Failure to take loss prevention measures: how could it impact on insurance cover ?

Claudio Perrella

Loss prevention and warranties

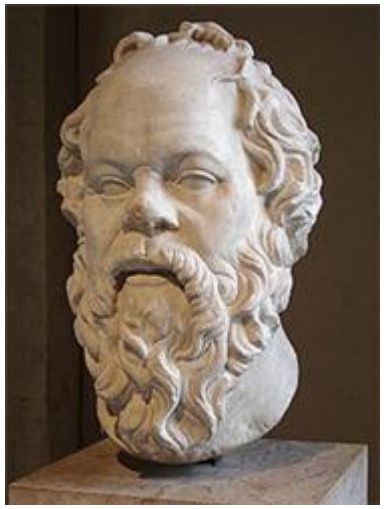
Doctrine of warranty under commow law

- The insured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled.
- The insurer only accepts the risk provided that the warranty is fulfilled.
- Burden of proving a breach of warranty lies with the insurer

Breach of warranty

The breach of a (promissory) warranty has "draconian" consequences:

- brings the risk to an end automatically as from the time of breach
- does not need to be causative of the loss, or material to the risk, before the insurer is discharged from liability



LEXJUS SINACTA

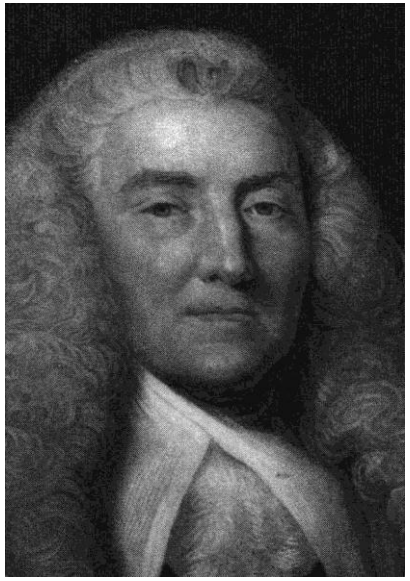
avvocati e commercialisti associati

Breach of warranty

Kenyon v Berthon (1779)

A ship was warranted as "*in Port 20th July, 1776*". If fact she sailed 2 days earlier.

Lord Mansfield stated that *"though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable."*



Breach of warranty

Courts around the common law world have often attempted to mitigate the effects of the breach, interpreting warranties restrictively

Hussain v Brown (1996) *"If underwriters want such protection, it is up to them to stipulate for it in clear terms"*

Lord Steyn in Sirius Insurance Co v FAI Insurance (2004): *"there has been a shift from literal methods of interpretation towards a more commercial approach"*

Brownswill Holdings Ltd. v. Adamjee Insurance co. Ltd. (the Milasan) (2000)

Institute Yacht Clauses

"Warranted professional skippers and crew in charge at all times".

Held:

at least one professional skipper on board "*the whole time, as opposed to intermittently or at intervals*"

"*all these requirements of the warranty are cumulative, and must all be complied with*".

Pratt c. Aigaion

Hull and machinery policy contained a warranty which stated *"warranted Owner and /or Owner's experienced Skipper on board and in charge at all times and one experienced crew member“*

The vessel took fire, investigation showed that the cause was the malfunction of the deep fat fryer or the fridge. No crew onboard when the fire occurred and the generator was left running while the crew was ashore.

Breach of warranty

Aigaion alleged a "*breach of warranty*".

Mackie QC: *the natural and literal meaning of the words required that the owner or the owner's experienced skipper must be on board and in charge at all times and that meant <u>all the time</u>.*

LEXJUS SINACTA

avvocati e commercialisti associati

Pratt c. Aigaion Court of Appeal (2009)

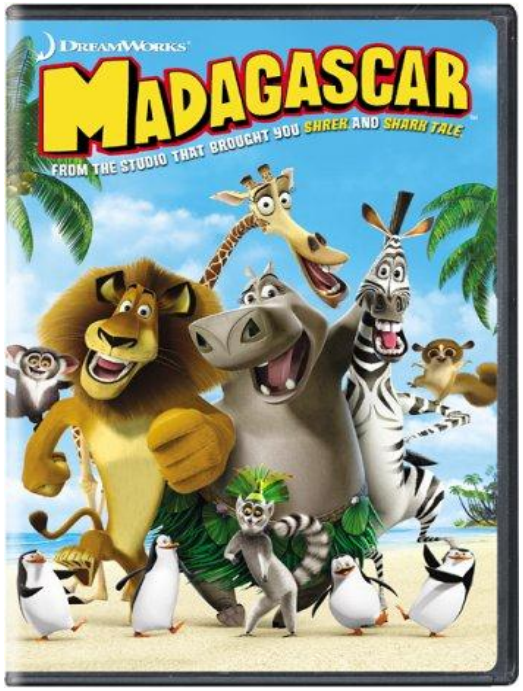
The primary purpose of the warranty was to protect the vessel against navigational hazards in circumstances in which at least two members of the crew, i.e. the skipper and one other, could be expected to be on board.

