IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 71/2020
[2020] NZSC 122

BETWEEN	IAG NEW ZEALAND LIMITED Applicant
AND	GRAEME JOHN MOORE Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	C T Walker QC, C M Laband and S K Swinerd for Applicant C R Carruthers QC, P A Cowey and A J Summerlee for Respondent
Judgment:	13 November 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

Introduction

[1] Mr Moore, the respondent, owns a house in Christchurch, which suffered extensive damage in the 22 February 2011 and 13 June 2011 earthquakes. The estimated reinstatement cost is said to be approximately $2.08 million for the damage caused by the February earthquake and $2.77 million for the damage caused by the June earthquake. Mr Moore's house was insured with IAG New Zealand Ltd, the applicant, for accidental loss over the relevant period. Under the insurance policy, the sum insured is $2.5 million (excluding GST).

[2] Mr Moore's claim is that he is entitled to be paid up to $2.5 million for each earthquake event. That claim turns on the interpretation of the aggregation clause in the insurance policy which, it is common ground, requires that in certain circumstances, losses arising from separate events are aggregated together for the purpose of applying the policy limit.

[3] The parties sought a ruling from the High Court on the preliminary question as to whether it could be said that under the aggregation clause the maximum sum payable was the sum insured. In the High Court, that question was resolved in favour of IAG.[1] Mr Moore successfully appealed to the Court of Appeal.[2] IAG now seeks leave to appeal to this Court.

Background

[4] IAG's limit of liability for accidental loss, the sum insured, generally applies to each successive insured loss occurring during the cover period. But this general rule is subject to the aggregation clause, cl C2, which relevantly provides that the maximum amount paid is as follows:

> The most that **we** pay for any **loss** (or any series of **losses** caused by **one event**) is the sum insured shown in the **schedule**.

[5] "One event" is defined as "a single event or a series of events which have the same cause".

[6] In the High Court and Court of Appeal, the parties agreed that aggregation clauses are to be interpreted according to settled principles of contractual interpretation. The Courts differed in the application of those principles to three issues, namely, whether there was a "series of losses"; if so, whether those losses were caused by a "series of events"; and, if so, whether the series of events had "the same cause".

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1 *Moore v IAG New Zealand Ltd* [2019] NZHC 1549 (Dunningham J) [HC judgment].

2 *Moore v IAG New Zealand Ltd* [2020] NZCA 319 (Cooper, Gilbert and Courtney JJ) [CA judgment].

[7] In summary, the High Court found that the term "series" did not require any greater connection than that the losses and events were "in some way, similar".[3] No other connecting factor was required. Rather, any further degree of connection was only created by the requirement in cl C2 that the events have "the same cause". As to that question of causation, the Judge said "cause" had to be interpreted in the usual way, that is a direct or proximate cause. The Judge said this was usually satisfied by the "but for" test, that is, would the February and June 2011 earthquakes have happened but for the September 2010 earthquake?[4]

[8] In finding in favour of IAG, the Judge said that as Mr Moore had "suffered more than one loss within [the] cover period", he had suffered a "series of losses" – the fact that "they are repeated experiences of loss" constituted the requisite connecting factor.[5] Similarly, the February and June earthquakes were a "series of events". And, relying on the agreed expert evidence to apply the "but for" test, the Judge held that the February and June 2011 earthquakes had the same cause, that is, the September 2010 earthquake.[6]

[9] On appeal, the Court of Appeal said that "series of losses" indicates the losses are temporally proximate and "linked in some way".[7] Similarly, the Court emphasised the requirement of a "proximate temporal sequence" in determining whether there was a "series of events".[8] On causation, the Court rejected the "but for" approach and said cl C2 was only triggered if the events had the same proximate cause. The Court said this test has "been expressed in a variety of ways, including as the direct cause, the immediate cause from which the loss arose as a natural consequence, the dominant cause, or the real efficient cause".[9]

[10] In finding in favour of Mr Moore, the Court held that two separate and temporally distinct occurrences of loss occurring four months apart could not be

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3 HC judgment, above n 1, at [31].
4 At [52].
5 At [32].
6 That evidence came from Professor Smith and Dr Quigley. See at [16]–[20] for a summary of the expert evidence.
7 CA judgment, above n 2, at [16]. See also at [19].
8 At [31].
9 At [34] (footnotes omitted).

