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Soft Words and Hard Arguments

Order Of Play

1. The Statutory Regime in Respect of Warranties (short)
2. The Courts' Approach to Construction (medium)
3. Worked Example (medium)
4. Achieving Precision (hot)

Nature Of Warranty

33. (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which 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, but without prejudice to any liability incurred by him before that date.

When Breach Of Warranty Excused

34. (2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

Wickman Machine Tools -v- Schuler [1974] AC 235 – Lord Reid

”The fact that a particular construction leads to a very unreasonable result must be relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make that intention abundantly clear.”

Antares Compania Naviera -v- Salen [1985] 1 AC 191 - Lord Diplock

“If detailed semantic and some technical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”

Hussain -v- Brown [1996] 1 Lloyd's Rep 627, 639 - Lord Justice Saville

“It must be remembered that a continuing warranty is a draconian term. As I have noted, the breach of such a warranty produces an automatic cancellation of the cover and the fact that a loss may have no connection at all with the breach is simply irrelevant. In my view, if Underwriters want such protection then it is up to them to stipulate for it in clear terms. “

ICS -v- West Bromwich Building Society [1998] 1WLR, 897 – Lord Hoffman

“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties, a situation in which they were at the time of contract.”

“The meaning which a document would convey to a reasonable man is not the same as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.”

McGillivray on Insurance

- “10-50 The first relevant rule of construction is that the apparently literal meaning of the words in a warranty must be restricted to produce a result consistent with a reasonable and business-like interpretation of such a warranty.”
- “10-53 The second principle of construction which assists the Assured if he contends that he has complied with the warranty is that any ambiguity in the terms of a policy must be construed against the insurer.”

The “contra proferentem” rule

Kler Knitwear –v- Lombard General Insurance Company [2000] LLR 57 – Mr Justice Morland

- *“It is warranted that within 30 days of renewal the sprinkler installations ... must be inspected by a LPC approved sprinkler engineer with all necessary rectification work commissioned within 14 days of the inspection report being received.”*
- *“Warranties: Every Warranty to which this Insurer ... is ... subject shall from the time the warranty attaches apply and continue to be enforced ... and non-compliance with any such Warranty whether it increases the risk or nor, or whether it be material or not to the claim, shall bar any claim in respect of such property or item.”*

Mr Justice Morland's Conclusions

- *“The fact that the clause is entitled ‘Warranty’ and contains the phrase ‘it is warranted that’ are some indication that the parties intended that the clause be a warranty in the true sense of the word.”*
- *“It would be utterly absurd and make no rational business sense whatever if at the end of a particular working day a small quantity of sawdust was not swept up and 300 days later a fire broke out due to an electrical fault that a claim for property damage would be barred.”*
- *“I have come to the clear and unhesitating conclusion that the clause is a suspensive condition and not a warranty.”*

Crew Warranty Cases

- *The Milasan* [2002] Lloyds Rep 458 - Mr Justice Aikens
“Warranted professional skippers and crew in charge at all times.”
- *The Newfoundland Explorer* [2006] EWHC 429 – Mr Justice Gross
“Warranted vessel fully crewed at all times.”

Held :

“The warranty obliged the defendant to keep at least one crew member on board the vessel 24 hours a day, subject to (i) emergencies rendering his departure necessary or (ii) necessary temporary departures for the purposes of performing his crewing duties or other related activities.” - per Gross J

Pratt –v- Aigaion Insurance [2008] EWCA Civ.1314 – Lord Justice Clarke/Lord Justice Burnton

- *“Warranted owner and/or owner’s experienced skipper on board and in charge at all times and one experienced crew member”.*
- *“It cannot have been thought that the vessel would be crewed while she was aground or at a place of storage ashore, while being dismantled etc. It follows that the warranty....cannot be read literally. Some qualification to the term ‘at all times’ must have been intended.” - per Burnton LJ*
- *“ In the circumstances, the clause should be construed contra proferentem...At the time the crew left, the vessel was safely tied up alongside as must happen very often. I would hold that that the insurer has not established that there was here a breach of warranty.” - per Clarke LJ*

Worked Example

A.C. Ward - v - Catlin & Others



The Assured's Submissions

- The 'warranties' are warranties in the strict sense.
- The terms of the 'warranties' are ambiguous so the *contra proferentem* rule comes into play.
- The obligation imposed by the warranties is no more than an obligation promptly to remedy defects - not that the alarms will be in full and effective operation.

The Underwriters' Submissions

- The 'warranties' are, on their true construction, classic examples of 'suspensive conditions'. The use of the term 'warranty' is inconclusive.
- This is the case, even though the term and the consequence of breach is defined in the policy.
- The Underwriters are therefore only 'off-risk' whilst the Assured is in breach.
- There is no genuine ambiguity in the terms of the warranties so the *contra proferentem* rule does not come into play.
- If the alarms were non-operational at the time of the burglary, then the term requiring that they be in full and effective operation will have been breached.

YOU BE THE JUDGE

The Courts' Conclusions

- The 'warranties' are strict warranties, not 'suspensive conditions' - because they are defined in the Policy.
- The words '*all defects occurring in any protective device must be remedied promptly*' prevent the clause being clear and unambiguous.
- The least unsatisfactory construction is to read the wording so that it refers only to defects that are not within the knowledge or reasonably capable of being in the knowledge of the Assured.

Is a warranty the right answer?

- A suspensive term - *" the vessel will be uninsured at any time when the vessel is in Somali territorial waters"*
- A condition precedent to inception - *"cover will not attach until the vessel has been surveyed and passed fit for the voyage"*
- Exclusion - *" No cover for sea-water damage to cargo'*
- Subject - *' Subject to survey by surveyor approved by Underwriters and all recommendations complied with"*
- A condition precedent to liability - more complicated - not for today.

Warranty Options

- A warranty may be the best option when:
- a) An Underwriter requires a promise as to a current state of affairs. This is an **affirmatory** warranty. For example:
“Warranted no known or reported losses”.
- b) An Underwriter requires a promise to be made and kept through the currency of the policy. This is a **promissory** warranty. For example:
“Warranted that prior to departure (1) tug and tow to be surveyed by Salvage Association (2) all SA towage recommendations to be complied with and (3) tug master to be instructed to comply with all conditions and voyage recommendations of the SA surveyor, at all times during the voyage”.

Achieving Precision

- Call it a warranty - not decisive but it helps.
- The core of the warranty - define **WHAT** you want promised.
- The detail of that - define **HOW** you want that done.
- The players - define **WHO** must be involved in this promise.
- The timeframe - define **WHEN** you want each part of this done.
- The effect of breach - restate the effect of s 33 MIA 1906



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