



LEGAL BRIEFING

Rain check

C A Blackwell (Contracts) Ltd v Gerling Allgemeine Verischerungs - AG (2007)

Judge Mackie QC, [2007] EWHC 94 (Comm)

The Facts

C A Blackwell (Contracts) Ltd (“Blackwell”) is a contractor with expertise in earthworks involved in motorway construction. Blackwell had successfully tendered for the earthworks on parts of the M60. B was responsible for ensuring adequate temporary drainage for the earthworks. B took out a policy with Gerling Allgemeine Versicherungs (“Gerling”) for the years to 31 December 1998 and 1999.

Bad weather and rain affected the works on several occasions and two incidents then caused damage to the capping layer (shale) and an area of sub-formation. The loss adjustor agreed £46,000 for the first incident and £488,975.15 for the second. Although the amount of damage was agreed, Gerling denied liability under the policy.

The schedule of the policy described it as “Contractors All Risks”. This was followed by a schedule applicable to Contractors Indemnity and Employers Liability Insurance which provides for a maximum sum of £6,000,000 subject to some excesses. The relevant provisions contained a clause excluding liability for loss or damage to property in a defective condition due to a defect in design plan specification, materials or workmanship.

Blackwell argued that the wording of the policy did not amount to an all risks policy. Gerling disagreed stating that the claimed losses were inevitable and not fortuitous and were therefore not recoverable. Gerling also argued that the losses had been caused by Blackwell performing work during the winter and failing to provide appropriate or adequate drainage for the season and further that the exclusion clause applied because the works were in a defective condition as a result of the absence of effective drainage.

The Issues

1. Was the policy an all risks policy?
2. Was the damage caused fortuitous? and
3. Was the loss caused by the wilful misconduct of Blackwell?

The Decision

Judge Mackie QC held that the policy was quite clearly a contractor’s all risks policy. This meant that the insured did not need to demonstrate that there was a precise cause of loss but did have the burden of proving that some loss or damage had occurred and that the loss was covered by the policy. The loss must be fortuitous, in other words it must have happened by chance.

It was then for the insurer to prove that the loss was not fortuitous or that the loss had been caused by an item that had been excluded from the all risks

policy.

In this case an exclusion covered a defective condition “due to a defect in design, plan, specification, material or workmanship”. The judge accepted that damage was caused by heavy rainfall. Heavy rainfall was not one of the excluded risks, and was therefore potentially covered by the all risks insurance policy. The contractor had in its risk analysis considered the impact of the weather risk on the shale. However, the actual rainfall was much worse than the risk analysis provided for; and the policy covered the excessive weather encountered.

Finally, the insurer’s allegation that the loss was caused by the wilful misconduct of Blackwell failed. There was no evidence to support the allegation that Blackwell knew of the risk and had deliberately run that risk without taking precautions. If the insurer had wanted to exclude cover for rainfall or negligence in respect of the use of the capping material (shale) then they should have included an appropriate exclusion to the all risks cover.

Comment

An “all risks” insurance policy covers any risk that is not set out as a specific exclusion to the policy. In this case the judge accepted that heavy rainfall caused the damage, and as that cause had not been excluded the insurer was liable to make a payment.

Interestingly, the contractor had considered the chance of encountering heavy rainfall in its risk analysis. The judge accepted that the contractor had, therefore, not simply run the risk of laying shale without considering the potential effects of heavy rainfall on that material. The contractor had considered the risk and taken it into account. It could not be said that the contractor had deliberately run an obvious risk. If the contractor had not properly considered the risk then they might not have been able to claim under the policy. Perhaps risk registers and risk analysis will assist those with similar policies to demonstrate that the risks they are taking on projects are managed and covered by the all risks insurance policy.

Nicholas Gould
March 2007