regarded as a "series of losses". And the losses were caused by "quite separate events" (not a "series of events").[10] Accordingly, it was not necessary for the Court to consider the question of causation. But for completeness, the Court, relying on the expert evidence before the High Court, concluded that the September 2010 earthquake (while a "but for" cause that "set the stage" for the subsequent earthquakes) was not the proximate cause of either the February or June 2011 earthquakes.[11]

The proposed appeal

[11] On the proposed appeal, IAG seeks to argue that the Court of Appeal made a number of errors. First, IAG submits that the Court of Appeal's "primary error" was to interpret "series" as requiring temporal proximity. It says that the overseas authorities relied on by the Court,[12] and other authorities not cited by the Court,[13] do not support such a requirement. The authorities require only some connection between the elements of a series albeit they will also usually follow each other temporally. Second, IAG submits the Court of Appeal was wrong to find that a series must have a common cause. Rather, all that is required is a linkage, with the requirement of a common cause often imposed separately (as it was in this policy). Accordingly, IAG submits the Court was wrong to find that in this case there was no series of losses. Third, IAG wishes to argue that there is a misstep in the Court's reasoning which is likely to cause confusion in the way this clause and other similar clauses are applied. That is, having made the point that "one event" can include a series of events with the same cause, the Court then proceeded on the incorrect basis that the series of losses had to be caused by the same event. Fourth, IAG submits that the Court erred in its application of the test for causation to these facts.[14]

[12] IAG says that the issues relating to the interpretation of the policy involve a matter of general or public importance and/or general commercial significance because these issues have general application to insurance policies and because

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10 At [35].
11 At [41].
12 *The Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1; and *Travelers Casualty and Surety Co v Certain Underwriters at Lloyd's of London* 760 NE 2d 319 (NY 2001).
13 For example, *Bank of Queensland Ltd v AIG Australia Ltd* [2019] NSWCA 190.
14 The notice of application also challenged the test for causation but that issue is not addressed in the written submissions and we say no more about it.

aggregation clauses with similar wording are common in insurance policies. It is also submitted that whether the aftershocks in issue are one event or have the same cause is a question of general commercial significance given the number of insurance claims concerning property damaged in more than one earthquake in this particular earthquake sequence.

[13] In opposing leave, Mr Moore submits that the proposed appeal does not raise a matter of general or public importance or commercial significance because IAG has provided no evidence of the interpretation of cl C2 being relevant to any other Canterbury earthquake litigation. Further, Mr Moore says that the Court of Appeal's interpretation adopted conventional principles based on overseas precedents and that IAG's submissions conflate the requirement for a linkage between the losses required to form a series and whether the loss-causing events have the same cause. Finally, Mr Moore says that ultimately the appeal would turn on a factual inquiry into the agreed expert evidence which raises no question of general commercial importance.

Our assessment

[14] As we see it, the high point of the proposed argument for IAG relates to the proposition that the Court of Appeal has effectively doubled up on the "same cause" requirement in the policy, by effectively saying this was a requirement for a series as well as a separate requirement of the clause. That is potentially a question of general or public importance or commercial significance.[15]

[15] We have nonetheless concluded that the criteria for leave to appeal are not met in this case. That is because, even if the question of the approach to the "same cause" requirement was resolved in favour of IAG, that would not affect the outcome of the appeal unless the Court also overturned the factual finding that the events did not have the same cause. The question of whether the Court of Appeal was correct to impose a requirement of temporal proximity is narrower because it reflects the wording of this particular policy. But, similarly, even if this question was resolved in IAG's favour, the outcome would not change unless this Court were to overturn the factual finding

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15 Senior Courts Act 2016, s 74(2)(a) and (c).

as to causation.[16] As Mr Moore submits, a further factual inquiry into the expert evidence which would then be necessary to resolve the appeal is not a matter of general or public importance or commercial significance. In these circumstances, we have concluded that it is not in the interests of justice to grant leave to appeal.

Result

[16] The application for leave to appeal is accordingly dismissed. We make an order that the applicant pay the respondent costs of $2,500.

Solicitors:
DLA Piper, Wellington for Applicant
Parry Field Lawyers, Christchurch for Respondent

[16] We also note that in its submissions to this Court, IAG advanced the alternative argument that the series of losses were caused by the same event (the September 2010 earthquake with its sequence of aftershocks). Even on this approach the Court would have to engage with the expert evidence to make a factual finding that the September 2010 earthquake and its sequence of aftershocks comprised "a single event" for the purposes of cl C2.