There was ambiguity in the warranty clause and therefore the clause should be construed *contra proferentem*, i.e. against the insurers.

Elafonissos Fishing & Shipping Co v Aigion Insurance Co SA (2012)

Institute Fishing Vessel Clauses 1987

The policy contained a warranty *"warranted laid up from 1/11/06 until20/02/07 in the port of Mahajanga Madagascar".*



Breach of warranty

On Christmas 25 December 2006 when a cyclone struck the port of Mahajanga, the vessel repeatedly hit the quay until it was towed to safety.

Insurers claimed (a) "warranted in the port of Mahajanga" required lay up to be in accordance with the regulations of that port; (b) such regulations required the vessel to have 4 crew members on board and operational main and auxiliary engines; (c) the vessel's owner was in breach of the warranty.

LEXJUS SINACTA

avvocati e commercialisti associati

Breach of warranty

The High Court found that, at the time of the cyclone, the Agios Spyridon was manned by the chief engineer and at least two other members of the crew, but there was no proof that the captain was on board

Held:

- Warranties were to be construed narrowly
- The warranty did not imply that lay-up had to comply with port regulations. If the underwriters wanted such protection, they should have stipulated this in clear terms

Hong Kong Nylon Enterprises Ltd v QBE Insurance (Hong Kong) Ltd (2002)

The insured *"warranted that this is a container load shipment"*.

Goods were devanned and shipped break bulk, and went damaged in transit. The insured claimed that the Institute Cargo Clause (A) 8.3 overrode the warranty. Clause 8.3 stated *"this insurance shall remain in force … during …. any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment."*

Justice Stone agreed holding that the general Clause 8.3 made an exception to the specific warranty.

Breach of warranty : is this the new trend?

- warranty delimiting, not necessarily promissory
- warranties in contracts of insurance must be clearly identified as such
- breach of warranty would suspend the insurer's liability rather than discharge it. The insurer's liability under the contract would be restored once the breach is remedied

Best practice

- Insurers need their warranties drafted broadly and not narrowly, clearly defined, using unambiguous language.
- should not have anything in their policy that could be seen as conflicting with the warranties.
- should incorporate the strict wording of the Marine Insurance Act

No insurance coverage in case of willful misconduct

Peracomo Inc. v. Société Telus Communication (2012) FCA 199, the Federal Court of Appeal upheld Justice Harrington judgment in the "cable-cutting case"

Justice Harrington: "*Réal Vallée is a good man; a decent man; an honest man - a crab fisherman, however…..*

LEXJUS SINACTA

avvocati e commercialisti associati

No insurance coverage in case of willful misconduct

he did a very stupid thing.

LEXJUS SINACTA

avvocati e commercialisti associati

No insurance coverage in case of willful misconduct

Vallée and his wholly-owned company were held liable for nearly one million dollars in damages, after Vallée cut the submarine cable belonging to Telus, which stretched across the bed of the St. Lawrence River (Quebec).

When the anchor of his crab cage got hooked on the cable Vallée on two occasions hauled the cable out of the water and freed the anchor by cutting the cable with an electric saw.

No insurance coverage in case of willful misconduct

He mistakenly thought that the cable had been abandoned

The Courts held: 1) Vallée (had his vessel's marine charts been up to date) should have known of the cable's existence as a navigational hazard; 2) neither Vallée nor his company was entitled to limit liability to $500,000 under the *Marine Liability Act* because Vallée's cutting of the cable was intentional or reckless 3) the insurer was not liable to compensate for the loss, because the intentional cutting of the cable constituted "damage attributable to the wilful misconduct" of the insured (subsection 53(2) of Canada's *Marine Insurance Act).*

c.perrella@lslex.com

LEXJUS SINACTA

avvocati e commercialisti associati