Released: December 20, 1990 **No. C895247**
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
DEREK CHUNG, CARL PROSKIN and ANTHONY KALANJ	**REASONS FOR JUDGMENT**
PLAINTIFFS	**OF THE HONOURABLE**
AND:	
LES GARRISON AGENCIES LTD. and LES GARRISON	**MR. JUSTICE COHEN**
DEFENDANTS	

A. Thiele — Counsel for the Plaintiffs

G.M. Nijman — Counsel for the Defendants

Heard at Vancouver: November l3, l990

By consent of the parties this hearing on a point of law arising from the pleadings in this matter was set down by praecipe pursuant to Rule 34 of the Supreme Court Rules.

The parties rely on the following agreed statement of facts:

> l. The Plaintiffs own a fourplex rental property at 306 - 308 Alberta Street, New Westminster, British columbia ("Alberta Street property").
>
> 2. The Alberta Street property was insured under a commercial fire and extended coverage policy issued by the Plaintiffs ("Insurance Policy"). A copy of the Insurance Policy is at Appendix "A" to this Statement of Facts.

3. On or about June l0, l989 the Alberta Street property was damaged by a fire.

4. It is assumed, for the purposes of this application only, that the fire occurred during the term of the Insurance Policy, and that the damage caused by the fire is insured by the Insurance Policy, subject to the application of the Tenant Exclusion Endorsement.

5. The fire damage was caused by Robert Kral, a tenant at the Alberta Street property, when Mr. Kral, after an argument with his co-tenant, went outside the building and threw one or more lit gasoline-filled bottles through the second floor window of the apartment which he shared with his co-tenant.

6. Mr. Kral was subsequently convicted of arson and was sentenced to 3 years imprisonment.

The material portions of the insurance policy in issue read as follows:

5. PERILS INSURED: This policy insures against direct physical loss or damage caused by the following perils:

(A) FIRE OR LIGHTNING: Including lightning loss or damage to electrical devices, appliances or wiring.

...

(D) RIOT, VANDALISM OR MALICIOUS ACTS: The term "Riot" includes open assemblies of strikers inside or outside the premises who have quitted work and of locked-out employees.

> There shall in no event be any liability hereunder for loss or damage:
>
> (i) due to cessation of work or by interruption to process or business operations or by change(s) in temperature;
>
> (ii) due to flood or release of water impounded by dam, or due to any explosion other than an explosion in respect of which there is insurance under clause 5(B);
>
> (iii) due to theft or attempt thereat.

The "Tenant Exclusion Endorsement" reads as follows:

> "In consideration of the premium charge, it is hereby understood and agreed that the peril vandalism and malicious acts excludes loss or damage, directly or indirectly, proximately or remotely, resulting from or contributed to by, or at the connivance of any person occupying the above described premises.

The only issue for me to determine in this hearing is whether the "Tenant Exclusion Endorsement" excludes coverage for damage caused by a tenant who intentionally ignited a fire at the insured property.

The plaintiffs' position is that the damage caused to their property falls under the peril listed in sub-clause 5(A) of the policy, namely, physical loss or damage caused by fire. The defendants' position is that the damage to the insured property was

caused by a malicious act of the tenant and thereby it is a loss excepted under the "Tenant Exclusion Endorsement".

It is trite law that in order to establish liability within the coverage of an insurance policy the loss must be caused by an act or operation covered by the policy: it must be the proximate result thereof, unless it is, there is no liability. This issue of causation, whether the loss was the proximate result of an act covered under the policy, becomes pivotal in cases such as the instant one where the loss is the result of several factors.

Brown and Menezes in their textbook Insurance Law in Canada (Toronto: Carswell, l982) at p. l95 comment on the significance of causation in situations where the loss is the result of several factors, not all of which are insured perils. They say:

> The question is whether the occurrence of one of the insured perils is sufficient to bring the loss within the terms of the policy. This problem is cast in even greater relief when one of the contributing factors is an insured peril but another is expressly excluded in the policy.

In the next paragraph, they continue:

> In general, the resolution of questions of this kind turns on the determination of the "proximate" cause. If the cause so established fits the description of an insured peril, the insured will be indemnified, but if

> it constitutes an excluded peril, there will be no indemnity.

E.R. Ivamy in his text General Principles of Insurance Law 5th ed. (London:Butterworths, l986) at 390 explains that:

> Where the peril insured against, though undoubtedly causing the loss, is preceded in point of time by an excepted cause, there is no loss within the meaning of the policy if the excepted cause can be regarded as its proximate cause.

Therefore, the determinative question is whether the proximate cause of the loss can be described as an insured peril or whether, in fact, the proximate cause fits the description of an excepted peril.

Mark S. Rhodes in the cyclopedia Couch on Insurance (New York: The Lawyers' Cooperative Publishing Company, l983) vol. l8 at pp. l0l8-l0l9 gives assistance on how to determine the proximate cause of a loss:

> A cause is proximate when it sets in motion a chain of events which result in the loss without the intervention of any new or independent force.
>
> Where the peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and the final injury, produce the final result for which the insured seeks to recover under his policy, the peril insured against will be regarded as the proximate cause of the entire loss, so as to render the insurer liable for the entire loss within the limits fixed by the policy.

