Neutral Citation Number: [2023] EWHC 630 (TCC)

Claim No: HT-2022-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 22/03/2023

Before :

His Honour Judge Bird sitting as a Judge of this Court

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Between :

ALLIANZ INSURANCE PLC	**Claimant**
- and -	
THE UNIVERSITY OF EXETER	**Defendant**

- -
- -

Miss Isabel Hitching KC (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Mr David Pliener (instructed by **Fenchurch Law Limited**) for the **Defendant**

Hearing dates: 24th & 25th January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 22nd March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Bird:

A. Introduction

1. This case concerns an insurance claim submitted by the defendant and declined by the claimant.

2. The damage suffered by the defendant, and the subject of the claim, came about in the circumstances set out below. The facts are agreed. In summary, in 1942 a bomb was dropped by hostile German forces in Exeter. The bomb did not explode but lay undiscovered until 2021 when it was unearthed during building works. Bomb disposal experts were called in. They determined that the bomb should be exploded and that it could not safely be transported away. The damage was caused when the bomb exploded as the result of a controlled detonation.

3. The claimant insurer is bound to honour the claim made by the defendant if the claim is one covered by the contract of insurance. The issue that arises for determination in this case can be simply stated: was the damage in respect of which the claim is made "*occasioned by war*"? If it was, the claim and damage are excluded. If it was not, the claim and damage fall within the terms of the insurance cover and the claim (subject to working the relevant detail) must be met.

B. The Claim

4. Part 8 proceedings were issued by the insurer on 26 January 2022. The claimant seeks declarations to the effect that it is entitled to decline the defendant's claim on the policy.

5. The process by which the claim comes to a final hearing is unorthodox. The requirements of CPR part 8 have not been followed so that neither party has for example filed any evidence. Instead the claimant has served Particulars of Claim as if the claim was one governed by CPR part 7. The parties have not treated the claim as one made under part 7 because there is no defence.

6. Further the claim is headed as being in the "shorter trials list" per CPR PD 57AB. The shorter trials scheme only appears to apply to part 7 claims and none of the usual directions as to witness statements or disclosure have been given. I am not clear if there has ever been a case management conference.

7. Despite these procedural anomalies, the parties have brought the matter to trial efficiently and there is no suggestion that any unfairness has arisen. The issues are clear, and the relevant facts are agreed. The parties have agreed to proceed on the basis that the claim is a part 8 claim. I endorse that agreement. The effect is that the claim is not one to which the shorter trials scheme applies.

C. Agreed Facts

8. The following agreed facts are taken, in the most part, from the "*Particulars of Claim*" but are supplemented in places by the content of an incident report compiled after the successful detonation of the bomb.

9. On 26 February 2021 contractors working on a construction site adjacent to the defendant's campus unearthed an unexploded bomb. The Emergency Services were immediately contacted and a safety cordon, initially of 100-metre radius and subsequently of 400-metre radius, was established around it. Halls of residence owned by the defendant, known as blocks A to E inclusive of Birks Grange Village

and Block B of Clydesdale Rise ('the halls of residence'), fell within the safety cordon and were evacuated.

10. An Explosive Ordnance Disposal ('EOD') team from the Royal Logistic Corps ('the RLC'), under the command of Colonel Daniel Reyland, Commander of 29 Explosive Ordnance Disposal and Search Group 3, identified the bomb as a 1000kg/2,200lb SC1000 thin cased, high explosive bomb dropped by German forces during World War II, and nicknamed 'the Hermann' after Hermann Göring. The bomb's fuze was carefully excavated in an attempt to identify it. The attempt revealed a single, very degraded, Transverse Fuze. The corrosion was such that no identification markings were visible, and it was noted that the metal had deteriorated to a point where the electrical contacts of the fuze were exposed, and fragments of the fuze were being dislodged from the bomb when brushed. The EOD team determined that the condition of the bomb (due to age, rusting, and uncertainty as to whether it was booby trapped) was such that it could not safely be removed from the site for controlled explosion, nor could a trepanning method be employed to remove some or all of the explosive. The post incident report notes that "*the only realistic course open to the team*" was to detonate the bomb on site, a very short distance (25-30 m) from where it lay, in a controlled explosion adopting safety measures designed to reduce, as far as possible, the consequences of such an explosion. These comprised the creation, by the EOD working with the Royal Navy during 27 February 2021, of a 'sand box' (a metal fence erected around the bomb which was then packed with 400 tonnes of sand) and the digging of trenches to limit the ground shock caused by the explosion.

