

Giaschi & Margolis

BARRISTERS AND SOLICITORS

401-815 Hornby Street
Vancouver, B.C.
V6Z 2E6
CANADA

Telephone (604) 681-2866
Facsimile (604) 681-4260
Email: giaschi@AdmiraltyLaw.com
Internet: www.AdmiraltyLaw.com

MISCELLANEOUS MARINE INSURANCE ISSUES

By
Christopher J. Giaschi

Presented to the
Marine Insurance Association of British Columbia
8 June 2007

Introduction

The purpose of this paper is to discuss a select number of issues encountered in the law of marine insurance with particular reference to recent court decisions. The issues discussed are:

Warranties

Almost precisely ten years ago I presented a paper to this group simply entitled "Warranties in Marine Insurance". In that paper I reviewed the provisions of the Marine Insurance Act relating to warranties and the case law. Specifically, I reviewed the decision of the Supreme Court of Canada in *Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II")*, ([1984] 1 WWR 97, and the cases that followed it. The *Bamcell II* created a distinction between a true warranty, the breach of which voids the policy from the time of the breach regardless of whether the breach was causative of the loss, and the so called "suspensive condition", a policy term that merely suspends the policy during the period of the breach. I concluded:

Recent developments in the law in relation to warranties in policies of marine insurance indicate that there has been a judicial amendment of, if not complete revocation of the Marine Insurance Acts. It is only in very rare circumstances that a Canadian court will find a policy to contain a true warranty. These circumstances will essentially be limited situations where the warranty is material to the risk and the breach has a bearing on the loss.

The case law since that paper has not caused me to alter this conclusion except I would now add that precise and unambiguous policy wording can go a long way towards establishing a true warranty as opposed to a suspensive condition.

In *Shearwater v Guardian Insurance Co.*, (1998) 60 BCLR (3d) 37, a vessel sank while moored to a log boom. The policy contained a term that the vessel would be inspected on a daily

basis and pumped as necessary. In fact, the vessel was not boarded daily but was observed from shore and pumped when necessary. The court held that the inspection term was not a true warranty but merely a suspensive condition and that because the vessel had been boarded and pumped the day before the sinking it was not causative of the loss.

In *Elkhorn Developments Ltd. v Sovereign General Insurance Co. et al.*, 2001 BCCA 243, the policy contained a warranty that any movements of the barge would be subject to underwriters' prior approval. In breach of this warranty, the barge was moved without any notice to underwriters and sank four days after the move had been completed. The Court of Appeal rejected the argument that there must be a "substantial relationship" between the policy term and the loss incurred before the term could be called a true warranty. All that was required was the intent that the breach would discharge the insurers from further liability. This intent was found in the use of the word "warranty" (which was not determinative), the fact that the parties were sophisticated professionals and in the fact that all cover notes clearly stated "No moves without prior approval". (Note: The intent would have been easier to find if it had been expressly set out in the policy.)

In *Ocean Masters Inc. v AGF M.A.T. (Allianz AGF MAT Ltd.)*, 2007 NLCA 35, a fishing vessel sank 40 miles off the coast but while returning from a journey to a place 170 miles off the coast. The policy contained a warranty that the vessel be "CSI certified and maintained". The vessel's CSI certificate did not permit the vessel to fish more than 120 miles off the coast. The Nova Scotia Court of Appeal held that the warranty was merely a suspensive condition because the general conditions of the policy provided a breach of a clause or condition prior to a loss would not void coverage and because the breach had no bearing on the loss.

Finally, in *McIntosh v Royal & Sun Alliance*, 2007 FC 23, a vessel was stolen while trailered at the assured cottage. The policy did, however, contain a pleasure use warranty which had previously been breached. The Federal Court held that the breach of the pleasure use warranty was a breach of a true warranty. Important to this conclusion was the wording of the policy which differentiated between absolute and suspensive warranties, defined the pleasure use warranty as an absolute warranty, and expressly provided that coverage would cease upon the breach of an absolute warranty and could not be reinstated. Thus, precise and unambiguous policy wording established a true warranty the breach of which discharged the underwriters from liability for a loss which occurred after the breach despite the fact that the breach was not causative of the loss.

Bad Faith

The liability of underwriters for the bad faith denial of a loss remains a hot topic in marine insurance. However, the small amount of case law on this topic indicates that underwriters' fears may not be completely justified. There have only been two reported Canadian cases dealing with allegations of bad faith in marine insurance context.

In *Forestex Management Corp. et al. v Underwriters at Lloyds et al.*, 2004 FC 1303, underwriters were sued for bad faith denial of a claim for the constructive total loss of a vessel. The Statement of Claim, however, had failed to allege that the loss was covered and the underwriters brought an application to strike the claim. The Federal Court held that a claim for bad faith could not succeed unless there was, in fact, coverage under the policy. The court, however, refused to strike the claim and instead gave the plaintiff leave to amend to allege that there was coverage under the policy.

The second case is much more interesting. *Continental Insurance Co. v Almassa International Inc.*, 2003 ONSC 10422, concerned damage to a shipment of lumber. Underwriters denied the claim arguing relying upon an exclusion in the policy for delay. The assured pleaded that underwriters had acted in bad faith in denying the claim and in dealing with the claim. Regarding the allegations of bad faith, the trial Judge was very critical of the way in which underwriters handled the file. The criticisms included: making an interim payment of only US\$260,000 when underwriters had agreed to pay US\$350,000; interfering with and attempting to influence the surveyor; failing to list relevant documents and lying about same on discovery; and, raising allegations the damage was caused by inherent vice when underwriters knew there was no basis for this defence. She concluded that there was definite evidence of unfairness and deception. However, and notwithstanding these findings, she declined to order punitive damages on the grounds that the conduct was not so outrageous that punitive damages were required to act as a deterrent.

