



MILLS
OAKLEY

**Market Ramifications of
*Swashplate Pty Ltd v Liberty Mutual Insurance
Company trading as Liberty International
Underwriters [2020]***

NSW MLAANZ Branch Seminar 1 September 2021
Presented by Maurice Lynch

- A. Read contractual documents **as a whole**
- B. **Expressly state** when one document varies another
- C. Courts do not always correctly **commercially construe** a contract
- D. Where ICC(A) applies, commencement of cover may start from the **first movement of goods**





A. Read contractual documents as a whole



A. Read contractual documents as a whole

- When reading an insurance contract, it is necessary to read all the contractual documents as a whole, giving effect where possible to all provisions.
- In *Swashplate* there was:
 - a facility;
 - master slip;
 - placement slip;
 - standard form ICC(A) clauses; and
 - email correspondence





A. Read contractual documents as a whole

In reading all the contractual documents as a whole, the Court found, for example, that:



- “Period of insurance” in the **master slip** was not the period of insurance as defined by when risks would attach.
 - Rather, it refers to the duration of a **facility** between the underwriters and brokers.
 - Insurance could be placed under the facility by the issue of a **placement slip** on agreed terms for a single helicopter transit.

A. Read contractual documents as a whole

- Clause 4.3 of the **ICC(A)** excluding cover for loss or damage caused by insufficient packing did not apply during transit.
 - This is because the **master slip** included a condition requiring cargo to be professionally packed, stowed, carried and overseen by a qualified aircraft engineer.
 - This meant that the policy was intended to cover damage due to insufficient packing during transit, and only damage during the process of packing would be excluded.
- The importance of construing an insurance contract as a whole has been re-affirmed in *Star Entertainment Group Ltd and Others v Chubb Insurance Australia and Others* [2021] FCA 907.





B. Expressly state when one document varies another

B. Expressly state when one document varies another

- For example, if a **placement slip** or **policy schedule** seeks to amend the **ICC(A)**, it must do so expressly.
- In *Swashplate*, the Court found that an email purporting to state that insurance cover began from 19 May 2018 did not have contractual force as it used the words “*bound with effect*” instead of “*commence*” or “*attach from*”.





B. Expressly state when one document varies another

- At [51] to [52]:

“Ms Baker responded to Mr Williams about a day later saying 'On that basis I confirm cover bound with effect from the 19th May...

*Again, the language used **does not specify that the cover is to commence or attach from 19 May 2018.** Rather, the email refers to cover 'bound with effect from' that date. This is a statement that could establish when the agreement was to be taken to have been made, a date which had significance for the purposes of cl 11 of the ICC(A)...*

*Therefore... the content of the email from Ms Baker...**is not contractual in character.**”*

- Accordingly, it is important to expressly and clearly state that a term has been varied in contractual documents.



**C. Courts do not always correctly
commercially construe a contract**



C. Courts do not always correctly commercially construe a contract



- Courts have made clear that insurance contracts would not be construed in an uncommercial manner.
- However, Courts do not always correctly commercially construe contracts.



C. Courts do not always correctly commercially construe a contract

- In *Swashplate*, the Court does not appear to have considered:
 - The premiums payable are often of low value;
 - The underwriters may **not have access** to applicable underwriting documents;
 - **Policies are fixed quickly** without detailed consideration of policy terms or the choice of words used in email correspondence;
 - Marine cargo insurance policies generally **always exclude loss or damaged caused by insufficient packing**;
 - It seems reasonable that the time a marine cargo policy would commence would be the time in **the jurisdiction in which the cargo is located**, not the location of where it is being shipped.
- This indicates that the Court is placing greater onus on underwriters to consider the effect of all contractual documents as whole.



D. Where ICC(A) applies, commencement of cover may start from the first movement of goods

D. Where ICC(A) applies, commencement of cover may start from the first movement of goods

- *Swashplates* provides a reminder that if the ICC(A) applies, the commencement of cover may begin with the first movement of the goods, not the time of entry into the contract.
- This is due to the operation of clause 11 of the ICC(A).





D. Where ICC(A) applies, commencement of cover may start from the first movement of goods

- ICC(A):

“Transit Clause

*8.1 Subject to Clause 11 below, this **insurance attaches from the time the subject-matter insured is first moved in the warehouse** or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit...*

...

Insurable Interest

11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

*11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring **during the period covered by this insurance**, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.”*



Discussion & Questions



MILLS
OAKLEY

Maurice Lynch

Special Counsel, Insurance - Transport

Mills Oakley, Sydney

Phone: +61 2 8035 7975

Email: mlynch@millsoakley.com.au



**MILLS
OAKLEY**

Melbourne

Level 6
530 Collins Street
Melbourne VIC 3000
T: +61 3 9670 9111
F: +61 3 9605 0933

Sydney

Level 7
151 Clarence Street
Sydney NSW 2000
T: +61 2 8289 5800
F: +61 2 9247 1315

Brisbane

Level 23
66 Eagle Street
Brisbane QLD 4000
T: +61 7 3228 0400
F: +61 7 3012 8777

Canberra

Level 1
121 Marcus Clarke Street
Canberra ACT 2601
T: +61 2 6196 5200
F: +61 2 6196 5298

Perth

Level 2
225 St Georges Terrace
Perth WA 6000
T: +61 8 6167 9800
F: +61 8 6167 9898

Disclaimer

This PowerPoint presentation is intended to provide only a limited analysis of the subject matter covered. It does not purport to be comprehensive, or to provide legal advice. Any views or opinions expressed are the views or opinions of the presenter, and not those of Mills Oakley as a Firm. Readers should satisfy themselves as to the correctness, relevance and applicability of any of its content, and should not act on any of it in respect of any specific problem or generally without first obtaining their own independent professional legal advice.