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LANDMARK WELCAR DECISION: A MATTER OF "PRINCIPAL"

The Court has handed down judgment in *Technip Saudi Arabia Limited v The Mediterranean and Gulf Cooperative Insurance and Reinsurance Company* (Medgulf)[1]. This is the first court decision on the construction of the Damage to Existing Property ("DTEP") Endorsement within the WELCAR standard form policy which will be of significant interest to the energy insurance market and no doubt will spark debate and discussion.

HFW acted in this matter for Technip and was led by Jonathan Bruce, assisted by Angela Bilardi and Astrid Ainley.

Background

Technip (the "Insured") were the contractors engaged by an unincorporated joint venture, the Al-Khafji Joint Operation (KJO), to improve certain production assets for a project in an oil and gas field off Saudi Arabia known as the Khafji Crude Related Offshore Projects (KCROP).

The Insured chartered an anchor-handling tug (the "Vessel") from Maridive & Oil Services SAE ("Maridive") on BIMCO SUPPLYTIME rules to assist with the contract works. On 16 August 2015, the Vessel was transiting back to port when it allided with an existing wellhead platform in the vicinity, known as Platform NR-09 (the "Platform"), causing significant damage. The Platform did not form part of the KCROP contract works.

Pursuant to the KCROP contract the Insured was liable for the damage to the Platform, and settled its liability under a Settlement Agreement with KJO for US$25,000,000.

The Insured claimed under its WELCAR Project Policy in respect of its liability to the platform owners for the cost of repairing the platform, plus additional costs incurred in relation to carrying out a survey to assess the damage and other ancillary costs. The total claim amounted to US$31,038,265 plus €458,052 (although certain ancillary costs were dropped at trial). The Insurer, Medgulf, declined cover on the basis of certain exclusion clauses in the policy as well as arguing that Technip was not liable to KJO and had not sought insurer's consent to the settlement.

The Policy

The Policy was written on an amended WELCAR 2001 form, which is standard form wording for offshore construction all risks cover.

The Insured's main claim was presented under Section II (third party liability). The Insured was listed as a Principal Insured together with the entities comprising KJO.

The insuring clause provided:

> *"Underwriters agree, subject to the limitations, terms, conditions and exclusions herein, to indemnify the Insured(s) for Ultimate Net Loss which the Insured(s) shall be obliged to pay by reason of*
>
> *i. liability imposed upon the Insured(s) by law, and/or*
>
> *ii Express Contractual Liability,*
>
> *for Bodily Injury or Property Damage caused by an Occurrence, provided always that the Occurrence takes place during the Project Period and arises out of the activities described in the Scope of Insurance section herein."*

[1] [2023] EWHC 1859 (Comm)

Medgulf sought to rely on a watercraft exclusion and an existing property endorsement to deny cover. The Watercraft Exclusion excluded liability:

> *"arising out of the use or operation of watercraft, whether owned, time chartered, bareboat chartered or operated by any Insured, or for which any Insured may be responsible other than as declared hereto".*

However, the policy contained a Watercraft Exclusion Endorsement that provided:

> *"Subject always to the terms and conditions of the Policy hereunder, Underwriters hereby agree that the Watercraft Exclusion 5 of Section II is deleted subject to watercraft associated with the Project maintaining Protection and Indemnity (P&I) cover up to a minimum of hull value."*

The DTEP Endorsement provided as follows:

> *"EXISTING PROPERTY ENDORSEMENT*
>
> *Cover for damage to existing property is subject to the following Existing Property Contractual Exclusion Buyback:*
>
> *Existing Property Contractual Exclusion*
>
> *The coverage provided under Section II of this policy shall not apply to any claim for damage to or loss of use of any property for which the Principal Assured:*
>
> *1) owns that is not otherwise provided for in this policy;*
>
> *2) has use of, custody, physical control, access, right of way or an easement to by operation of a contract or agreement, or*
>
> *3) is liable or claimed to be liable by operation of any indemnification, hold harmless or similar provision contained within any contract or agreement.*
>
> *All other insuring agreements, terms, conditions, definitions, exclusions, notice requirements, schedules and endorsements of the policy remain unchanged.*
>
> *Existing Property Contractual Exclusion Buy-Back*
>
> *Notwithstanding the Existing Property Contractual Exclusion above, it shall not apply to any claim for:*
>
> *Physical loss of and/or physical damage to existing property as per Schedule of Existing Property below and extends to anything reasonably ancillary thereto.*
>
> *All other insuring agreements, terms, conditions, definitions, exclusions, notice requirements, schedules and endorsements of the policy remain unchanged.*

Exclusion 1) above was referred to as Limb 1 and exclusion 3) above was referred to as Limb 3.