> Proximate cause is that which, in a natural sequence, unbroken by any new cause, produces the result which would not otherwise have occurred.

Similarly, E.R. Ivamy in General Principles of Insurance Law, supra, at p. 390 says:

> If the peril insured against is the reasonable and probable consequence, directly and naturally resulting in the ordinary course of events from the excepted cause, the excepted cause is the cause of the loss within the meaning of the policy, since there is no break in the sequence of causes, and the relation of cause and effect between the excepted cause and the loss is, therefore, established.

Brown and Menezes in their text Insurance Law in Canada, *supra,* at pp. l96-l98 comment:

> If an insured peril is the originating factor, the test of proximity is whether the loss was the direct result of that peril. In *Drumbolus v. The Home Insurance Company* the insured claimed under a policy covering loss by "fire". The fire had started in the basement of an ice cream store and firemen were called. In a successful effort to contain the flames the firemen dismantled part of the furnace. Consequently the heat was turned off, causing the pipes to freeze and finally resulting in damage to the store. It was held that this damage was the "direct" and "immediate" result of the fire so that the policy applied. Although not raised specifically in that case, the test for directness is whether, once the originating cause has operated, there has been no new intervening cause
>
> ...

> While there is some authority to the contrary, it is generally accepted that the intervening cause must be a human intervention if it is to negate the proximity of the originating cause. In *Roth v. South Easthope Farmers Mutual Fire Insurance Company,* for example, a barn was partially damaged by lightning and then some minutes later was completely destroyed by high winds. Although it was not established whether the wind would still have damaged the barn if the lightning had not struck first, the court held the lightning to be the proximate cause of the whole loss.
>
> ...
>
> Where the insured peril is not the originating cause of the chain of events leading to the loss it may be more difficult to establish that it is the effective cause.

In MacGillivray and Parkington on Insurance Law 8th ed. (London: Sweet & Maxwell, l988), the editors make a very important point (at p. 838) relating to the doctrine of proximate cause:

> The doctrine of proximate cause applies just as much to excepted perils as to those insured against. Thus an insurer cannot escape liability unless he can show that the loss or damage was proximately caused by an excepted peril and, conversely, once it is shown that an excepted peril was in operation, the assured will be unable to recover for any loss or damage which is the proximate result of that peril. Thus, if explosion is excepted from a fire policy, the exception will exclude not only damage caused by an explosion consequent upon a fire but also damage caused by a fire consequent upon an explosion. Similarly where a fire policy excepted loss or damage by fire occasioned by any earthquake and an earthquake caused a lighted stove in one house to be upset and in consequence the house caught fire and the fire spread to other houses, in so far as it spread without the

> intervention of other than natural causes it was a fire caused by or through an earthquake.

The Supreme Court of Canada applied this doctrine of "proximate cause" in the case of ***Wadsworth*** v. ***Canadian Railway Accident Insurance Co.*** (l9l4), 49 F.C.R. ll5, l6 D.L.R. 670. The insured under an accident policy suffered a fit which caused a lantern to tip over which started a fire. The insured was burned to death. A majority of the Supreme Court of Canada held that the fit, and not the fire, was the proximate cause of death. Therefore, a clause in the policy limiting liability in cases of injury or death caused by "fits" applied. Had the policy not contained the limiting provision with express reference to "fits", it is unclear whether the result would have been the same. The clause figured prominently in the reasons of the majority. It was stated, for example, that the clause would be virtually meaningless if it did not cover the fact situation in that case.

Applying the above law to the instant facts, I must conclude that the proximate cause of the loss was the throwing of the incendiary into the insured property by Mr. Kral and not the subsequent fire. That act by Mr. Kral set in motion a chain of events which resulted in the loss without the intervention of any new or independent force - the throwing of the incendiary set the fire of the insured property which in turn produced the loss for which the insured seeks to recover under his policy. The act of

Mr. Kral in its natural sequence, unbroken by any new cause, produced the result which would not otherwise have occurred. Once the originating cause of throwing the incendiary occurred there was no new intervening cause to negate the proximity of the originating cause.

The facts of the instant case fall within the cases and examples discussed above where the loss was fire damage but the proximate cause of the loss was not held to be the fire. In ***Wadsworth,*** *supra,* the proximate cause was held to be the insured's "fits" which resulted in a lantern being tipped over and starting a fire burning the insured to death. Similarly in MacGillivray and Parkington on Insurance Law, *supra,* the editors describe the situation where explosion is excepted from a fire policy, the exception will exclude not only damage caused by an explosion consequent upon a fire but also damage caused by a fire consequent upon an explosion. In that example, it is the explosion and not the fire which is the proximate cause of the loss just as in the instant case, it was the hurling of the incendiary, and not the resultant fire which was the proximate cause of the loss.

