Indexed as:

Conohan v. Cooperators (The) (C.A.)

Walter A. Conohan and Eastern Marine Underwriters Inc.
(plaintiffs/appellants)
v.
The Cooperators (defendant/respondent)

[2002] 3 F.C. 421

[2002] F.C.J. No. 203

2002 FCA 60

Court File No. A-779-00

Federal Court of Canada - Court of Appeal

Stone, Evans and Malone JJ.A.

Heard: Montréal, January 23, 2002.
Judgment: Ottawa, February 11, 2002.

(32 paras.)

Maritime Law -- Insurance -- Appeal from F.C.T.D.'s dismissal of action for damages arising out of collision between Conohan's, another's ships -- Owner of other vessel admitted liability, assigned all rights of claim against insurer (respondent) in respect of marine insurance policy -- Cl. 16 of rider contained in policy providing insurer would pay insured for loss of third party's vessel as result of collision where insured "liable to pay and shall pay by way of damages" -- Trial Judge holding Cl. 16 requiring insured to first pay before could claim indemnification from respondent in respect of liability to appellant -- