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COURT OF APPEAL ON THE CONSTRUCTION OF “PAY FIRST” CLAUSE IN CHARTERERS’ LIABILITY INSURANCE - MS AMLIN MARINE NV ON BEHALF OF MS AMLIN SYNDICATE AML/2001 V (1) KING TRADER LIMITED (2) BINTAN MINING CORPORATION (3) THE KOREA SHIPOWNERS’ MUTUAL PROTECTION & INDEMNITY ASSOCIATION [2025] EWCA CIV 1387

In a recent Court of Appeal judgment in *MS Amlin v King Trader Ltd*, the Court of Appeal upheld the Commercial Court judgment which found that a “pay first” clause in a policy of charterers’ liability insurance was enforceable and had the effect that no indemnity was payable by the insurer where the assured had not discharged the legal liability for which indemnity was sought. The Court of Appeal dismissed the appeal and in doing so considered, in detail, the approach to be taken to conflicting or inconsistent terms and the “onerous clause” doctrine.

FACTS

The underlying facts, and the decision of the Commercial Court judgment, were covered in Issue 90 of CIF Weekly¹.

In short, King Trading Ltd (“**Owners**”) time chartered the vessel SOLOMON TRADER (the “**Vessel**”) to Bintan Mining Corporation (“**BMC**”) on 29 May 2017. BMC took out a policy of charterers’ liability insurance (the “**Policy**”) from MS Amlin Marine NV (“**Amlin**”) on 28 March 2018, with cover incepting for 12 months from 1 April 2018.

The Policy took the form of an insurance certificate (the “**Certificate**”), which incorporated Amlin wording entitled “Charterers’ Liability: Marine Liability Policy 1 – 2017” (the “**Booklet**”).

¹ [Commodities in Focus Weekly – Issue 90 | Stephenson Harwood](#)



Part 1 of the Booklet provided, at relevant parts, that “[Amlin] shall indemnify [BMC] against the Legal Liabilities, costs and expenses under this Class of Insurance which are incurred in respect of the operation of the Vessel, arising from Events occurring during the Period of Insurance as set out in sections 1 to 17 below. “

Part 5 of the Booklet, headed General Terms and Conditions, contained (a) the pay first clause in section 30.13 which stated “It is a condition precedent to the Assured’s right of recovery under this policy with regard to any claim by the Assured in respect of any loss, expense or liability, that the Assured shall first have discharged any loss, expense or liability.” and (b) the hierarchy clause at section 25, which stated that the terms of the specific Charterers’ Liability clauses in Part 1 of the Booklet should prevail over the General Terms and Conditions in Part 5, which includes the pay first clause, “in the event of a conflict between them”.

In February 2019, the Vessel grounded in the Solomon Islands and, on 14 March 2023, Owners and Korea Shipowners’ Mutual P&I Association (the “**Club**”) obtained an LMAA arbitration award in Hong Kong (the “**Award**”). The Award, with costs and accrued interest, exceeds USD 47 million.

BMC was wound up in the British Virgin Islands on 25 March 2021 and, on 24 April 2024, also in London.

Amlin issued proceedings on 5 October 2022 seeking declarations that:

- (i) a “pay to be paid” or “pay first” clause in the Policy was enforceable by the insurer against BMC in respect of its liability under the Award, and
- (ii) the pay first clause survived the transfer of rights to Owners and the Club under the Third Parties (Rights against Insurers) Act 2010 (the “**2010 Act**”)².

In other words, Amlin claimed that the pay first clause meant that it did not have to indemnify BMC against its liability under the Award, because BMC had not paid, and could not pay, the Award, because of its insolvency. As a result, Amlin said that the proper interpretation of the Policy meant that it had no liability to Owners and the Club, even if BMC’s liabilities passed to Amlin under the 2010 Act.

COMMERCIAL COURT DECISION

The Commercial Court judge, Mr Justice Foxton, made the declarations sought by Amlin, declaring that: (i) the pay first clause was incorporated into the Policy, (ii) the pay first clause was enforceable against BMC, (iii) the true interpretation of the Policy meant that no indemnity was payable by Amlin in respect of any liability that BMC had not discharged, and (iv) the pay first clause survived any vesting of BMC’s rights under the Policy in Owners and the Club under the 2010 Act.

As result, because BMC had not discharged its liability, no indemnity would be payable by Amlin to Owners and the Club.

GROUNDS OF APPEAL TO THE COURT OF APPEAL

Owners and the Club appealed the judgment on three grounds and argued that the pay first clause should not be given effect because:

- (1) it is inconsistent with the insuring clause.
Owners and the Club asserted that the insuring clause in Part 1 providing for Amlin to indemnify BMC against its legal liabilities under the Award is fundamentally inconsistent with the pay first clause, which has the effect that BMC has no right to recovery under the Policy until it has paid the Award and that these two clauses could not be sensibly read together.

² Section 1 of the 2010 Act, provided certain conditions are met, transfers and vests insured’s rights under a policy in respect of insured liabilities where the insured incurs a liability against which it is insured and becomes insolvent in third parties, who are then entitled to bring a direct claim against the insurer to enforce those rights. Here this meant that BMC’s rights under the Policy in respect of the insured liability were transferred and vested in Owners and the Club who were entitled to bring a direct claim against Amlin to enforce those rights. BMC’s liability to Owners and the Club had been established for the purposes of the Act. Whilst section 9 of the 2010 Act provides that transferred rights are not subject to a condition requiring prior discharge by the insured of the insured’s liability, this is qualified for marine insurance, which the Policy was, by section 9(6), which provides that the statutory overriding of any condition requiring prior discharge applies only to the extent that the liability of the insured is a liability in respect of death or personal injury, which was not the case here.