I should add that this case is not one of independent contributing causes. The act of throwing the incendiary and the resultant fire were not coincidentally at the same time but instead

the fire was the natural result (in fact the intended result) of the arsonist act of Mr. Kral.

Having concluded that the proximate cause of the loss in this case was the hurling of the incendiary by Mr. Kral, I now turn to whether the arsonist act of Mr. Kral was a "malicious act", a point contested by the plaintiffs. The plaintiffs submit that the act of arson is significantly different than a malicious act. In support of their argument they point to the distinction made in the Criminal Code between arson and other acts which are more appropriately considered malicious acts. I do not accept the plaintiffs' argument in this respect.

I find that the arsonist act of Mr. Kral in this case clearly falls within the meaning "malicious acts", a peril insured against under sub-clause 5(D) of the policy. To not include an act of arson in the meaning of "malicious acts" in my opinion, would be to impose a very forced, convoluted, and unnecessary meaning on the term "malicious acts" which on the face of it is rather plain and obvious.

The editors in MacGillivray and Parkington on Insurance Law, *supra,* at p. 455 describe the basic presumption that words in an insurance policy should receive their ordinary and natural

meaning, and this is displaced only where there is a real ambiguity. The editors say:

> If the meaning of the words is reasonably clear it must have full effect even although it operates harshly against the assured. It would not be in the interest of trade or the public generally to disregard the obvious meaning of words and to try and wring from them a hidden meaning in favour of the assured, and there is no other reason apart from ambiguity to strain the language of the policy in favour of the assured.

The ordinary and plain meaning of a malicious act or acts has been discussed in various texts. Black's Law Dictionary (6th ed., l990) p. 958, defines "malicious act" as a wrongful act intentionally done without legal justification or excuse; an unlawful act done wilfully or purposely to injure another. In Couch on Insurance, *supra,* vol. l0A at 574 the language typical of that used to extend vandalism and malicious mischief coverage is described as meaning only the wilful and malicious damage to or destruction of the property covered. The Oxford Companion to Law by David M. Walker (Oxford: Clarendon Press, l980) at 779 concisely states the general use in British law of the term "malice" as meaning no more than the deliberate or intentional doing of wrongful conduct.

In my opinion, the arsonist act was by definition undoubtedly done with the intention of destroying property and can only be described as a wrongful act, intentionally done without

legal justification or excuse. Hence, the throwing of the incendiary by Mr. Kral was a "malicious act" and was the proximate cause of the loss in this case. Such a loss, is referred to under the perils listed in sub-clause 5(D) of the insurance policy and not sub-clause 5(A) as claimed by the plaintiffs.

I turn then to a consideration of the "Tenant Exclusion Endorsement" which purportedly carves an exception out of the perils "vandalism or malicious acts" insured against in sub-clause 5(D) of the policy. Essentially the endorsement excepts vandalism and malicious acts to the insured property by any person occupying the insured premises. The plaintiffs argue that this exclusion endorsement robs the insured of the primary benefits under the policy. They argue that if the exclusion endorsement in this case is held to be determinative of the issue, then a nullification of coverage under the policy will result. I do not accept this argument.

The exclusion endorsement in this case neither robs the insured of the primary benefits under the policy nor results in a nullification of coverage under the policy if held to be determinative of the issue. The exclusion endorsement in this case specifically is a "Tenant Exclusion Endorsement" (emphasis mine). It only purports to except coverage where vandalism or malicious acts results from any person occupying the premises. Presumably the perils insured against under sub-clause 5(D) would still

include malicious acts and vandalism resulting from all other persons except those that are occupying the premises. An act of arson by someone other than an occupant of the premises in this case would be covered by the insurance policy. In fact, the "Tenant Exclusion Endorsement" only carves a small exception out of a rather broad spectrum of coverage.

Finally, the plaintiffs submit that the exclusion clause is drafted in an ambiguous manner which leaves doubt as to the extent of the limitation of the insurance coverage. They argue that the defendant having elected not to draft the exclusion in a clear and unambiguous manner is subject to the rule of *contra proferentum* and any and all ambiguities should be resolved in favour of the insured. I do not accept this argument. The "Tenant Exclusion Endorsement" refers to "vandalism and malicious acts". In my opinion, this reference is clearly referring to the perils referred to in paragraph 5(D), specifically "vandalism or malicious acts". I cannot contemplate any other interpretation of this reference.

In conclusion, the proximate cause of the loss was the hurling of the incendiary by Mr. Kral. This arsonist act was a malicious act and therefore the fire damage fell under the peril listed in sub-clause 5(D) of the insurance policy, specifically "riot, vandalism or malicious acts". Sub-clause 5(D) is subject to

a "Tenant Exclusion Endorsement" which specifically excludes from coverage malicious acts resulting from any person occupying the insured premises. Mr. Kral, being a tenant of the insured premises, and being the person who committed the malicious act, is therefore contemplated by the "Tenant Exclusion Endorsement". Therefore, the loss is excluded under the "Tenant Exclusion Endorsement" and in the result no indemnity exists.

Vancouver, B.C.
December 20, l990