

## Insurance of Construction Equipment - Disclosure to Insurer of Material Change

*Ferrcom Pty Ltd v Commercial Union Assurance Company of Australia Ltd*, unreported, High Court of Australia, 17 February 1993.

A recent High Court decision has reinforced the importance of informing an insurer of a significant or material change to policy conditions. Failing to do so can be a costly mistake for the insured.

Ferrcom Pty Ltd owned a mobile crane that, until March 1987, had spent its "life" working on the site of the new Parliament House in Canberra. Ferrcom had insured the crane with Commercial Union Assurance Company of Australia Limited ("CU") under a policy for "unregistered mobile machinery" - as an on-site machine there had been no need for the crane to be registered as a motor vehicle.

In May 1987 the crane was transferred to Sydney to commence work on a project in Darling Harbour. It was registered as a motor vehicle in New South Wales by Ferrcom on arrival, but this important information was not passed on to CU.

Four months later the crane overturned and was extensively damaged whilst trying to lift some large steel structures in Darling Harbour. CU denied that it had to pay for the damage to the crane under the existing policy conditions.

### The Insurer's Situation

CU stated that because the crane was insured as an unregistered vehicle and had later been registered, the registration of the crane substantially changed CU's position. CU said that if they had been notified of the crane's registration then they would have pursued one of two options:

- cancelling the policy of insurance; or
- arranging for the registered crane to be insured under an alternative policy which required both the payment of a much higher premium whilst also denying liability for loss or damage if the crane overturned during operations.

Accordingly, CU argued that either way it would not have been liable for the damage to the crane.

### What the Crane's Owner Argued

Ferrcom admitted that the information concerning the registration of the crane had not been passed on to CU. Ferrcom had informed its insurance broker, Mr Green, of the registration but the broker had not informed CU of the change. Ferrcom argued, however, that under section 54(1) of the *Insurance Contracts Act*, CU was liable to meet the claim under the policy. Ferrcom said that the insurer's liability could be reduced only by an amount which would reflect the prejudice which CU suffered by being exposed to an increased risk of damage when the mobile crane was travelling on a public road.

### What the High Court Decided - Unanimously

Initially, the New South Wales Supreme Court

(*Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia* (1989) 5 ANZ Insurance Cases 75, 793) found in favour of Ferrcom. This decision was overturned by the New South Wales Court of Appeal (*Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd and Another* (1991) NSWLR 389), and the High Court upheld this latter ruling in a 5-0 decision.

The High Court found that section 54(1) of the *Insurance Contracts Act* does impose on CU an initial liability to pay Ferrcom's claim. However, that liability can be reduced depending on the nature of the prejudice suffered by CU because of Ferrcom's failure to reveal that the crane was registered.

The court said that the prejudice suffered by CU included:

- That there was an increased risk to CU whilst the registered crane was driven on the public roads; and
- That CU was denied the additional premium which it could have demanded if it had arranged to insure the registered mobile crane;
- The most significant prejudice suffered by CU was the loss of the opportunity to cancel the policy.

In the High Court's opinion, the loss of the opportunity to go "off risk" was equivalent to the liability that CU faced under the *Insurance Contracts Act*. Accordingly, CU's liability was offset by the prejudice it suffered and its liability was reduced to nil.

### Lessons for Insureds

- Disclose every material change of fact that might relate to an insurance policy.
- Ensure that the insurer is informed of the changed circumstances.

### Lessons for Insurers

CU presented very convincing evidence to the court regarding the registration of the crane. Had Ferrcom told them about the registration, CU would have cancelled the policy and would not have granted cover for the registered vehicle except on terms that excluded liability for the crane overturning.

- Insurers should ensure that their internal guidelines describing different degrees of risk are absolutely firm and published in clearly understood documentation. This will be the best evidence in any future dispute.
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