Owners and the Club also argued that the two clauses were in different documents and, applying the hierarchy clause, the pay first clause in Part 5 should rank behind the insuring clause in Part 1;

- (2) it falls foul of the so-called “red hand doctrine”, because it is an onerous or unusual clause, and was not brought fairly and reasonably to BMC’s attention. Owners and the Club asserted that the more stringent or draconian a clause, the higher degree of notice was required for it to be incorporated; and
- (3) it was not incorporated into the Policy. The argument was advanced on the basis that the general terms of the Booklet formed no part of the Policy, relying on, *inter alia*, the fact that Part 1 of the Booklet did not refer expressly to Part 5 of the Booklet, whilst Part 2 of the Booklet did refer to it.

COURT OF APPEAL JUDGMENT

Sir Geoffrey Vos MR, giving the leading judgment in the Court of Appeal, dismissed all three grounds of appeal, largely agreeing with the reasoning of the trial judge.

Inconsistency ground

Sir Geoffrey Vos MR held that on the wording of the Policy, there was no inconsistency or conflict between the Certificate and the insuring clause on one hand and the pay first clause on the other:

- i) The Judge considered that the pay first clause did not negate the insuring clause, but qualified and supplemented it. Even though there was a hierarchy clause in the Policy, that did not mean that construction should be approached with any predisposition to find inconsistency. The Judge also noted that the fact that a wide and absolute provision is subject to limitation, modification or qualification does not make the qualifying provision inconsistent or repugnant.
- ii) The indemnity fell due when the Award was made, but that indemnity could not be enforced until the insured had paid the claim. That was a qualification, not a negation of the indemnity.

- iii) He did not agree that, from a business common sense, it could be said that the effect of the pay first clause was to either emasculate the insuring clause or to deprive the insuring clause of all practical effect, or to be said to be inconsistent with the main purpose or object of the insurance – pay first clauses are commonly used, the issue at present has arisen only because BMC has gone insolvent. For a term to be inconsistent, it must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses, which is not the case here.
- iv) The pay first clause can be fairly and sensibly read together with the insuring clause. This can be verified by applying the “single clause” test which involves putting the two clauses together into a single clause to see whether they could be fairly and sensibly read together.

The “red hand” or onerous clause ground

The onerous clause doctrine provides, that where a particularly onerous or unusual term of a contract is contained in one party’s standard terms, and where the other contracting party does not actually know of that term, it will not bind the other contracting party unless the party seeking to rely upon it shows that the clause in question (whether individually or as part of the standard terms) was fairly and reasonably brought to the other contracting party’s attention. Where the doctrine applies, the onerous clause would not be regarded as having effect. However, the threshold for establishing that a clause in question is onerous or unusual is high, especially in a commercial context.

Sir Geoffrey Vos MR, agreeing with the trial judge that the pay first clause was not onerous or unusual, did so on the basis that:

- i) Pay first clauses were not unusual against the legal background, being commonly used by P&I Clubs and in marine insurance;
- ii) Not every clause which is burdensome can be properly regarded as onerous, and a clause in common use is less likely properly to be regarded as onerous, especially between two commercial parties;



- iii) The argument that the pay first clause was hidden away in section 30.12 could not avail Owners and the Club when BMC was represented by a professional marine insurance broker, who ought to have drawn BMC's attention to it. The Judge suggested that the onerous clause doctrine could never be applicable in any normal case in which a party has its own professional broker or adviser acting for it in the transaction;
- iv) Even if there was no broker acting for BMC, there is a clear reference in the Certificate to the general provisions in the Booklet, so that any reader of the Certificate and the insuring clause in Part 1 would have appreciated that general conditions appeared in Part 5 of the Booklet; and
- v) This was a commercial contract between parties of broadly equal bargaining power, in which the Court should be slow to intervene.

The incorporation ground

Only touching upon the incorporation ground briefly, Sir Geoffrey Vos MR also dismissed this ground of appeal, finding it entirely unsustainable to argue that the general terms and conditions, which include the pay first clause, were not incorporated. The Certificate expressly referred to the Booklet, and the Booklet's structure and references made it clear that both the specific insuring clauses and the general terms applied.

COMMENT

Whilst "pay first" clauses have been subject to criticism, the Court of Appeal has reaffirmed their enforceability, recognising the fact that they remain prevalent in marine insurance policies and the market understands their effect. Lord Justice Males, who agreed with Sir Geoffrey Vos, noted, that the question of whether pay first clauses in marine liability policies should be rendered ineffective as against third parties must be a matter for Parliament.

Of wider importance and relevance, particularly to traders and those involved in chartering given how these contracts are usually drafted, is the Court of Appeal's discussion and approach taken to contractual construction in the context of (alleged) inconsistency or conflict.

The Judgment makes it clear that, when construing contracts the Court should strive to read the document as a whole, to the extent it is possible to do so fairly and sensibly, and try to avoid finding an inconsistency or conflict unless terms contradict one another or are in conflict, so that effect cannot fairly be given to both provisions.

The judgment also contains useful discussion on the doctrine of onerous clauses and serves as a reminder of the fact that where parties are sophisticated commercial entities, with broadly equal bargaining power, and representation during the contractual formation stage, courts should be slow to intervene and find a clause to be onerous or unusual.

Please click [here](#) for a copy of the full judgment.

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