

Reinsurance notes

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Pure economic loss not covered by radioactive contamination extension

OUTOKUMPU STAINLESS LTD v AXA
GLOBAL RISKS (UK) LTD & 11 ORS

Commercial Court – Mr Justice Tomlinson –
8 November 2007

This case involved losses to the claimant's steelworks when radioactive plutonium was inadvertently melted in their furnace. The principal issue was whether purely economic losses could be claimed under a radioactive contamination extension, even though the insurance policy related to 'property damage and business interruption'.

The facts

The claimant was Avesta Sheffield Ltd, a subsidiary of Outokumpu, who owned and operated Sheffield steelworks. The defendants provided insurance cover against property damage and business interruption. On 31 March 2000 the claimant unintentionally melted 'shielded' radioactive plutonium 238. It was accepted that Avesta had acted in the best possible manner to eliminate or reduce any risk of harm.

There was no serious damage to the smelting plant equipment but the claimant was left with a substantial amount of contaminated slag which it had to dispose of via tightly controlled conditions.

The loss

Avesta put in a claim under their insurance policy for £6.38 million for the costs incurred in testing, handling, safely storing, quarantining, transporting and disposing of the contaminated material. Mr Justice Tomlinson quantified three parts of the claim:

- The contaminated slag from the three affected melts were decanted into four 'slagpots'. The slagpots then had to be disposed of at a licensed site. The underwriters accepted that this amounted to 'physical damage in the form of radioactive contamination'. This part of the claim was therefore settled.
- A further 200 tonnes of slag became contaminated when the radioactive slag ran off 'the ladle' into the pit beneath the arc furnace. The pit slag then had to be dug out under controlled conditions and transported in special ISO containers to Drigg in Cumbria for disposal.
- Finally it was thought that residue may have adhered to the brick lining of the arc furnace. The brick lining is renewed every four weeks, but this had to be brought forward and carried out under controlled conditions to minimise the risk of employees inhaling or ingesting dust and fumes.

There was no claim for business interruption and the claim in respect of property damage was confined to the costs of the four slag pots – however that amount fell below the relevant deductible. The ISO containers were not insured property (as they were acquired subsequent to the incident), meaning the bulk of the claim was for costs incurred by Avesta in dealing with the incident and disposal costs.

The question for the Court was whether costs of this nature (ie pure economic loss) were recoverable under the policy.

The policy

Whilst there was a 1999 and a 2000 policy that were relevant, Mr Justice Tomlinson only dealt with the 1999 policy as they were both identical in all material respects. The 1999 policy was led by the First Defendants – Axa, and was entitled "ALL RISKS" MATERIAL DAMAGE INCLUDING MACHINERY BREAKDOWN AND BUSINESS INTERRUPTION.

Bound with the policy was a 'Statement of Intent' which provided, inter alia that; "*The Insurers severally agree each for the proportion set against its name to insure against accidental loss or damage subject to all the terms conditions and exclusions in this policy.*"

Avesta argued that there was no reference to 'property' in the recital and that 'accidental loss' was unqualified by words indicating it only covered loss of property, thereby the policy could include pure economic losses.

The policy also provided a radioactive contamination memorandum which covered 'loss destruction or damage due to contamination caused by the use of radioactive scrap materials utilized in the manufacturing process'.

Construction of the policy

Mr Justice Tomlinson followed the reasoning of Lord Hoffmann in *ICS Limited v West Bromwich Building Society* that "the policy should be discerned from the words used, giving to them the meaning which they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

There was no evidence of what was discussed between the parties prior to the placement of the 1999 policy. Mr Ward, Avesta's Accident Prevention, Occupational Health and Security Manager and their Insurance Manager had one meeting with Axa prior to the placement where he was certain a discussion took place on the same grounds as a discussion he had had earlier with Commercial Union and Royal Sun Alliance in October 1998.

The October 1998 meeting

In May 1998 the Acerinox steelworks in Spain inadvertently melted down a sealed caesium source, and prevailing winds bore the caesium away to France and Italy, whilst the contaminated product was sent to other plants in Spain where contamination was later found.

Mr Ward asked CE Heath (Insurance Broking) Ltd (Avesta's brokers) to investigate the possibility of cover for radioactive contamination under the Property Damage and Business Interruption and Public and Products Liability policies. Heath advised that there was no cover under the Property Damage and Business Interruption policy for radioactive contamination as it was excluded under the policy.

Mr Ward became concerned over Avesta's exposure and asked for a meeting with Commercial Union and Royal Sun Alliance (their insurers at the time). Following this meeting further negotiations were carried out but no endorsement was ever finally agreed as part of the cover.

Mr Justice Tomlinson considered how relevant the negotiations with previous underwriters were to the construction of the 1999 policy.

Mr Justice Tomlinson set out what he felt were the relevant background matters to construction: that the general insurance market in London did not in 1999 offer cover against the risk of radioactive contamination; that there are two broad forms of exclusion in an ordinary property damage cover – a radioactive contamination exclusion and a more general pollution and/or contamination exclusion; and finally that it would be 'highly unusual in the then London market to obtain cover of any sort against the risk of radioactive contamination'.

The decision

The Judge found that the overall shape of the policy was clear. In the definition clause defining 'Damage' the word loss meant loss of insured property. The Insurers agreed to pay loss resulting from damage to the property of the insured. There was no doubt in the Judge's mind that the cover was for traditional property damage insurance.

The question that then needed asking was whether the word 'loss' in the radioactive contamination extension carried a broader meaning encapsulating economic loss.

The Judge was not persuaded that when used with the words 'destruction or damage' the word 'loss' must bear a wider meaning than that which it typically bears elsewhere in the policy. The memorandum was seen as an extension to the cover given by the Property section of the policy. If 'loss' was to be given an unrestrained meaning then it would transform the cover of the policy and exposures wholly alien to the policy would be introduced subject only to the sub-limit provided by the extension.

The radioactive contamination memorandum fell short of extending the cover to pure economic loss as claimed by Avesta. It provides property damage cover of a type that would otherwise be excluded but did not go as far as to cover against purely economic loss consequent upon radioactive contamination.

If you require any further information in relation to the way in which these developments impact upon your business please contact Nicholas Bradley, William Sturge, Colin Peck, or David Breslin on 020 7379 0000 at Lawrence Graham LLP.

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