D. Damage

11. The controlled explosion ("the detonation") took place at 18:10 on 27 February 2021. It resulted in the complete destruction of the bomb and the consequent release of its full explosive load. The post incident report notes that "*it was unfortunate, but unavoidable given the [fact the bomb contained between 520kg and 630kg of high explosive which exploded] and the small distances involved, that some damage was caused to some buildings in the immediate vicinity of the site*".

E. Insurance

12. On 1 April 2020, the claimant had issued a policy of insurance to the defendant, with a term of one year. The defendant notified a claim under the Policy in respect of physical damage to student halls of residence and business interruption in connection with the temporary re-housing of students.

13. On 28 April 2021, the claimant declined the defendant's claim on the basis that any loss or damage suffered by the defendant fell within the scope of the War Exclusion clause, being loss and damage 'occasioned by war'.

14. The sole issue before the court is whether, properly construed, the War Exclusion clause excludes the alleged physical damage and loss suffered by the defendant from the cover provided by the general insuring clause.

F. The Policy

15. The claimant has treated the claim as one made under the general insuring clause. It provides that the insurer will:

> "*Indemnify or otherwise compensate the insured against loss, destruction, damage, injury or liability (as described in and subject to the terms, conditions, limits and exclusions of this policy or any section of this policy) occurring or arising in*

> *connection with the business during the period of insurance or any subsequent period for which the insurer agrees to accept a renewal premium*."

16. The "war" exclusion is set out at general exclusion 2 as follows:

> "**War** (*Not applicable to the Computer, Engineering Machinery Damage, Engineering-Business Interruption, Employers' Liability, Personal Accident, Business Travel, Terrorism, Fidelity Guarantee, Cyber and Directors and Officers Sections)* Loss, destruction, damage, death, injury, disablement or liability or any consequential loss occasioned by war, invasion, acts of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power."

17. The structure of the general insuring clause is such that no liability to indemnify in respect of loss occasioned by war ever arises. The exclusions are therefore part of the definition of the scope of the cover, not exemptions from liability for cover which would otherwise exist.

G. Arguments

18. The parties accept that in order to answer the central question: "was the loss occasioned by war?" I need to consider what the "*proximate cause*" of the loss was. The phrase "*proximate cause*" has a particular meaning in insurance cases. I deal with that meaning at section H below.

19. Miss Hitching KC, who appears for the claimant, submits (as her primary case) that the proximate cause of the loss was the dropping of the bomb. That act is accepted to be an act of war and so, if she succeeds in that argument, the claimant is entitled to the relief it seeks. As an alternative position, Miss Hitching submits that the dropping of the bomb was "a" (not "the") proximate cause of the loss. If she succeeds in that, then even if there are other "proximate causes" the claimant would still succeed. The exclusion (she submits) would apply by operation of the concurrent causes rule (where there are concurrent proximate causes, one insured against the other excluded, the exclusion applies see *Wayne Tank and Pump v Employers Liability Assurance Corp.* [1974] QB 57 cited at para.174 of *FCA v Arch* [2021] UKSC 1 and at para.27 of *Brian Leighton (Garages) Limited v Allianz* [2023] EWCA Civ 8).

20. Mr Pliener, who appears on behalf of the defendant, submits that the proximate cause of the loss was the deliberate act of the bomb disposal team in detonating the bomb, not the dropping of the bomb. He submits that support for that point can be gleaned from the language used in the policy, the fact that the parties cannot have intended that the policy exemptions would apply to historic wars and the relevance and purpose of the exclusion. He submits that this is not a concurrent cause case. If he is wrong about that, he does not dispute the existence of the concurrent causes rule (at least does not dispute it for the purposes of argument before me) but does submit that it is ousted by the express terms of the insurance contract.

