Marine Insurance Warranty Upheld

A marine insurance dispute that ascends to Hong Kong's Court of Final Appeal is both a rarity and a matter of international legal interest, given that Hong Kong's statute is in identical terms to the UK's seminal Marine Insurance Act 1906. The case in question, *Hua Tyan Development Limited v. Zurich Insurance Co Limited* [2014] HKEC 1489, concerned the interpretation of a warranty given by the assured, and the impact of matters within the insurer's presumed or constructive knowledge. Before considering the legal issues involved, a brief summary of the facts is essential.

Background

The marine insurance policy concerned a cargo of logs to be carried from Malaysia to China. The policy named the actual carrying vessel, the m.v. "HO FENG NO.7", and included a condition as follows: "*Warranted year built of the vessel not over 30 years. Warranted deadweight not less than 10,000 MT.*" This "Deadweight Warranty" was the provision at the heart of the dispute.

During the voyage to China the m.v. "*HO FENG NO. 7*" sank and the cargo was totally lost. The assured claimed under the policy for the insured value of the cargo, but the insurer rejected the claim on the straightforward basis that the assured was in breach of the Deadweight Warranty because the vessel's deadweight was less than 10,000 MT.

The assured's case was founded on the fact that it had not given simply a general warranty but instead had specifically identified the carrying vessel "*HO FENG NO. 7*". There were two key elements to the assured's case on the contractual interpretation of the policy:

1. The Deadweight Warranty was of no effect because the insurer knew, or ought to have known, that the deadweight of the "*HO FENG NO. 7*" was less than 10,000 MT; and
2. The intention of the parties was clearly to have effective insurance cover for the carriage of the cargo on board the "*HO FENG NO. 7*" from Malaysia to China, and it was simply inconsistent then to be able to deny liability on the basis that the named vessel was not covered by reason of the Deadweight Warranty.

The First Instance Judgment

At first instance it was held that the Deadweight Warranty did not apply because it was inconsistent with the fundamental purpose of the policy, which of course was to provide coverage for the cargo. The court also found that the assured did not breach its duty of disclosure because the insurer could have found out about the tonnage of the vessel from the internet.

The Court of Appeal

The First Instance Judgment was overturned on appeal. The Court of Appeal found that, on the face of the policy, there was no inconsistency between the Deadweight Warranty and the coverage provided because the insurer had agreed to cover the cargo subject to the Deadweight Warranty.

By virtue of s.18 of the Marine Insurance Ordinance, an insurer is presumed to know matters of common notoriety and matters which it ought to know in the ordinary course of its business. The Court of Appeal held that just because the information was available on the internet and the insurer *could* have made inquiries, it did not mean the insurer *should* have made inquiries. The assured must show there was some foundation for the insurer to make such inquiries, for instance, that it was common practice for insurers to make such enquiries in the marine insurance industry. However, no evidence as to the practice of marine insurers had been put forward.

The Court of Final Appeal ("CFA")

The CFA took as its starting-point the Marine Insurance Ordinance, section 33 of which specifically concerns the nature of a marine insurance warranty:

> *"33. Nature of Warranty*
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> *(1) ...the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled or whereby he affirms or negatives the existence of a particular state of facts.*
>
> ...
>
> *(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty ..."*

The CFA emphasised that the definition of warranty included the affirmation of the existence of a particular state of facts, namely in this case, the carrying vessel had a deadweight capacity of 10,000 tonnes. Where such a warranty was breached, there would be an automatic discharge from liability: in other words, a complete defence to any claim made under the policy. There was no inconsistency between the identification of the vessel and the existence of the Deadweight Warranty. The CFA further noted: "*The mere fact that a vessel is named in a contract of marine insurance does not mean in any way that an insurer is somehow prevented from insisting by way of warranty on that vessel possessing certain characteristics.*"

Details of a vessel's deadweight are readily available on the internet, so it was argued by the assured that the information could be presumed to be within the knowledge of the insurer. The assured's position was that by reason of the insurer's "constructive" knowledge of the vessel's deadweight, the insurer was prevented from relying on the Deadweight Warranty.

The CFA agreed with the Court of Appeal that the fact that the vessel's particulars can be readily obtained from the internet did not mean that the insurer was to be fixed with knowledge, whether actual or presumed. There was simply no evidence that the insurer knew the deadweight, nor evidence as to the extent to which the insurer subscribed to and consulted online databases, etc. The factual matrix (which includes all facts which may be "reasonably available") could assist to determine the true meaning of the contract and its terms but could not undermine or nullify terms. The Deadweight Warranty was already clear and no assistance was required from the factual matrix.

The CFA favoured the certainty for insurers that flows from upholding the strict terms of section 33 of the statute – "*a warranty is a condition which must be exactly complied with*" – rather than the unpredictability that could result from an attempt to achieve fairness for a particular assured in the "Information Age". The CFA concluded: "*Quite simply, the Deadweight Warranty was breached and there was no answer to that.*"

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