Landlord Tenant Dispute

As demonstrated during the various Court Hearings associated with the Covid-19 business interruption claims, Courts or dispute resolution forums in different countries or jurisdictions are often influenced by a decision elsewhere. In this respect I came across a case in "Insurance News.com" which is an Australian publication, which I thought was very interesting in the context of both Policy Liability and Legal Liability and bearing in mind that Policy wordings are not dissimilar from jurisdiction to jurisdiction and that these cases can have persuasive influence on the Courts or indeed Ombudsman in another jurisdiction.

The case was heard recently by the Australian Financial Complaints Authority (AFCA) and was ruled upon in December 2021. The AFCA would be the equivalent to the Ombudsman or FSPO in this country.

The Australian Ombudsman decided that as the tenant in the dispute had custody or control of the premises and because this was an exclusion under the Policy that Insurers were correct in declining the claim. They further held that "*use"* of the vehicle included welding work and such ancillary activities and if Insurers wished to exclude these type of works they needed to include specific wording to this effect but this did not affect the declinature of the claim.

"Tenant loses dispute over $786,000 fire bill from his landlord's insurer

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A tenant who was welding his 1968 Ford Mustang in a garage when a fire broke out and destroyed the property has lost a dispute after he tried to claim the cost of the damage under his third party liability motor policy.

The man had just replaced a clutch kit on the vintage car in January 2017 and began welding a patch onto the floor. The fire started and spread throughout the home he was renting.

Two years later, he received a demand from the landlord's insurer for $786,000 for damage to the rented home.

He lodged a claim seeking full payment of that demand under a Special Vehicles policy held with IAG Insurance, which denied the claim on the basis of a policy exclusion which stated it would not pay for damage to property that was "in the physical or legal control of you or any person using your vehicle".

The Australian Financial Complaints Authority (AFCA) ruled IAG was entitled to do so as the rented property was in his control under the residential tenancy agreement, which gave him right of occupancy.

"The panel sympathises with the complainant but the policy is clear," AFCA's ruling said.

"Although the complainant did not own the rented property he did have physical control of the property. The policy excludes third party liability where the damage claimed is to property in the physical control of the complainant.

"As the wording is clear and unambiguous, it is fair the insurer is entitled to rely on the exclusion to deny the claim."

The Mustang owner said he was a mere tenant, arguing he only had the right to live at the home but otherwise had no right to do anything to the property.

AFCA said once he commenced residing in the property, he had physical control.

"He may lock doors and prevent or grant access. He must prevent his guests from causing damage or disturbance.

"The panel accepts the complainant may not have any legal control over the property in the sense of ownership however he did have the rights provided under the tenancy agreement. Arguably this includes the legal right or control over access to the property," the ruling said.

IAG had separately argued welding did not constitute the insured use of the Mustang as another reason for it to decline liability but AFCA said the act of replacing the clutch and welding did constitute use of the vehicle.

The policy was geared towards vehicle owners with an interest in vintage, classic and collectable vehicles and AFCA said it was reasonable such owners were interested in carrying out work on their automobiles.

"Should the insurer wish to narrow the scope of cover to avoid risks associated with this type of work, the policy should be clear and unambiguous," AFCA said.

"On page 36, the policy refers to the 'private use definition (above)'. Concerningly, there is no such definition either in the PDS or on the certificate of cover."

One IAG policy definition included the vehicle being used in connection with repairing, servicing and testing, and AFCA said the act of welding or working on the vehicle was a fit with that wording and ruled "vehicle use" was not limited only to driving the Mustang". However, this did not impact on Insurers decision to decline the claim because the tenant had "*physical/legal control"* of the rented premises.

I find this case most interesting for the following reasons:

<u>Standard Exclusion under a Public Liability/Third Party Policy – custody or control of the premises</u>

Whilst this case dealt with liability under a Special Vehicle Policy, most Liability Policies will have an exclusion for property in the custody or control of the insured and in this case the wording said that

"We will not pay for damage to property belonging to, or in the physical or legal control of you or any person using your vehicle and/or any attached trailer, caravan or side car".

Clearly the complainant was renting the residential property from the Landlord and the Insurer claimed that the property was in the complainant's physical or legal control and therefore the exclusion applied. The Australian Financial Complaints Authority agreed with this interpretation because the complainant had a legal right of occupancy and was also in physical control of the rented property. It was decided that the exclusion was clear and unambiguous (so contra proferentem did not apply) and the tenants Policy therefore did not cover damage caused to the rented property whilst it was in the physical or legal control of the complainant.

As you are aware it may be possible to endorse the Policy in the context of this exclusion along the following lines:

"*Property in the custody or control of the insured shall not be deemed to include premises (including fixtures and fittings) leased or rented to the insured provided always that*

- *(a) The premises are specified in the Schedule*
- *(b) Liability assumed by the insured under agreement is excluded unless such a liability would have attached notwithstanding such agreement".*

As you are aware the last condition (b) would encompass a contractual liability over and above the tenant's "*normal"* legal liability.

It is of course possible for the tenant to take out Contents cover which will state that if the Policyholder is a tenant and not owner that Insurers will pay all sums which he is liable to pay under the terms of the Tenancy Agreement etc but subject to listed exclusions which may include fire. The best case scenario is that the tenant addresses the issue in advance particularly in the context of any particular or special activity he carries out at the premises but unfortunately a lot of these situations are only addressed when an event or claim happens.

If this matter had arisen in Ireland (or indeed the UK) a Loss Adjuster would immediately refer to the UK decision of Mark Rowlands -v- Berni Inns Limited which case involved a fire in a tenanted unit whereby the Landlord

pursued the tenant for negligence for causing the fire. The Lease was referred to and it was noted in the Lease that the tenant covenanted to pay the Landlord a contribution to the insurance premium on the premises/building and this provision was referred to as an *"insurance rent"* paid by the tenant to the Landlord. On this basis the Court decided that the Landlord had insured the entire premises for the joint benefits of the Landlord and the tenant and that any subrogation or recovery by the Landlord against the tenant failed as in essence the tenant was also the insured and that the Landlord's Insurers could not seek to recover from its own insured i.e. the tenant.

Use of the property insured

In the AFCA case the tenants Insurer had also argued that the proximate cause of the fire was the welding works to the vehicle and that in addition the Policy did not respond as welding did not constitute *"use"* of the vehicle. The AFCA emphasised that the Policy was written or structured with vehicle owners with an interest in vintage/classic and collectable vehicles in mind and that it was therefore reasonable to infer that those owners would be carrying out work on their vehicles. It was stated in terms of ambiguity that if Insurers wish to narrow the scope to avoid such activities (welding etc) the Policy should be clear and unambiguous. In this respect the AFCA referred to the Policy wording and pointed out that there was no specific definition in the context of *"private use".*

Again, I would suggest that the issue of ambiguity in terms of contra proferentem etc is a common theme in any decision regarding an interpretation of Policy cover. The contra proferentem ruling dictates that any ambiguity is construed in favour of the Policyholder so that Insurers should draft their Policies clearly and precisely and, in this case, if they had intended the private use to exclude works on the vehicle then they should have specified this accordingly.

Kind regards

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