21. Mr Pliener relies on the contra proferentem rule, or (as the argument was developed) something close to it.

H. Proximate Cause

22. Whether a loss is caused by an insured peril is a question of interpretation of the contract of insurance (see for example *Arch* para.162). The parties' agreement that I should look for the "*proximate cause*" of the loss is an agreement about the interpretation of the policy. It reflects (as it was put by Popplewell LJ in *Leighton* at para.27) a "*general principle of insurance law*"

based on the presumed intention of the parties and codified in the Marine Insurance Act 1906.

23. In *Arch*, at paragraphs 162 to 170, Lord Hamblen and Lord Leggatt (giving in respect of these points the unanimous judgment of the Court) consider how the proximate cause test is to be applied and what it means. Its origins are to be found in Sir Francis Bacon's *Maxims of the Law* of 1596 where "*proximate*" cause is equated to "*immediate*" cause and contrasted with "*remote*" cause. In the 19th century, in cases like *Reischer* (see below), the Courts were prepared to adopt a broader definition of causation, looking not just for the "immediate" cause, but for what might be described as the "*real*" cause.

24. *Reischer v Borwick* 1894 2 QB 548 (see para.165 of Arch) concerned:

> "*a claim under a marine insurance policy which covered loss or damage from collision with any object, but not loss from perils of the sea. The ship collided with an object floating in a river, which caused a leak. The ship was anchored, and the leak temporarily repaired. A tug was sent to tow the ship to the nearest dock but, while the ship was being towed, the effect of the motion through the water was that the leak was re-opened, and the ship began to sink. To save the lives of the crew, the ship was then run aground and abandoned. The Court of Appeal held that, notwithstanding the intervening events, the loss of the ship was proximately caused by the collision and was therefore covered by the policy*."

25. The headnote of *Reischer* records that "*so long as the ship was at anchor the water was thus prevented from entering the vessel to any dangerous extent*". The report also notes that there were no criticisms of the actions taken by the crew ("*negligence or mismanagement on the part of those on board the ship is not suggested……all was done that could be done to save the ship*" and it was admitted that the decision to tow the boat was "*a reasonable and proper act in the circumstances*").

26. Lord Lindley noted that if the ship had sunk within a short time of the collision, the "*inference ….. that the collision caused the loss*" would have been "*unavoidable*" (see p.550 of the report). Looking at the passage of time in that case between the collision and the sinking and at the happening of subsequent events without which the vessel would not have sunk, he went on to say: "*the fact that some fresh cause arises, ….is…. far from conclusive*". Lopes LJ made the same point, noting that when looking for the cause of a loss, it was:

> "*well settled law that it is only the proximate cause that is to be regarded and all others rejected, although the loss would not have happened without them*."

27. Davey LJ concluded that the "*failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot in my opinion be justly described as the cause of the ultimate damage*."

28. It follows from *Reischer* that a loss might have more than one cause and the proximate cause need not be the cause which stands closest in time to the loss. Even if a subsequent cause is of such potency that the loss would not have happened without it, the earlier cause may still remain the proximate cause.

29. In *Leyland Shipping Company v Norwich Union Fire Insurance Society Limited* [1918] AC 350 (as described at para.166 of *Arch*), the House of Lords was concerned with the following facts:

> "*a ship torpedoed by a German submarine was towed to the nearest port but had to anchor in the outer harbour exposed to the wind and waves. After three days the ship sank. The ship was insured against perils of the sea but there was an exception in the*

> *policy for "all consequences of hostilities or warlike operations". The House of Lords affirmed the decision of the lower courts that the loss was proximately caused by the torpedo, which was a consequence of hostilities, and was therefore not covered by the insurance*".

