify.

As insurance practitioners with an interest in advancing the claims of cover holders, we seek to provide cover holders with more guidance on insurance claims. Our insurance practitioners assist cover holders with identifying grounds of claim, providing claim strategy, assisting with claim preparation and submission, dispute resolution of claim (whether via arbitration, mediation or settlement), as well as negotiating policy renewal pursuant to a claim.

To find out how we may be of assistance to you, feel free to contact any member of our team.

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