



DMS Maritime -v- Navigators [2020] QSC 382

MLAANZ NSW BRANCH SEMINAR ON MARINE INSURANCE

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Kennedys





ACPB Contract - make good obligation

By cl 6.8.1.1 the Contract provided (emphasis added):

..., [the plaintiff] bears the risk of and shall indemnify the Commonwealth against:

- a. any loss or damage to a Patrol Boat or any other Supplies until delivery in accordance with the Contract; and
- b. **after delivery of a Patrol Boat or any other Supplies, any loss or damage to the Patrol Boat or other Supplies:**
 - i. **which occurs while [the plaintiff] or any Subcontractor is in possession of the Patrol Boat or other Supplies for the purpose of carrying out its Integrated Support Activities;**
 - ii. to the extent it occurs as a result of [the plaintiff] or any Subcontractor carrying out its Integrated Support Activities to the Patrol Boat or other Supplies; or
 - iii. which is caused by any act or omission of [the plaintiff] or any Subcontractor during the Production Phase, or by any damage to the Supplies which occurred prior to the delivery of the Patrol Boat or other Supplies.

by cl 8.3.1, the Contract provided (emphasis added):

During the period in which [the plaintiff] bears the risk of loss or damage of anything under clause 6.8, [the plaintiff] shall promptly replace or otherwise make good any loss of, or repair the damage to, the thing at its cost unless [there followed exceptions from that promise which are not presently relevant].



POLICIES

Primary Policy
\$10m



First Excess Policy
\$40m XS \$1.0m

RSA  100%

RSA  50%

NAVIGATORS  30%
Insuring a World in Motion®

BRIT 10%

MARKEL  5%

QBE  5%



UDAX AT

DMS -v- RSA

DMS Maritime Pty Limited v Royal and Sun Alliance Insurance Plc [2018] QSC 303

Royal and Sun Alliance Insurance Plc v DMS Maritime Pty Limited [2019] QCA 264

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UDAX AT

DMS -v- NAVIGATORS & ORS

DMS Maritime Pty Limited v Navigators Corporate

Underwriters Limited [2020] QSC 382

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Insurance Contracts Act 1984 (Cth)

8 Application of Act

- (1) Subject to section 9, the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

...

9 Exceptions to application of Act

- (1) Except as otherwise provided by this Act, this Act does not apply to or in relation to contracts and proposed contracts:

...

- (d) to or in relation to which the *Marine Insurance Act 1909* applies; or

...



Marine Insurance Act 1909 (Cth)

6 Application of Act

- (1) This Act shall apply to marine insurance ...
- (2) ...

7 Marine insurance defined

A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

8 Mixed sea and land risks

- (1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.
- (2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

9 Marine adventure and maritime perils defined

- (1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.
- (2) In particular there is a marine adventure where:
 - (a) any ship, goods, or other movables are exposed to maritime perils. Such property is in this Act referred to as *insurable property*;
 - (b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;
 - (c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

Maritime perils means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.



Insurance Contracts Act 1984 (Cth)

...

(1A) If a contract of insurance, or a proposed contract of insurance, includes:

- (a) provisions (the *first group of provisions*) that would, if they comprised a single contract or proposed contract, form a contract referred to in any of paragraphs (1)(a) to (f); and
- (b) provisions (the *second group of provisions*) that would, if they comprised a single contract or proposed contract, form a contract other than a contract referred to in any of paragraphs (1)(a) to (f);

then subsection (1) applies as if the first group of provisions and the second group of provisions were each a separate contract or proposed contract.

...

(1C) If:

- (a) a provision (a *related provision*) of a contract of insurance, or a proposed contract of insurance, relates to or affects the operation of a group or groups of provisions included in the contract or proposed contract; and
- (b) because of subsection (1A) or (1B), subsection (1) applies as if that group or those groups of provisions were a separate contract or proposed contract;

then the related provision is, for the purposes of subsection (1), to be regarded as a provision included in that separate contract or proposed contract.



[32] A complicated insurance contract with multiple sections and provisions might permit a differential outcome to that question depending on which provisions were selected so as to be notionally grouped together. But the legislature must have intended that the question of whether or not the ICA applies to a part of an insurance contract is capable of objective ascertainment by the application of the law to the contract. It could not have intended that the application of the ICA could turn on a unilateral (and after the fact) formulation of a grouping of provisions by one of the contracting parties in the context of a dispute over the application of the ICA.

[33] ...the course which must have been contemplated is that the grouping of provisions would be consistent with the contractual intention, objectively ascertained, as to the nature of insurance cover provided by the contract concerned and how it might be conceptually subdivided.

