[2004] QSC 150

State Reporting Bureau

Queensland Government
Department of Justice and Attorney-General

Transcript of Proceedings

REVISED COPIES ISSUED
State Reporting Bureau
Date: 7 May, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No BS 9534 of 2003

CENTURY DRILLING LIMITED (ACN 002 975 439)	First Plaintiff
and	
CENTURY ENERGY SERVICES PTY LIMITED (ACN 069 875 716)	Second Plaintiff
and	
GERLING AUSTRALIA INSURANCE COMPANY PTY LIMITED (ACN 069 085 196)	Defendant

BRISBANE

..DATE 30/04/2004

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application to strike out certain paragraphs of the second further amended defence in this matter pursuant to rule 171 of the Uniform Civil Procedure Rules 1999.

The first paragraph attacked is paragraph 5C.

> "5. In answer to paragraph 6 of the claim the defendant:
>
> ...
>
> (c) if Century Drilling or alternatively Century Energy was the owner of Rig 25 (which is not admitted), says Rig 25 had been misappropriated and the plaintiffs denied possession of Rig 25 prior to the fire damage with the result that:
>
> (i) the plaintiffs could suffer no further loss as a result of the fire damage;
>
> (ii) alternatively, the loss of the plaintiffs (if any) has to be assessed by taking into account the prospects, immediately prior to the fire damage, of the plaintiffs recovering possession of Rig 25, which prospects were poor;
>
> Particulars of Prospects
>
> (aa) the defendant relies upon the matters in paragraph 20, 22-27 and 29-36 of this pleading;
>
> (bb) the defendant will provide further particulars following further interlocutory steps in this matter, including discovery and possibly interrogatories;"

The paragraph must be read in its context. The claim to which it responds is a claim for indemnity pursuant to an insurance policy in respect of fire damage to a drilling rig that occurred at an exploration well in Indonesia on 25 February 2002 according to the pleadings.

The policy, itself, insures against loss arising from any insured events which occur during the period of insurance. It is not in issue at the moment that the fire alleged in the statement of claim occurred during the period of insurance. But paragraph 5(c) of the second further amended defence seeks to answer the claim for the loss described in paragraph 6 of the amended statement of claim.

On its face it appears to do so on the hypothetical basis that the plaintiffs could suffer no further loss as a result of the fire damage because the rig had been misappropriated, or, alternatively, its loss had to be assessed by taking into account the prospects immediately prior to the fire damage of the plaintiffs recovering possession, which prospects are alleged to have been poor.

This has to be seen in the context where it is a deemed admitted fact that the rig had been recovered and that the claim is one for repairs to it in its recovered state. The recovery, at least, is the subject of a deemed admission.

In that context, it does not seem to me that this pleading can withstand proper analysis when there remains no uncertainty associated with the issue, whether or not the rig had been recovered.

Mr Bain QC, for the defendant, who was not the author of the pleading attacked, submitted that the plaintiff had lost nothing of worth during the period of the policy because

during that period the property remained with the persons alleged to have converted or misappropriated it and his argument was based on the policy wording that it was therefore not a loss arising from any insured events which occurred during the period of insurance.

That does not seem to me to be the proper construction of the policy wording which speaks of "loss arising from any insured events which occur during the period of insurance."

Here the insured event is the fire which did occur during the period of insurance and the loss arising is said to be the repairs which, I would have thought, were losses which could arise from the insured event, but outside the period of insurance. That appears to have been the approach adopted in the authorities, see in particular, Re Mining Technologies Australia Pty Ltd [1999] 1 QdR 60, 64, 70, 76-77 per McPherson JA.

Accordingly, I would strike out paragraph 5(c). That has the natural consequence that paragraphs 8(d)(i) and 8(d)(ii)(cc) are also struck out.

Paragraph 10 of the defence is the next paragraph the subject of an attack. An earlier pleading in a partly similar form was struck out by my order in an earlier application in this matter on 1 March 2004. That paragraph has been repeated in the new paragraph 10, but supplemented with further

allegations which seek to invoke an exclusion in the policy in clause 3(b) which provides:

> "that the policy does not insure misappropriation, secretion, conversion, infidelity or any dishonest act on the part of the insured, his or their employees or agents, or others to whom the property may be entrusted..."

Paragraph 10 which is based on that exclusion reads as follows:

> "The claim by the plaintiffs for indemnity pursuant to the contract of insurance is excluded by clause 3(b) of the policy in the events which have occurred:
>
> (a) as the plaintiffs had lost Rig 25 by about *April 2001*, alternatively prior to the commencement of the contract of insurance, alternatively prior to *25 February 2002*, as a result of misappropriation, secretion, conversion, infidelity or dishonest act by a party to whom the property was entrusted, namely, OBD (**"the misappropriation"**).
>
> **Particulars**
>
> See paragraphs 13 to 18 and 20 to 39 below
>
> (b) the misappropriation occurred prior to the fire;
>
> (c) the fire damage is a subset of loss excluded by clause 3(b) of the policy;
>
> (d) on the proper construction of clause 3(b) of the policy, all losses to property the subject of misappropriation, secretion, conversion, infidelity or dishonest act by a party to whom the property was entrusted, after such misappropriation etc are excluded;
>
> (e) but for the misappropriation the fire damage would not have occurred; and
>
> (f) the fire damage occurred at a site controlled by OBD to where Rig 25 had been moved without the permission of the plaintiffs.

