WHAT DO THE WORDS ‘ARISING OUT OF’ ACTUALLY MEAN?

GOVERNMENT INSURANCE OFFICE OF NSW V RJ GREEN AND LLOYD PTY LTD
(1965) 114 CLR 437

In Australia, the High Court’s decision in Government Insurance Office of NSW v RJ Green and Lloyd Pty Ltd (1965) 114 CLR 437 is often cited when the words “arising out of” require interpretation. In that case, the High Court was asked to consider the operative provision of a policy that provided that the insurer would indemnify the insured against “all liability incurred by the [insured] in respect of the death or bodily injury to any person caused by or arising out of the use of the motor vehicle”.

Ultimately, the High Court in that case did not consider it necessary to express a general view as to the precise meaning and ambit of the expression “arising out of”. However, Barwick CJ, Menzies and Windeyer JJ all indicated that the words “arising out of” imported a causal connection that was “wider”, “less proximate” and “less immediate” than that imported by the words “caused by”. This has been applied by many a lesser court in Australia.

The meaning of the words “arising out of” has recently been considered, with interesting effect, by the High Court of England and Wales (Queen’s Bench Division) in the decision of British Waterways v Royal & Sun Alliance Insurance [2012] EWHC 460 (Comm).

The decision arose out of a tragic set of circumstances. British Waterways had engaged two men, a father and son, to trim hedges along the towpath of the Kennett and Avon Canal. To undertake the work, the men used a tractor, with an attached hedge cutter, owned by British Waterways. As the men were carrying out the work, the bank of the canal along which they were reversing collapsed and the tractor toppled into the canal. Both men were killed. The families of the men brought claims against British Waterways. British Waterways sought indemnity in respect of the claims from its insurer, Royal & Sun Alliance.

The insurer declined cover in respect of the claim, pointing to an exclusion in the policy that provided that:
The insurer sought to rely on this exclusion and the question for the court was whether the deaths “arose out of” the operation of the tractor as a tool.

Mr Justice Burton held that:

(i) The tractor was on the towpath to carry out hedge-cutting;
(ii) Hedge-cutting had taken place immediately prior to the accident;
(iii) The tractor was being reversed so that it could make its way to another part of the towpath to recommence hedge-cutting;
(iv) The proximate cause of the tractor toppling into the canal was it being reversed too close to a vulnerable part of the canal bank; and
(v) The men’s deaths had arisen out of the collapse of the bank and not out of the operation of the tractor as a tool.

In coming to these conclusions, Mr Justice Burton found that the words “arising out of” in the policy exclusion before him required him to consider what the “proximate cause” of the men’s deaths was. He noted that this was contrary to indications given by Australia’s High Court in the Government Insurance Office of NSW case. However, he drew a distinction between the meaning of the words “arising out of” when used by an insurer to rely on an exclusion containing them, compared to their meaning when used to determine whether there is cover under an insuring clause.

If a similar approach is adopted by Australian courts, insurers will need to consider carefully the wording of future policy exclusions.

AUTHORS

STEPHANIE COOK
SPECIAL COUNSEL
+61 7 3251 6161
stephanie.cook@bnlaw.com.au