The Legal Arguments and Judgment

Legal Liability to KJO

The Insured submitted that pursuant to clause 5.2.3 of the KCROP contract (*"...CONTRACTOR shall protect from damage all existing structures, improvements or utilities at or near the WORK Site..."*) and 12.6 (*"CONTRACTOR shall be fully responsible to COMPANY for the acts, negligence, alteration, additions and omissions of all its Subcontractors at whatever tier, and their personnel, as if they were the CONTRACTOR's own personnel..."*), it had a clear express contractual liability to KJO which satisfied part ii) of the insuring clause.

Medgulf argued that Maridive was not a subcontractor within the meaning of the contract as it was not a party to the Subcontracting Plan and only provided an ancillary service to the contract works. Furthermore, they submitted that clause 12.6 did not create a free standing basis of liability.

Mr Justice Jacobs was unconvinced by Medgulf's arguments. Medgulf's narrow construction of clause 5.2.3 would not make business common sense as KJO would want wide protection against damage to structures, improvements or utilities. The Platform was located 1km away from a well jacket being worked upon and was clearly "at or near the WORK Site".

The judge held that clause 12.6 did create a standalone liability as there was nothing in its language which limited its scope. Furthermore, Mr Justice Jacobs was not convinced that Maridive was not a subcontractor and referred to authorities whereby a shipowner had been deemed a subcontractor of a charterer.

Absence of Consent to Settlement Agreement

Medgulf also argued that as the Insured had not obtained its consent before entering into the Settlement Agreement with KJO, the Insured's loss did not constitute "Damages" within the meaning of the policy and therefore could not be claimed as part of its Ultimate Net Loss. Damages was defined as:

"DAMAGES" shall mean compensatory damages, monetary judgements, awards, and/or compromise settlements entered with Underwriters' consent, but shall not include fines or penalties, punitive damages, exemplary damages, equitable relief, injunctive relief or any additional damages resulting from the multiplication of compensatory damages."

The Insured submitted that the sum paid under the Settlement Agreement constituted "compensatory damages" and "compromise settlements", and there was no requirement for consent with compensatory damages. Furthermore, in circumstances where insurers had declined cover and instructed Technip to act as a prudent uninsured 3 years before the Settlement Agreement was agreed, the requirement to obtain consent no longer applied.

Mr Justice Jacobs stated that the four categories could not be regarded as separate watertight compartments and saw no reason why the sums paid under the Settlement Agreement would not fall within the meaning of "compensatory damages". Accordingly, this argument was dismissed.

Of interest to the market are the judge's comments, that in circumstances where Medgulf had made it clear to the Insured that there was no cover under the policy, it would be a "surprising" result if an insurer could then defend a claim on the basis of absence of consent. Whilst the comments were obiter, Mr Justice Jacobs stated he considered a court would have little difficulty in concluding that an insurer had waived any requirement for consent or was estopped from asserting such.

The Existing Property Endorsement

This was the only point on liability in the dispute between the parties where the judge found in favour of Medgulf. The Insured's case was as follows.

The Insured submitted that the language of the policy was important. The starting words of the exclusion stated that it concerned "*any property for which the Principal Assured*..." not any Principal Assured.

In the context of Limb 1 of the exclusion, *"any property for which the Principal Assured owns that is not otherwise provided for in this policy"* must mean the claimant Principal Assured (i.e. Technip) and not KJO. The Insured did not own the Platform that was damaged and so Limb 1 of the DTEP Endorsement was not engaged.

The reason for the above being that the policy is a composite policy. The policy provided *"This policy shall be deemed to be a separate insurance in respect of each Principal Insured hereunder without increasing Underwriters' limits of liability."*

Moreover, the policy contained a cross liabilities clause which stated: *"In the event of one Insured incurring liability to any other of the Insured(s), this Policy shall cover the Insured against whom the claim is or may be made in the same manner as if separate policies had been issued to each Insured."*

In support of this argument, the Insured submitted that Limb 3 of the DTEP Endorsement clearly referred to the particular Assured's obligation of indemnity and not any other Principal Assured's obligation of indemnity.

Thus in summary, the Insured argued that the exclusion operated to exclude an insured's claim under the policy in respect of damage to its own property, but not in relation to damage by one insured to another insured's property.

Medgulf's case was straightforward. The Platform was property owned by a Principal Assured, KJO, and was therefore caught by Limb 1 of the DTEP Endorsement. The commercial rationale for the Existing Property Exclusion is to identify categories of property that are excluded, and if insureds wished for cover for specific property, this could be listed in the schedule and bought back. This buy-back mechanism allows insurers to price the risk of that property being damaged and an additional premium is paid in respect of that property. The Platform was not scheduled by the Insured and, as such, was not subject to the buy-back and was excluded under the policy. It was submitted that the composite policy argument had no relevance to this DTEP Endorsement.

Mr Justice Jacobs favoured Medgulf's analysis. In his view, the DTEP Endorsement was drafted very widely when referring to "existing property" and therefore would apply to existing property owned by Principal Assureds as well as Other Insureds.