The argument advanced by Mr McKenna SC for the plaintiff in respect of this paragraph of the second further amended defence is that it impermissibly asserts a causative link between the fire, the subject of the claim, and the misappropriation or conversion described in the exclusion clause.

He concedes that, for example, if the pleaders had alleged facts leading to the conclusion that the fire damage was the proximate cause of the misappropriation, such a plea may be sustainable.

In making that concession he referred me to a recent decision of the House of Lords in Kuwait Airways Corporation v. Kuwait Insurance Co SAK [1999] 1 Lloyds Law Reports 803 at 815, where Lord Hobhouse said:

> "It is not disputed in the present case, and it is the law, that where there are a number of perils covered by the policy it suffices for the assured to prove that his loss was proximately caused by any one of the perils covered. Similarly, if there is an exclusion, the assured is not entitled to recover under the policy if the accepted peril was a proximate cause of the loss."

Mr Bain invited me to read the pleading in the context of the balance of the defence and also of the amended statement of claim. In doing so it seems to me that all that one can conclude is that there has been a conversion or

misappropriation of the property, and that there has been fire damage.

It is true that paragraph 10 (e) pleads that "but for the misappropriation the fire damage would not have occurred", but Mr McKenna SC relies upon a large body of authority to the effect that reliance on exclusion clauses in policies of this nature which depend upon a causative link between the loss claimed and the exclusion relied upon has made it clear that a mere "but for" test or a causa sine qua non relationship does not enliven the exclusion.

In particular he drew my attention to a decision of the Manitoba Court of Appeal in Walker v. Blakeley (1968) 67 DLR (2d) 613. That was a decision where the insured's automobile was destroyed in a head-on collision with another vehicle while being driven by the insured's adopted son without his consent and, in fact, in circumstances where it had been stolen.

The Court took the view that, where all that was shown was that the automobile collided with another vehicle, it could not be said that the theft, as opposed to the collision, was the effective cause of the damage, and thus decided that an exclusionary provision excluding loss or damage caused by theft had no application.

The reasoning for that is developed at 615-616 in particular:

> "A lay person facing this question might be tempted to answer that it was caused by both. And in truth such an answer would affront neither reason nor logic. For without the theft there would have been no collision, and without the collision there would have been no damage. In that sense both causes may be said to have contributed to the ultimate result. But the Judge confronting the problem must be more precise in his answer. He is bound to choose from the available causes the one which to him appears to have been the effective cause of the damage. Sometimes we speak of that cause as the proximate cause, or the predominant cause, or the causa causans. However it may be described it must be found by the Judge, and to find it he may have to go through a process of selection.
>
> Once it is clear ... that "proximate" here means, not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among the co-operating causes in order to find what is the proximate cause in the particular case ... The question always is what is the cause, nor merely what is a cause.
>
> The theft of an automobile need not in the ordinary case cause any damage. The automobile may be returned or recovered undamaged. A different situation might arise if the vehicle were the object of hot pursuit. A thief pursued by the police might well act in desperation, he might drive at high speed and with complete recklessness, and an accident might thus occur. Damage to a vehicle in such circumstances could with some reason be said to have been caused by the theft. For a causative link between the theft and the damage would there be discernible. The reckless driving giving rise to the accident would be an incident of the theft, one aspect of it, in a sense part of the res gestae. But nothing like that is present here. There was no hot pursuit. Indeed the automobile had not even been reported as stolen, for the plaintiff himself was unaware of the theft. All we know is that following the theft an accident occurred, and there is nothing to link the accident causatively to that theft. A whole day, possibly, has elapsed, and many miles have been travelled. Now a collision takes place with an army vehicle, and we are asked, without more, to say that the resultant damage was caused by the theft. Again I say I am unable to do so.
>
> To me the theft was an anterior event, something aptly described as a causa sine qua non. Its role in the case was that of a preceding link without which the causa

> causans could not have become operative. But it was not itself the causa causans of the damage, in the sense of being the proximate or effective cause. And it is the proximate cause or effective cause that we are seeking."

As the pleading currently stands it seems to me that it merely alleges misappropriation and/or conversion and that a fire occurred. There is no link between the two events sufficient to allow reliance upon clause 3(b) of the policy.

It may be, depending on the facts that may be relevant to this issue, that the pleaders can replead, but that is a matter for them. This again, however, has the consequence in my view that paragraph 10 of the second further amended defence should be struck out.

They are the two principal issues the subject of argument, and it seems to me that the consequence of my decision about paragraphs 5(c) and 10 is that paragraph 11 and paragraph 51 also should be struck out.

Accordingly I will make the orders sought in paragraph 1 of the application.

...

HIS HONOUR: I give the defendant leave to replead.

...

HIS HONOUR: I will order that the defendant pay the plaintiff's costs of and incidental to the application on the standard basis.