30. Having reached the port, the vessel was moored safely: "*she was always afloat and would have been saved if she had been allowed to remain there*." Adverse weather conditions arose. The port authorities became concerned that she might sink and so block the quay (which was urgently required for purposes connected with the war). They ordered the Master to move to an outer harbour and moor in what was effectively open water. The decision to order the ship to leave the safe harbour was described by Lord Finlay as given for "*very intelligible and weighty reasons*". He went on say that "*there is no ground for thinking the port authorities committed any error of judgement in ordering the removal*." The vessel remained at the new berth for two days "*taking the ground at each ebb tide but floating again with the flood and finally her bulkheads gave way, and she sank and became a total loss*."

31. The House of Lords in ***Leyland*** approved the Court of Appeal's decision in ***Reischer***. Lord Finlay was of the view that the case was to be dealt with "*as if the episode of the vessel's being taken to [the first, safe, mooring] had not occurred and she had been taken in the first instance straight to [the outer harbour]*". The effect of this approach was to ignore the obviously reasonable order for the vessel to move to open water from a safe mooring.

32. At p.361 of the report, Viscount Haldane expressly approved the words of Davey LJ in ***Reischer*** (para.27 above) that the failure of the attempt to mitigate or stop the damage arising from the breach could not "*be justly described as the cause of the ultimate damage*". He noted that they "*express what the common sense of mankind would assert in such a case."*

33. Lord Shaw's judgment in ***Leyland*** is a call for common sense to be applied and a rejection of what was later referred to as "*microscopic analysis*". He raises Aristotle's thoughts on the "doctrine of cause" only to dismiss them as a basis of analysis, preferring instead the application of "perfectly familiar" and common place principles. He expresses the view (p.368 of the judgment) that

> "*too much is made of refinements upon [the meaning of "proximate cause"]. The doctrine of cause has been, since the time of Aristotle and the famous category of material, formal, efficient, and final causes, one involving the subtlest of distinctions. The doctrine applied in these t*
> *o existences rather than to occurrences. But the idea of the cause of an occurrence or the production of an event or the bringing about of a result is an idea perfectly familiar to the mind and to the law, and it is in connection with that that the notion of proximate cause is introduced."*

34. At page 369 of the report Lord Shaw (in a passage cited at paragraph 166 of ***Arch***) explains that the phrase *"chain of causation*" is "*handy*", but wrong ("*inadequate*"). It suggests that causative events always follow on in a linear fashion, one leading on to another (like "*beads in a row or links in a chain*"). The better description is of a two-dimensional "net" rather than a one-dimensional "chain". At any given point in a net, "*influences, forces [and] events*" converge from all directions, not just in a straight line. Lord Shaw notes that an earlier "cause" may be more potent that a later "cause". He explains the point in this way:

> "*the cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be*

ascribed".

35. At paragraph 165 of *Arch* Lord Hamblen and Lord Leggatt briefly return to Aristotle, explaining that the notion of *efficient cause* meant "*something that is the agency of change*". The modern approach to identifying proximate cause remains, as the Supreme Court made clear, a practical and not a philosophical exercise. The Supreme Court in *Arch* adopted the words of Lord Wright in *Yorkshire Dale Steamship Co Ltd v Minster of War Transport* [1942] AC 691, 706 to express the point:

> *"This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view."*

36. The process of identifying the proximate cause is not simply a matter of "*unguided gut feeling*" (as might be suggested by the *Yorkshire Dale* case). The Supreme Court considered the point in *Arch* at paragraph 168:

> *"The common sense principles or standards to be applied in selecting the efficient cause of the loss are, however, capable of some analysis. It is not a matter of choosing a cause as proximate on the basis of an unguided gut feeling……The question whether the occurrence of [an event] was the proximate (or "efficient") cause of the loss involves making a judgment as to whether it made the loss inevitable - if not, which could seldom if ever be said, in all conceivable circumstances - then in the ordinary course of events. For this purpose, human actions are not generally regarded as negativing causal connection, provided at least that the actions taken were not wholly unreasonable or erratic."*

37. The general rule that human actions are (effectively) ignored in the causal analysis is an example of the principle (see Lord Shaw) that events which "*spring up*" after a given event do not necessarily "destroy" or "impair" the causative potency of that earlier event. The chronological order of events is not determinative in the analysis. The key consideration is the nature of each event.