DMS Maritime Pty Limited v Navigators Corporate Underwriters Limited [2020] QSC 382 at [32] - [33]

Excess Policy

[80] Third, it described and classified the risks insured, but again it did so in a different manner to the way in which that was done in the primary policy. This is best appreciated by contrasting how the two policies did so:

Primary policy	Excess policy
<p>Section 1 – Hull Interests Coverage hereon in respect of vessels owned or chartered by the Assured:</p> <p>a) Hull and Machinery. b) Increased Value and/or Disbursements c) Loss of Charter Hire d) Innocent Owners</p> <p>Including new and/or acquired and/or managed and/or chartered vessels held covered at rates and terms to be agreed</p> <p>Section 2 - Marine Contractual &/or Legal Liability Coverage hereon in respect of the Assured's legal and/or contractual liability in respect of specific contracts declared and agreed by Underwriters hereon. Further to include the</p>	<p>Excess marine contractual &/or legal liability Sub-Section a) Excess hull & machinery. Sub-Section b) Excess contractual liabilities. Sub-Section c) Excess contingent products / shiprepairers liabilities Sub-Section d) Excess products liabilities</p>
<p>Assured's legal liabilities to Third Parties in respect of said contracts.</p> <p>a) Hull and Machinery. b) Consequential Costs under Contract following total loss. c) Contingent Products/Shiprepairers Liabilities. d) Combined General Liability.</p> <p>Section 3 - Miscellaneous Third Party Liabilities / Products Liability Coverage hereon in respect of the Assured's direct third party legal liabilities as may be declared hereon.</p>	



...
[85] The conditions applicable to these two components of excess risk cover were identified in these terms:

Sub-Section a) and c)
All terms clauses and conditions as per -
Section 2 Marine Contractual &/or Legal Liability - a) Hull & Machinery c) Contingent Products / Shiprepairers Liabilities of underlying Willis Ltd. policy 91256M14 written 100% by RSA, but only in respect of coverage provided under :

Declaration No. 1⁶⁰ - Repair, Maintenance and Support of 14 Patrol Vessels following delivery to the Royal Australian Navy,

Excess Policy

SHIPREPAIRER'S LIABILITY CLAUSES LSW 169A

6. COVERAGE

Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned to indemnify the Assured for all sums which the Assured shall become liable to pay by reason of the legal liability of the Assured as shiprepairers for:-

- (i) Loss of or damage to any vessel or craft which is in the care, custody or control of the Assured for the purpose of being worked upon including shifting and moving within the limits of the port at which the work is being carried out and including trial trips but not exceeding 100 miles from such port;
- (ii) Loss of or damage to any other vessel or craft upon which the Assured is working except vessels or craft at sea other than whilst on trial trips;
- (iii) Loss of or damage to cargo or other things on or discharged from any of the vessels or craft referred to in (i) or (ii) above;
- (iv) Loss of or damage to machinery or equipment of any vessel or craft, whilst such machinery or equipment is removed from such vessel or craft and is in the care, custody or control of the Assured for the purpose of being worked upon, including whilst in transit between such vessel or craft and the premises of the Assured or whilst in transit to or from specialist repairers' or manufacturers' premises;
- (v) Removal of wreck;
- (vi) Loss of or damage to third party property occurring in the course of or arising from the ship repairing operations of the Assured,

where such liability results from negligence of the Assured, his servants, agents or sub-contractors occurring during the period of this insurance.

...

9. EXCLUSIONS

Notwithstanding anything contained herein to the contrary, this insurance shall not cover any liability:-

...

- (ii) being collision liability, towage liability or liability arising out of the navigation of any vessel or craft owned or operated by the Assured or any affiliated or subsidiary concern or party;

...

- (xiii) assumed under contract or otherwise in extension of the liability imposed upon the Assured by law in the absence of contract;

8.7.4 Ship Repairers' Liability Policy

- a. DMS shall effect and maintain for the full period of the Support Phase under the Contract a Ship Repairers' Liability policy.
- b. The policy shall be in the name of DMS and the Commonwealth and insure DMS for its liability for its own acts or omissions and the acts or omission of its employees, Approved Subcontractors, Subcontractors, agents and consultants.
- c. The policy shall cover:
 - i. DMS' liability for any claims made against it by the Commonwealth for loss of or damage to any Patrol Boats and its machinery or equipment upon which DMS is working; and
 - ii. for claims in respect of personal injury or loss of or damage to property made against DMS by any person,

caused by negligence of DMS in connection with DMS carrying out its obligations under the Contract.

- d. The policy shall be extended to include:

- i. personal injury endorsement;
- ii. liability assumed by DMS under clause 6.8.1.1b. of the Contract;

...

- e. The policy shall be endorsed:

...

- iii. to delete the strikes exclusion and standard collision liability exclusion.



The risks encountered in the marine adventures were not limited to risks encountered on the high seas, but extended to risks encountered in harbours, dry docks and ports, where the boats were to be maintained by the plaintiff in such a way as they could continue on their marine adventure and the plaintiff could discharge its contractual obligations. Being the subject of work of that nature must be regarded as incidental to or a consequence of marine adventure. The risk of a ship being damaged or lost by fire while the subject of work of that nature is a “maritime peril” within the meaning of s 9 of the MIA.

(emphasis added)

DMS Maritime Pty Limited v Navigators Corporate Underwriters Limited [2020] QSC 382 at [121]

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