Recent Cases

Co-insured and The Insurer's Right of Subrogation

Cooperative Bulk Handling Ltd v Jennings Industries Ltd,
unreported, Supreme Court of Western Australia, 1 September 1995.

Introduction

Standard form building contracts commonly require that a contract works insurance policy not only be taken out but that it includes a cross-liability clause. In such a clause, the insurer agrees to waive all rights of subrogation against anyone covered under the insurance. See, for example, subclause 21.6 of AS2124-1992 and clause P8.06 of JCC-C 1994.

A recent judgment of the Supreme Court of Western Australia, *Cooperative Bulk Handling Ltd v Jennings Industries Ltd,* found that, irrespective of such waivers, an insurer does not have a right of subrogation against a co-insured under a contract works policy.

Background

The *Bulk Handling* case concerned a claim brought by underwriters, in the name of the principal, against a subcontractor purportedly under a right of subrogation. The subcontractor, Jennings, provided a crane and an operator to the contractor, Olympic Engineering, to assist in the construction of a grain elevator ("the Contract Works") for Bulk Handling at its Koorda site. While the crane was being operated by a Jennings' employee it collapsed and damaged the elevator.

Under a Contract of Insurance ("the Leask Policy") a number of underwriters insured Bulk Handling and subcontractors for their respective rights and interest in the Contract Works, both in relation to property and liability risks. Jennings was, for the purposes of the Leask Policy, considered to be a subcontractor.

The Decision

In deciding whether the underwriters were entitled to maintain a claim of subrogation against Jennings, the Court considered the following questions:

- Did Jennings have an insurable interest in the whole of the Contract Works?
- If so, was that interest covered by the Leask Policy?
- If so, were the underwriters barred from making a subrogated claim against Jennings on the basis that Bulk Handling and Jennings were co-insured?

Subcontractor's Interest

It is common in large building contracts for a head contractor to insure under a single policy of insurance, in its own name and the name of its subcontractors, all works to be carried out under a works contract. See, for example, clauses 18 and 19 of AS2124-1992 and clauses P8.03 and P8.04 of JCC-C 1994. A subcontractor named under such a policy would be, like the head contractor, entitled to recover the whole of the loss insured.

This arrangement is commercially prudent and clearly an advantage to all parties involved in the construction industry. The Court found that the Leask Policy was such an arrangement. It said that if Bulk Handling had made a claim for damages against Jennings, rather than under the insurance policy, Jennings could equally have sought indemnity under the Leask Policy. For this reason, the Court found that Jennings had an insurable interest in the whole of the Contract Works.

Subcontractor's Cover

The Leask underwriters asserted that because Jennings was insured under another insurance policy, Jennings was excluded from claiming under the Leask Policy.

This assertion arose firstly, because Bulk Handling had taken out extra insurance under another policy ("the Taisho Policy"); and secondly, because of a specific provision in the Leask Policy which stated that the policy was:

> *"... not to be called upon in contribution and is only to pay loss hereon if and so far as not recoverable in any other insurance."*

The Taisho Policy was a liability only policy, under which Jennings could seek indemnity for claims made against it. The Leask Policy, on the other hand, covered Jennings for both liability as well as property risks. The Court found that on the facts of the *Bulk Handling* case, even though there was a degree of double indemnity, the claim made by Jennings was a property claim which was not recoverable under the Taisho Policy. Given this, Jennings' insurable interest was covered solely by the Leask Policy.

Subrogation and the Co-insured

Based on its findings that Jennings had an insurable interest in the whole of the Contract Works and because that interest was covered by the Leask Policy, the Court found that the underwriters' subrogated claim should not be allowed. It said that to allow otherwise would permit an insurer to indemnify itself by seeking to recover a loss from a party it had insured for that loss.

Also, for reasons of public policy, parties should be able to conduct their affairs on the basis that the insurance cover granted in the circumstances will protect them without the risk of a subrogated claim being made on behalf of a co-insured.

Conclusion

The *Bulk Handling* case decision ensures commercial efficacy in insuring contract works. So long as a party has an insurable interest under a contract works policy - and that interest is covered by such a policy - the policy insurer will be precluded from making a subrogated claim against that party irrespective of whether or not there is a specific waiver of the right of subrogation. However, it would be wise, until the *Bulk Handling* decision is affirmed on appeal, to continue the present practice of requiring all contract works insurers to waive their rights of subrogation against co-insured under their contract works policies.

- Reprinted with permission of Clayton Utz, Solicitors and Attorneys.