The judge placed reliance on what he perceived was the commercial purpose of the DTEP Endorsement rather than prioritising the language of the policy. He was not convinced that the difference between the words "the" "a" or "any" before Principal Assured had any significance.

Mr Justice Jacobs decided that a reasonable person, with all the background knowledge reasonably available to the parties at the time they entered into the contract, would understand that if damage was caused to existing property owned by any Principal Assured, then the only property covered would be that property identified in the Schedule of Existing Property in the DTEP Endorsement. If property was not identified, then the exclusion operated.

One of the judge's reasons was that Limb 1 could not refer to property that was jointly owned by all the Principal Assureds.

Mr Justice Jacobs considered that the Insured's construction of Limb 1 would produce a complex and odd result as the Platform would qualify as excluded existing property if the damage was caused by KJO and KJO were making the claim, but not if the damage was caused by the Insured.

Whilst the judge did not dispute that the policy was a composite policy, he did not believe that analysis had any relevance to the construction of the DTEP Endorsement. The "Principal Assured" referred to included KJO whether there was a separate contract between KJO and Medgulf or between Technip and Medgulf.

Mr Justice Jacobs considered that his construction was supported by the factual matrix to the policy and was more consistent with business common sense. At the time of placement of the policy the Insured had completed a questionnaire which had included the following question:

> *"**Third Party Property***
>
> *Details of any third party property - pipelines, platforms etc. - in vicinity of contract plus any indemnities provided under contract"*

In response to this the Insured had included a table listing specific properties with their declared value. The property was all KJO property and the Platform was not listed. The judge decided there was significance in the nature of the property identified in the Schedule and said that that had a bearing on how the exclusion was to be construed.

Given the judge's finding above on the application of Limb 1 of the DTEP endorsement, the judge only dealt with Limb 3 briefly. The Insured's case on Limb 3 was that the reference to "indemnification, hold harmless or similar provision" was to a contractual assumption of liability for loss irrespective of whether the loss was caused by any fault or breach of duty by the Insured. In contrast, clauses 5.2.3 and 12.6 of the KCROP contract related to liability due to the Insured's negligence and were therefore not caught by Limb 3.

The judge agreed with the Insured's argument and stated that clauses 5.2.3 and 12.6 were not "indemnification, hold harmless or similar". Clause 5.2.3 created a fault based liability for damage to KJO's property at or near the Work Site and 12.6 extended the Insured's fault based liability to subcontractors it had engaged on the project.

Based on his reasoning above, Mr Justice Jacobs concluded that the Insured's liability under the policy was excluded by virtue of Limb 1 of the DTEP Endorsement and dismissed the claim.

The Watercraft Exclusion

This was dealt with swiftly by the judge. It was not in dispute that the Vessel was covered under a P&I policy (although the Insured, being the charterers, were not themselves covered by that policy). The judge accepted the Insured's argument that it was enough for the Vessel to have had P&I insurance in place, regardless of whether the Insured themselves were covered under the policy. On that basis, insurers failed to establish that the Watercraft Exclusion applied.

Comments

On policy liability, the Insured has succeeded in overcoming every hurdle here except for one, and the judge has granted the Insured permission to appeal on that one point (i.e. the construction of Limb 1 of the Existing Property Endorsement).

The point on which the Insured has lost is the exclusion in the liability section for "property owned by "the" Principal Assured". The Insured argued that this means the Principal Assured which is bringing the claim. The judge decided that this means "any" Principal Assured. This interpretation creates a difficulty for insureds in certain situations such as this, where they are the main contractor who has bought liability insurance and are named as a Principal Assured, and would not necessarily have any way of knowing (before accidentally damaging property located anywhere, for which they have a liability in contract or at law) whether that property could be at least partly owned by one of the other Principal Assureds. This is especially the case in what is a composite policy, where there is case law supporting the Insured's interpretation in other contexts, and where the wording of the clause supports the Insured's construction.

The judge was seemingly heavily influenced by certain commercial factors, but what is different in this case (as compared to the scenarios discussed in Sharp[2] and Reed[3], which are the only textbooks dealing with this area) is that it is the main contractor who arranged the insurance and was one of the Principal Assureds (i.e. it was not just the owner of the project who is the Principal Assured in this case). Sharp and Reed do not deal with this scenario and there is no detailed consideration of the composite insurance point in those textbooks in this context. This is not an uncommon scenario.

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[2] Upstream and Offshore Energy Insurance, 3rd edition, David Sharp

[3] Construction All Risks Insurance, 3rd edition Paul Reed QC

This state of affairs may create real difficulty for the contractor, particularly in a region where one of the Principal Assureds will have at least some ownership interest in a vast number of offshore structures / port installations etc inside and outside the project work site.

For now, therefore, at least until the matter has come before the Court of Appeal, buyers of Welcar insurance need to make sure that any property even partly owned by any of the Principal Assureds anywhere near the project is scheduled in the DTEP endorsement, not just existing property on the work path or tied into or crossed - also potentially more widely than within the field itself.

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