Browne Jacobson

Recklessness not ‘accidental’ when it comes to trespass

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The recent judgment in MacPhail v Allianz Insurance Plc [2023] EWHC 1035 (Ch) puts public liability policies under the microscope and considers the question of ‘accidental trespass’.

The dispute revolved around a property constructed by a development company, HCL, that encroached upon the land of an adjoining owner.

Facts

Mr MacPhail acquired the ownership of one of the developed properties and as part of the acquisition became a director of HCL. The property’s cellar was found to have encroached by around 18 inches, under a passageway belonging to Mr and Mrs Gueterbock, the adjoining neighbour. During construction of the development HCL stated it did not know conclusively who the passageway belonged to.

The Gueterbocks brought a claim for trespass directly against MacPhail, which was settled for around £250,000 inclusive of damages, rectification costs and the Gueterbock’s legal costs. McPhail also incurred defence costs of c. £280,000.

MacPhail subsequently sought indemnity from Allianz, which had issued a policy to HCL. The policy contained provisions entitling MacPhail to claim under the policy, despite not being a named insured. He also brought a claim against HCL for breach of contract.

Allianz denied liability, arguing that the trespass was not accidental, therefore it did not trigger the insuring clause and fell outside the policy's coverage.

With the parties failing to reach a resolution McPhail issued a claim for breach of contract against HCL and for a declaration against Allianz.

First instance decision

At trial the court held that the director of HCL was reckless in building under the entire width of the passageway and up to the neighbour’s flank wall as there was a risk that: (1) the neighbours would complain that this was encroachment; and (2) that they would be correct.

Therefore, whilst the breach of contract claim against HCL for £530,000 damages succeeded, the declaration for an indemnity against Allianz did not.

McPhail appealed against the finding that the trespass was not “accidental”, namely that (1) the Judge had misstated the legal test and (2) even if the test was correctly stated, the Judge had misapplied the law.

Court of Appeal decision

The Court of Appeal found that the first instance court's explanation that HCL's 'willingness to take the risk' that there was an actionable encroachment was merely a modern formulation of a decision that was to 'court the risk'.

The Court of Appeal relied upon an excerpt from Colinvaux and Merkin's Insurance Contract Law (2022), which helpfully explains the distinction between accidental conduct and recklessness. It states:

> "It is settled law than an accident, for the purposes of an insurance policy, is from the assured's point of view an act, intentional or otherwise, which has unintended consequences. However, if the consequences were intended by the assured, or if the consequences while unintended were inevitable so that the assured can be regarded as having acted with reckless disregard for them, then it is clear from the authorities that there is no accident and the assured is precluded from recovery by the terms of the policy itself as well as on the grounds of public policy. The principle is that, by embarking upon a course of conduct that is obviously hazardous the assured intends to run the risk involved…"

As such the Court of Appeal was satisfied that the correct legal test had been applied. It was not the construction works but the risk of trespass caused by that construction that was the relevant 'action' to which the question of mens rea [intention] was applied in order to determine whether the act was 'reckless' or merely 'accidental'.

The Court of Appeal was satisfied that where an insured was aware of the risk of a different interpretation of the boundary, even notwithstanding the finding of the relevant individual's belief that the flank wall was the true boundary, this awareness meant the trespass was not an 'accidental event' that would trigger cover – there was a high degree of recklessness to the conduct.

The appeal was dismissed; the claim under the policy did not satisfy the test for "accidental".

Comment

The question of how a tortfeasor's belief came about is likely to be relevant in these sorts of cases. The outcome may have been different if professional advice had been taken and if, for example, such advice had confirmed the developer's belief regarding the true boundary. It would have made the tortfeasor's belief itself much more justifiable and less likely to be seen as reckless.

Practically, in circumstances where boundaries are often unclear and may be subject to later debate, property owners and developers should consider the option of defective title insurance cover, which may provide protection e.g. against the costs of rectification or paying damages for a breach, provided it is taken out before any dispute arises.

This case provides a refresher on the meaning of 'accidental', particularly in relation to policy interpretation and provides valuable guidance to both insurers and policyholders moving forward. In doing so it explores the distinction between 'reckless' and 'accidental' conduct (which will always be fact sensitive) and highlights the danger for an insured if they conduct themselves in a way that could be interpreted as "courting the risk".

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