

## London Market Team– Legal update

### Physical loss/damage trigger and business interruption claims

As a general rule, business interruption (“BI”) losses must be the result of loss or damage to insured property before there is BI cover under the policy. In most policies, “loss or damage” in this context is commonly defined as requiring “physical loss or damage” so that BI cover is only triggered upon the occurrence of a covered physical loss or damage.

What happens, however, if this pre-requisite is present in the general provisions of the policy but absent from specific cover for interruption by civil authorities? This was a common debate before the American courts in the wake of September 11, and a recent Australian judgment relating to a mining loss shows that the question remains a thorny issue.

**Allstate Exploration v QBE Insurance (Australia) Limited** (Supreme Court of Victoria – Court of Appeal, 21 August 2008) concerned a claim brought against insurers in respect of a rock fall at the Beaconsfield gold mine in Tasmania in 2006. The rock fall was caused by a seismic disturbance and an order was subsequently made by the local inspector requiring all mining activities to be ceased.

Under the Industrial Special Risks Insurance policy, cover was provided under section 1 for “**physical loss, destruction or damage**” to insured property with indemnity for BI loss under section 2 in the following terms:

**“In the event of any Property Insured (as described in Section 1...) being physically lost, destroyed or damaged by any cause or event not hereinafter excluded... and the Business carried on by the Insured at the premises being in consequence thereof interrupted, or interfered with, the Insurer(s) will, subject to the provisions of this Policy, pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement.”**

There was then the following clause in a separate section of the policy covering civil authority interruption (clause 23):

**“Notwithstanding anything contained herein to the contrary, the Property Insured under this Policy is also covered against the risk of loss, destruction or damages arising from the actions of any civil authority during a conflagration or other catastrophe and for the purposes of preventing, minimising or retarding same and shall also include the closure of any Premises/operations by any civil authority due to the operation of a peril insured against”.**

There was no dispute that there had not been physical loss or damage within the meaning of sections 1 and 2 of the policy so that there was no BI claim that could be made under section 2.

The main issue between the parties was whether this physical loss or damage trigger was also required for cover under clause 23.

The insured put forward a number of arguments to support their basic premise that there is no need for physical loss or damage for clause 23 to take effect. However, all of these which were rejected by the first instance court. The Court of Appeal in Victoria upheld this decision.

The reasoning behind this decision included that:

- 1 The overwhelming structure of the policy provided cover for losses arising from (section 1), or consequent upon (section 2) any event causing physical loss or damage to insured property subject to specific exclusions. Hargrave J at first instance had pointed in particular to the lack of a basis of settlements provision in clause 23 for support that cover under clause 23 had to be construed as within the structures of sections 1 and 2. Victoria's Court of Appeal agreed and found that this supported an inference that clause 23 was not intended to be a third and independent basis of claim.
- 2 Clause 23 undoubtedly extended the cover under the policy. However, the primary focus of clause 23 was to identify additional causes of coverage rather than to enlarge the indemnity beyond the loss or damage elsewhere provided for in the policy. In particular, there was an excluded peril (Perils Exclusions clause 1 (b)) for loss or damage **"by or under the order of any Government or Public or Local Authority ... unless it is the result of actions taken by or under the government order"**. Clause 23 acted as a further qualification to this excluded peril so that cover was extended to any physical loss or damage from any action taken by a civil authority/any closure by a civil authority, whether or not by or under a government order.
- 3 The insured had argued that clause 23 should be read in two parts so that it is split as follows:

**"Notwithstanding anything contained herein to the contrary,**

- (1) **the Property Insured under this Policy is also covered against the risk of loss, destruction or damages arising from the actions of any civil authority during a conflagration or other catastrophe and for the purposes of preventing, minimising or retarding same and**
- (2) **shall also include the closure of any Premises/operations by any civil authority due to the operation of a peril insured against"**.

The main argument for this interpretation being that even if there had to be physical loss or damage for limb (1), this was not required for limb (2).

Hargrave J disagreed and had preferred the clause to be divided in this way:

**"Notwithstanding anything contained herein to the contrary, the Property Insured under this Policy is also covered against the risk of loss, destruction or damages arising from**

- (1) the actions of any civil authority during a conflagration or other catastrophe and for the purposes of preventing, minimising or retarding same and shall also include
- (2) the closure of any Premises/operations by any civil authority due to the operation of a peril insured against”.

The Australian Court of Appeal agreed with the trial judge and found that this was the more natural way to demarcate the clause and when read this way, it was consistent with the overall structure of the policy.

Interestingly, the insured's argument based on the absence of the word **“physical”** in clause 23 was rejected on the basis that the lack of the word **“physical”** in a clause which was adding to events/causes to a risk already identified was **“less significant”**.

The insured had also argued that the use of the word **“damages”** in clause 23 rather than **“damage”** as used in section 2 should differentiate the two provisions. This argument was similarly dismissed by the court on the basis that the plural word had been used in mistake particularly as there were other typographical errors in the policy.

### Comment

Although a decision by the Australian courts, this judgment may be of interest more generally given the common prevalence of physical loss/damage trigger language in the main insuring clauses which may not always be carried through to the extensions of cover.

For a discussion or assistance with any of the above issues, please contact Ling Ong at [ling.ong@weightmans.com](mailto:ling.ong@weightmans.com) or on +44 (0) 20 7822 1985.

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