38. The question of inevitability is to be examined on the basis of the facts known at trial. The initial "peril" in each of the shipping cases identified as the proximate cause (striking an object or being torpedoed) would not, in the ordinary course of events, inevitably have led to the loss as the reports show. The torpedoed ship could have stayed in the safe harbour and the holed vessel might have stayed put until repairs were completed. Only looking back at the events as they unfolded does the proximate cause become clear. By the time of trial, the full range of influences, forces and events is available for the court to consider and there is no need to second guess any outcome.

39. In both *Reischer* and *Leyland* (cases which the Supreme Court described as being *"materially similar*"), the courts were faced with a choice. The loss in each case was either caused by an insured event (perils of the sea or collision) or by an excluded event (war or perils of the sea). Further, in each case there was some important human intervention shortly before the loss. In *Leyland*, the order to move the vessel from the quay to virtually open sea and in *Reischer* the decision to have the boat towed in its repaired state. In each case if that human intervention had not occurred the ship would not have been lost. In each case the intervention was reasonable and in neither case was it criticised.

40. What is the position if it cannot be said that one of two or more possible causes made the loss inevitable (see para.175 of *Arch*)? In that case (where the causes act together and are of equal

– or nearly equal - efficacy) there can be said to be concurrent proximate causes. Where one of the concurrent proximate causes is excluded from cover but the other is included, the general rule is that the exclusion will prevail (the general rule is accepted by the parties, but Mr Pliener submits that it is disapplied by the terms of the contract. See para.174 of ***Arch*** for an expression of the rule).

I. Application of the facts

41. Applying the guidance set out in ***Arch***, I remind myself that the test of "proximate cause" is a matter of judgment based on common sense rather than over-analysis. It is open to me to conclude that one or other of the dropping of the bomb and the detonation of the bomb was "the" sole proximate cause or that each was "a" proximate cause. No further potential candidate for "proximate cause" is proposed.

J. Can the human intervention (detonation) be ignored?

42. If I leave out of account the reasonable human act of detonating the bomb (on the basis of the general guidance set out in ***Arch***), I am driven to the conclusion that the dropping of the bomb was the proximate cause of the loss. It is the only remaining option.

43. ***Arch*** however does not set down a firm and fixed rule that human intervention is to be ignored. Human actions are simply *"not generally*" regarded as new causes. To determine if the general guidance applies, I need to consider what part if any the detonation played in the causal "net".

K. If the human intervention (detonation) is not, simply ignored

44. If, rather than simply ignoring the human intervention, I consider the "*net of causation*" and look at the "*influences, forces and events*" which converged at the point of loss, concentrating on the character of those events rather than the chronological order in which they occurred, then I would in any event conclude that the dropping of the bomb was the proximate (dominant or efficient) cause of the loss.

45. The common sense analysis is this: the loss was caused by an explosion. The explosion was triggered by the reasonable (and indeed obviously correct) decision to detonate the bomb. That decision was necessitated by the presence of the bomb. If there had been no bomb, there would have been no explosion. The bomb provided both the explosive payload and the absolute need for the detonation. In my view, the dropping of the bomb was the obvious proximate cause of the damage.

46. If the bomb had exploded when it landed (and if the damaged buildings had been there) the conclusion that the bomb was the proximate cause of the damage would have been inevitable. Does the reasonable and necessary human act of detonating the bomb change that analysis? In my view it does not. It is the presence of the bomb that leads to both the need for the detonation and the inevitability of the damage. As a matter of common sense, the dropping of the bomb and its consequent presence at the site, was the proximate cause of the damage.

L. The passage of time

47. The defendant submits that the passage of time means that this conclusion is wrong. I am unable to accept that submission.

