Deliberately taking a risk can still be an 'accident'

***Matton Developments Pty Ltd v CGU Insurance Limited* [2016] QCA 208**

31 AUGUST 2016

WHY IS IT RELEVANT

The Court of Appeal of Queensland's decision in ***Matton Developments Pty Ltd v CGU Insurance Limited*** [2016] QCA 208 is of significance to both insurers and policy holders in providing further guidance on what constitutes "accidental damage", and how the courts are reluctant to interpret additional benefits provisions and exclusion clauses against the policy holder where the drafting does not contain limiting words. The Court found that the damage and the action that caused the damage must both have been expected to not be covered by the policy.

In this case, the Court found in favour of an insured when the materialisation of a known and appreciable risk was considered to be "accidental damage" under a Contractors Plant and Machinery policy of insurance.

THE FACTS

CGU, the respondent insurer, provided Contractors Plant and Machinery insurance in respect of a 100 tonne Telescopic Crawler Crane (**the crane**) owned by Matton Developments Pty Ltd (**Matton**), the appellant.

On 1 February 2009, the crane was used to lift a concrete tilt panel weighing about 39 tonnes. In the course of the lift, the boom of the crane collapsed and the crane was damaged beyond economical repair.

The concrete panel itself did not overload the crane. However in order to support that load, the crane needed to be operated on a gradient no greater than 0.3 degrees. The area the crane needed to access was not level. The crane operator, Mr Hitaua, attempted to level the ground by spreading unreinforced concrete rubble in a ramp.

At the time of the incident the crane was being operated on a 7 degree slope, in contravention of Australian standards and manufacturer's guidelines. CGU refused indemnity under the policy stating that the damage was not accidental, and therefore not covered. Importantly, Hitaua expected the weight of the crane and concrete panel to compress the concrete rubble as the crane drove over it. That did not occur, and the crane became overloaded due to the change in force created by the 7 degree slope that remained.

Matton sought cover under the policy pursuant to an additional benefits clause for *"Accidental Overload"*.

THE POLICY

The *"Accidental Overload"* additional benefits clause provided:

> *"We will pay for insured damage caused by or resulting from accidental overloading which is non-deliberate and clearly unintentional.*
>
> *The onus rests with you to substantiate any claims relating to accidental overload."*

The expression *"Insured Damage"* was defined to mean:

> *"Accidental sudden and unforeseen physical loss of or damage to a machine which occurs during the period of insurance and requires immediate repair or replacement to allow continuation of use."*

The case turned on whether the damage that was caused was an *"accident"*.

FIRST INSTANCE

At first instance, Justice Flanagan of the Supreme Court of Queensland found that Matton was not entitled to indemnity under the Accidental Overload clause. His Honour found that:

1. the structural overloading that occurred was not *"overloading"* within the meaning of that term in the *"Accidental Overload"* clause;

2. the overloading was not *"accidental"*; and

3. the damage to the crane was not *"accidental, sudden and unforeseen"*.

The trial judge held that "overload" in the policy should be interpreted separately from the circumstances of operation - that is, to fall within the scope of cover, the crane needed to be overloaded in its normal operating conditions, as opposed to being overloaded because it was on a slope.

In finding that the collapse of the boom was not accidental, the trial judge identified three factors which supported the conclusion:

1. Hitaua knew that the crane should be operated on level ground and that if it was not operated on level ground there was a risk that the boom would fail;
2. Hitaua disregarded the advice of a colleague, Mr Sprecak, that the "ramp" which had been constructed was too high; and
3. within the 12 seconds during which the crane was crawling up the ramp, Hitaua *"must have appreciated"* that *"the rubble was not compressing as he expected and … from looking at the spirit level, the crane was not being operated on level ground".*

Matton appealed the decision on numerous grounds, but primarily argued that the trial judge erred in characterising the facts as a deliberate courting of the risk such that the overloading and consequential damage was not accidental.

The case turned on whether the damage that was caused was an *"accident"*,

APPEAL

The Court of Appeal, in a 2:1 majority (Fraser JA dissenting), allowed Matton's appeal, set aside the judgment of the trial judge and ordered that CGU indemnify Matton's loss.

The Court of Appeal unanimously held that *"overload"* within the policy included structural overloading caused by operation of the crane outside manufacturer's guidelines and Australian Standards. This was because the *"Accidental Overload"* clause did not contain limiting words and *"overload"* was given its natural meaning.

President McMurdo and Morrison JA both noted that for Matton to be deprived of the benefit of the accidental overload clause, both the overloading itself and the resultant damage must have been expected. Citing, ***Fenton v Thorley & Co Ltd*** [1903] AC 443, 448, President McMurdo concluded the overloading and damage would be considered accidental if each could be categorised as "*an unlooked-for mishap or an untoward event which is not expected or designed"*.

The trial judge and the Court of Appeal accepted that the method of operation (laying the concrete rubble ramp in the expectation it would compress) was standard in the industry and an acceptable method of accessing the relevant area. This itself was not inherently hazardous.

The hazard (and incident) occurred because the concrete did not compress as expected. Hitaua only drove along the ramp for 12 seconds before the boom collapse occurred, and according to the

majority, he simply did not have enough time to realise that the rubble did not compress as hoped. This was not equivalent to deliberately courting the risk or acting recklessly in respect of the risk.

McMurdo P concluded that whilst Hitaua deliberately courted a risk, he did not invite the disaster which ensued.

Fraser JA, in dissent, concluded that Hitaua *"must have known for an appreciable period"* that he was operating on an incline and it was dangerous to do so. The trial judge made findings on similar grounds.

Otherwise applicable exclusions within the policy (for example, excluding damage where a machine was being used contrary to manufacturer's guidelines) were read down heavily against the insurer's interests. If such an approach was not adopted, the *"Accidental Overload"* additional benefits clause would have been illusory and have no effect.

IMPLICATIONS

The Court of Appeal's decision highlights that the conduct of an insured, while on its face reckless, can still be found to be "accidental, sudden and unforeseen". There is a point at which a risk taken by an insured is sufficient that its consequences are no longer "accidental", but it can be extremely difficult to prove the point at which that occurs.

Four judges (including the trial judge) considered the matter and were evenly split on the issue. This demonstrates how fine the balance can be when interpreting the meaning of "accident" within a policy in the context of a risk deliberately taken by an insured.

Further, while exclusion clauses may assist insurers in limiting liability, specific coverage and additional benefits clauses will take priority over potentially applicable exclusions to ensure that all coverage clauses have a role to play. Where there is any doubt in the interpretation, the courts will be reluctant to adopt an outcome which is against the interests of the policy holder.

It remains to be seen whether CGU will seek special leave to appeal this decision to the High Court.

For further information please contact: **www.wottonkearney.com.au**

Paul Spezza
PARTNER
Brisbane
T: +61 7 3236 8701
Paul.Spezza@wottonkearney.com.au

Scott Macoun
SENIOR ASSOCIATE
Brisbane Office
T: +61 7 3236 8713
Scott.Macoun@wottonkearney.com.au

Bree Smith
ASSOCIATE
Brisbane Office
T: +61 7 3236 8709
Bree.Smith@wottonkearney.com.au