Thus, although underwriters need to be continuously vigilant that they deal fairly and in good faith with their assureds, the concerns that every denial will give rise to a finding of bad faith are not justified.

Waiver of Subrogation and Third Parties

The case of *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.*, [1999] 3 SCR 108, concerned an action by the owners of a barge against the charterers for the sinking of the barge while it was under charter. The action was subrogated action brought by the underwriters of the barge. However, the policy that had been taken out by the owners included a provision that waived subrogation against charterers. The owners and underwriters argued that the charters were not entitled to rely upon this provision because they were not a party to the policy of insurance, were completely unaware of the waiver of subrogation clause when they chartered the barge and their contract with the barge owner did not require the owners to take out insurance for their benefit. Moreover, after the loss of the barge, the owners and underwriters had agreed to commence legal proceedings against the charterer. The Supreme Court of Canada held, however, that the charterers were entitled to rely upon the waiver of subrogation clause. In reaching this conclusion the Supreme Court developed a principled approach to exceptions to the doctrine of privity of contract. The principled approach was: 1. the parties to the contract must intend to extend the benefit to the third party seeking to rely on the contractual provision; and 2. the activities performed by the third party must be the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, as determined by reference to the intentions of the parties. The charterer met each of these tests.

As a result of the decision in *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.* some underwriters amended their policies to preserve their rights of subrogation in similar cases. This was the case in *North King Lodge Ltd. v Gowlland Towing Ltd. et al.*, 2005 BCCA 557 affg. in part 2004 BCSC 460. This case again involved the sinking of a barge while in the possession of charters and again the policy included a clause waiving subrogation against charterers. However, the policy also contained an additional clause in the following wording:

It is not intended by the Assured and the Insurer(s) that this Policy shall automatically cover any party named herein other than the specifically named Assured(s). Notwithstanding any Waiver of Subrogation, Additional Assureds, or similar clauses contained in this Policy, the coverage and benefits provided by those clauses are only extended to parties other than the specifically named Assured(s) at the option of the Assured(s), and no one other than the specifically named Assured(s) may claim any

rights in respect of this Policy without the written consent of the specifically named Assured(s).

The trial Judge held that this wording prevented the charterer from taking the benefit of the waiver of subrogation clause without some evidence that the owner exercised his option to extend the benefit of the waiver of subrogation clause. (Note: Although this case went to appeal, the Court of Appeal did not deal with this issue.)

Another case that considered waiver of subrogation but in a different context is *Secunda Marine Services Limited v Fabco Industries Limited*, 2005 FC 1565. In this case a vessel was damaged by fire during the course of a major refit. The vessel was insured under a builders' risk policy and the underwriters brought action against the subcontractor that caused the fire. The subcontractor sought to rely upon a line of cases relating to building construction in which various courts have held that subrogation actions are not available as against contractors and subcontractors. The Federal Court refused to extend this line of cases to ship building contracts which he held were governed by federal marine insurance and not provincial law.

Loss by two or more concurrent causes

In a previous paper ("Canadian Law of Marine Insurance – Frequently Asked Questions") I pointed out that there seemed to be a difference of opinion as between the Supreme Court of Canada and the British Columbia Court of Appeal concerning whether there would be coverage in situations where a loss was caused by two independent concurring causes one of which was a covered peril and one of which was excluded. The decision of the Supreme Court of Canada in *C.C.R. Fishing Ltd. v British Reserve Insurance Co.*, [1990] 1 S.C.R. 814, strongly suggests that if one of two concurring causes is an excluded peril there will still be coverage under the policy provided the other cause was a covered peril and "one without which the loss would not have occurred". However, in *Charterhouse Properties Ltd. v Laurentian Pacific Insurance*, (1993) 75 B.C.L.R. (2d) 299, the British Columbia Court of Appeal held that if one of the concurring causes is excluded by the terms of the policy the damage is not recoverable.

This issue was recently considered in the case of *Continental Insurance Co. v Almassa International Inc.*, 2003 ONSC 10422 and in *566935 B.C. Ltd d.b.a West Coast Resorts v Allianz Insurance Co. of Canada*, 2006 BCCA 469. In *Continental Insurance Co. v Almassa* the Ontario Supreme Court held that a policy exclusion would only be operative if the excluded peril was the sole cause of the loss.

In *West Coast Resorts v Allianz* the issue was whether the sinking of a barge was due to perils of the sea. At the time of her sinking ordinary wear and tear had opened her seams allowing the continuous ingress of substantial amounts of sea water and requiring continual pumping to keep her afloat. The assured alleged that the shore power to the pump must have been interrupted and that the loss was, accordingly, fortuitous and due to a peril of the sea. The Defendant underwriters alleged that the cause of the sinking was a failure in the planking of the barge due to worm infestation which allowed water to enter at a rate that overwhelmed the pump. The trial Judge held the loss was caused by ordinary wear and tear or the actions of vermin, excluded perils, and not by a peril of the sea and the case was dismissed. On appeal, the Court of Appeal noted that Anglo-Canadian law required that for a loss to be considered a peril of the sea, the actual entry of sea water must have been caused by a fortuity. Here, the fortuity alleged by the

Plaintiff, the failure of the pump, was not such an antecedent fortuity and the loss was therefore not caused by a peril of the sea. The British Columbia Court of Appeal referred to the decision of the Supreme Court of Canada in *C.C.R. Fishing Ltd. v British Reserve Insurance Co.*, [1990] 1 S.C.R. 814. The court read this case as requiring that the competing causes which combine to produce the loss must all have been operative in relation to allowing the ingress of water.