48. The bomb was dropped in 1942. Almost 80 years passed before the damage was caused. The detonation occurred to all intents and purposes at the same time as the damage. It is natural that an "*unguided gut feeling*" would strongly lean towards the conclusion that the detonation

was the relevant, dominant or proximate cause. But such an approach would in my judgment, and for the reasons I have given, be wrong. As Lord Shaw pointed out in ***Leyland*** "*to treat [the proximate cause] as the cause which is nearest in time is out of the question*". The passage of time does not of itself provide an answer to the question of "proximity".

49. Is there any suggestion that the passage of time had reduced the potency of the explosive load of the bomb? In my view there is not. It is clear from the incident report (paragraph 10 above) that the bomb as an object had degraded over time. The photographs clearly show that it had rusted (as the parties agree) and the incident report makes specific reference to the deterioration of the bomb's fuze. There is however no suggestion at all that the explosive load of the bomb had become any less lethal over time. Indeed, the report provides that although local police had already imposed a 100 metre safety cordon around the bomb, the disposal team "due to the size of the [bomb]" advised that the cordon be widened. If the bomb had been moved, a "rolling cordon of +2km" would have been required. Here in my judgment, the passage of time had no relevant or material impact on the danger posed by the bomb.

M. The agency of change

50. The defendant also submits that the detonation is the "agency of change" (as set out in ***Arch*** at para.165) and is therefore the proximate cause. I do not accept this argument. The phrase "agency of change" does not appear in any of the older cases and is simply an alternative way of expressing the Aristotelian concept of "efficient" cause. Mr Pliener submitted that in looking for the "agency of change" I should look for agency of change that explains the damage. I agree. At a given moment in time the damaged property was undamaged. It then became damaged in the next moment. That is a change in its state. What brought about that change? Viewed in that way, the investigation to identify the agency of change is precisely that undertaken in respect of "proximate cause". Given that "agency of change" is not a new or different test, that is not surprising. Mr Pliener's argument asks what brings about the change of state of the bomb (from unexploded to exploded). In my view that is the wrong question.

N. Conclusion

51. It follows, either because the detonation can be ignored or because if it is taken into account the bomb remained the proximate cause of the loss, that I am satisfied that the dropping of the bomb was the proximate cause of the loss. The dropping of the bomb is an act of war and so the loss suffered is excluded from cover. Subject to dealing with a short point of contra proferentem that is enough to dispose of the claim.

O. Concurrent causes

52. If I am wrong and the dropping of the bomb was not "the" proximate cause, then I am satisfied that it was "a" proximate cause.

53. ***Arch*** deals with concurrent causes at paragraphs 171 to 176. At paragraph 173 ***JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (the Miss Jay Jay)*** [1987] 1 Lloyds Rep 32 is cited as the leading modern authority illustrating the possibility of concurrent proximate causes operating in an insurance context. In that case a yacht sank as a result of a combination of causes which were "*equal, or at least nearly equal, in their efficiency*" namely, adverse sea conditions and design defects.

54. If I am wrong to conclude that the dropping of the bomb was the proximate cause of the loss then, applying the ***Arch*** guidance, the combined effect of the detonation and the bomb made the damage inevitable. If the analysis that led me to conclude that the dropping of the bomb was "the" concurrent cause was wrong, the alternative analysis must be that the damage was

(as a matter of common sense) caused by the combined effect of the detonation and the presence of the bomb. If my conclusions above are wrong then I am driven to the conclusion that the detonation and the presence of the bomb were "*equal, or at least nearly equal*" in their efficiency.

55. I should add, although it follows from my conclusions set out above, that I am satisfied that the detonation was not "the" proximate cause of the loss. In my judgment, the only route to that conclusion would be that the detonation occurred (for all practical purposes) at the same time as the damage. The attribution of causal proximity on that basis alone is (as set out above) "*out of the question*".

56. As a result of my alternative finding that the dropping of the bomb is "a" proximate cause of the damage, it follows that (subject to Mr Pliener's argument that the rule is ousted by the policy) by operation of the concurrent proximate causes rule, the exclusion applies.

