

Shipping & Transport - South Africa

Marine insurance: High Court revisits breach of warranty

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The Merchant Shipping Act warranty has been a feature of hull and machinery policies written in the South African market for some time, but its meaning and effect are often uncertain in coverage disputes, owing to the absence of judicial consideration of the clause.

However, in *Viking Inshore Fishing (Pty) Ltd v Mutual & Federal Insurance Company Limited*, the South African High Court recently had an opportunity to decide on the clause and to revisit the effect of a breach of warranty in South African law insurance policies more generally.

Facts

The case concerned the collision between bulk carrier Ouro do Brazil and fishing vessel Lindsay in the early hours of May 8 2005, 18 miles off Sardinia Bay near Port Elizabeth. The Lindsay sank almost immediately and 14 of the 16 crew members perished at sea. A lengthy Court of Marine Enquiry into the incident and the publication of a detailed report with recommendations followed.

The most recent judgment concerns the hull underwriters' repudiation of a claim by the Lindsay's owners under a policy incorporating the Institute Fishing Vessels Clauses and Institute Additional Perils Clauses – Hulls. In defence of the claim, the underwriters placed particular reliance on the Merchant Shipping Act warranty, which stated as follows:

"Warranted that the provisions of the South African Merchant Shipping Act and the regulations pertaining thereto shall be complied with at all times during the currency of this policy, provided that this warranty shall be effective only to the extent of those regulations which are promulgated for the safety and/or seaworthiness of the vessel(s) ... It is understood and agreed that this warranty shall in no way be construed to nullify the 'inchmaree' Clause, or any part thereof in the Institute Clauses attached to this Policy."

The specific breaches of the act that the underwriters complained of were those articulated in the Merchant Shipping (Safe Manning) Regulations 1999 – which in summary were that:

- there was no officer in charge of the navigational watch either at all times or at all relevant times or at the time immediately before the incident; and
- the owners did not prepare or preserve a schedule of duties, with the consequence that the underwriters were not liable to the insured for the claim and became entitled to reject it.

Decision

Regarding the meaning and effect of a 'warranty' in a policy of insurance, the court restated the principles of South African law on the point. In terms of insurance transactions, a 'warranty' is a statement or stipulation where the validity of the contract depends upon the exact truth or performance by the insured, as the case may be.

Courts will construe such stipulations as they would any other conditions of the policy; but once the meaning has been ascertained, the warranty must be complied with exactly, whether it is material to the risk or not. Strict observance of its terms is a condition precedent to the incidence of liability and the insurer need not prove a causal connection between the loss and the breach of the warranty.

The court was satisfied that the Merchant Shipping Act warranty in the policy ought to be construed as a promissory warranty, and that it imposed a duty on the insured to comply with those regulations falling within the ambit of the warranty.

Turning to the second part of the Merchant Shipping Act warranty dealing with the effect of the warranty on the 'inchmaree' clause, the court held that the proper approach was that the warranty and the inchmaree clauses both formed part of the policy and must be read together, as opposed to being

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treated as mutually destructive as the owners had argued. The court found that the inchoate clause did not preclude the underwriters from relying on the Merchant Shipping Act warranty as a defence to the claim; rather the insured enjoys cover in the inchoate clause, but subject to the warranty.

The court concluded that there had been a number of breaches of Merchant Shipping Act regulations and, on that basis, the claim under the policy had failed.

Comment

The Merchant Shipping Act warranty withstood judicial scrutiny and the outcome of the case sends a reminder to insureds to have due regard for all warranties included in contracts of insurance, particularly under the Merchant Shipping Act, which contains extensive regulations applicable to the safety and seaworthiness of vessels.

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