P. Is the concurrent proximate causes rules ousted by the policy?

57. In my view there is nothing in the policy to oust the operation of the rule.

58. Mr Pliener's argument is that some general exclusion clauses in the policy expressly incorporate (by making express reference to it) the concurrent causes rule. The war exclusion clause makes no such express reference. Given that the policy must be interpreted as a whole, Mr Pliener submits that the decision to make no express reference to the rule in the war exclusion clause (and in many other clauses) means that the policy should be interpreted on the basis that the parties have agreed to disapply it in all clauses save where it is expressly mentioned.

59. The clauses relied upon are set out below. The specific words relied upon are underlined:

    a. Clause 3 terrorism:

    Terrorism *(not applicable to the Computer, Engineering Machinery Damage, Engineering-Business Interruption, Employers' Liability, Public Liability, Products Liability, Environmental Impairment Liability, Directors and Officers, Personal Accident, Business Travel, Cyber or Terrorism [when insured as a separate section] Sections)*

    (a) In respect of England, Wales and Scotland but not the territorial seas adjacent thereto as defined in the Territorial Sea Act 1987:

    Loss or destruction or damage or consequential loss of whatsoever nature, directly or indirectly caused by, resulting from or in connection with

    (i) Any Act of Terrorism, regardless of any other cause or event contributing concurrently or in any other sequence to such Act of Terrorism

    (ii) Any action taken in controlling, preventing or suppressing any Act of Terrorism, or in any other way related to such Act of Terrorism

    In respect of (a) above an Act of Terrorism (Terrorism) means: acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government de jure or de

facto

(b) in respect of territories other than those stated in a above loss or destruction or damage for any consequential loss of whatsoever nature, directly or indirectly caused by, resulting from or in connection with

(i) any act of Terrorism <u>regardless of any other cause or event contributing concurrently or in any other sequence to such act of Terrorism</u>

(ii) any action taken in controlling preventing or suppressing any act of Terrorism or in any way related to such act of Terrorism

In respect of the above an act of Terrorism (Terrorism) means:-

An act including but not limited to the use of force or violence and/or the threat thereof of any person or group(s) of persons whether acting alone or on behalf of or in connection with any organisation(s) or government(s) committed for political religious ideological or other *similar purposes including the intention to influence any government and/or put the public or any section of the public in fear*

b. Clause 4 Cyber Event

Cyber Event *(not applicable to Terrorism, Employers' Liability, Public Liability, Products Liability, Aviation Products Liability, Professional Indemnity, Computer, Engineering Machinery Damage, Engineering-Business Interruption, Directors and Officers, Cyber, Accident, Business Travel or Commercial Legal Expenses Sections)*

(a) damage to, loss, destruction, distortion, erasure, corruption, alteration, theft or other dishonest, criminal, fraudulent or unauthorised manipulation of Electronic and digital data from any cause whatsoever (including but not limited to Computer attack) or loss of use, reduction in functionality, loss, cost, expense and/or fee of whatsoever nature resulting therefrom, <u>regardless of any other cause or event contributing concurrently or in any other sequence to the loss or damage</u>

Q. <u>Is this an express statement of the concurrent causes rule?</u>

60. Mr Pliener first submits that the underlined words are an express reference to the concurrent causes rule. In other words they make plain that the relevant exclusion will apply even if the loss (by act of terrorism and cyber event in each case as defined) is caused by two or more concurrent proximate causes.

61. Miss Hitching KC submits that the underlined words are not in fact a simple expression of the rule. She points out that these exclusions (unlike the war exclusion) invoke causation tests wider than proximate cause (as it is put at para.162 of *<u>Arch</u> "a looser form of causal connection will suffice than would normally be required*"). The terrorism clause refers to loss "*directly or indirectly caused by, resulting from or in connection with*…" specified acts, and the cyber exclusion clause refers to specified damage "*from any cause whatsoever*….". Miss Hitching points out therefore that the concurrent or contributing causes might be of a different character. For example some might be direct, others indirect. In those circumstances, there is at least doubt as to the application of the concurrent causes rule. Such doubt is sensibly resolved by express incorporation.

62. Miss Hitching submits that I should resist the temptation to interpret these clauses and determine what exactly they mean. If I were to conclude that the underlined words are mere repetitions of the rule, then I would be interpreting the clause. The exercise of interpretation should not be carried out in a vacuum without the benefit of understanding the factual situation.

63. I prefer Miss Hitching's argument on this first issue. It seems to me (without attempting a definitive interpretation) that the underlined words clarify the position if the loss and damage has more than one cause and one cause is indirect (or non-proximate) whilst the other is direct (or proximate).

64. I note also that the terrorism clause refers to contributions to the act of terrorism itself rather than the loss. It might be, as Mr Pliener suggested, that is the same as a contribution to loss or damage, but the position is not clear.

65. This conclusion is enough to dispose of the issue in favour of the claimant.

R. If the underlined words are a simple restatement of the rule

66. If I am wrong, and the underlined words do simply restate the rule I remain of the view that the argument fails.

67. I remind myself that 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*." (see Arch para.47). I accept (and it is agreed) that the concurrent causes rule forms part of the "background knowledge" against which the exercise of interpretation is to take place.

68. In my judgment, the reasonable person, knowing of the existence and importance of the rule, would not conclude that the absence of reference to it in the war exclusion clause meant that the exclusion had to be read as if it expressly disapplied the rule. A reasonable person with such knowledge would expect that if the rule was to be excluded clear words would be used.

S. Contra Proferentem

69. Mr Pliener submits that he can rely on the *contra proferentem* principle of construction so that any ambiguity in the construction of the war exclusion should be resolved against the claimant.

70. In my judgment this argument must fail for at least two reasons advanced by Miss Hitching KC.

71. First, there is no obvious ambiguity in the construction of the exemption. Any lack of certainty arises, not from the interpretation of the clause but in deciding how the exemption properly applies to the facts of the case. The contra proferentem rule has no application in those circumstances. In fact, the parties have agreed on the proper interpretation of the exclusion clause and in particular on the degree of causative potency required by the words "occasioned by". Once there is an agreement on interpretation the rule obviously has no application.

72. Secondly, and alternatively, the rule applies to contractual provisions which exempt a party from a liability which (absent the exclusion) would arise. That is not the case here. As in ***Leighton***, the apparent exclusion is no such thing. In the present case, no liability arises if the "exclusion" applies. The exclusion is an exclusion from cover, not from liability. The point is

put this way at para.27 of *Leighton*:

> *"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."*

T. The optional points raised by the Defendant

73. Mr Pliener raises three points which he describes as optional, additional or mere indicators. By that he means that they are not stand-alone points which if determined in his favour would result in the defendant being successful. He relies on the points to show that the conclusion he urges me to reach (which I have already rejected) is correct. As I have rejected the main points I can deal with these points in a relatively summary fashion.

74. The first point relates to the language of the exclusion. In essence because the exclusion does not refer to damage which is caused "directly or indirectly" by war, Mr Pliener submits that there needs to be a close connection between the excluded event and the damage. But Mr Pliener accepted that the test I am to apply (and have applied) is that of proximate cause. This point in my judgment takes us nowhere.

75. The second point deals with the objective intention of the parties. Mr Pliener submits that the determination of proximate cause involves identifying the objective intention of the parties. He submits that the parties cannot be taken to have contemplated excluding liability in respect of things that happened in a war which ended more than 75 years ago. The short answer to the point is that the parties can be taken to have agreed that damage occasioned by "war" is excluded. For the reasons I have set out I am satisfied that the (or "a") proximate cause of the loss which is the subject of the claim was war.

76. The third point is about the purpose of the exclusion. Mr Pliener submits that the detonation was not an act of war so that the proximate cause of the loss was not an act of war. At best the detonation was one of two concurrent proximate causes, the other being a clear (and admitted) act of war. In that case, the concurrent causes rule means that the exclusion applies. If the only proximate cause of the loss was the dropping of the bomb (as I have found) then the act of detonation has no causal significance. There is nothing in the point.

U. Disposition

77. The claimant is entitled to the declarations it seeks. I am grateful to Miss Hitching KC and to Mr Pliener for their submissions and assistance.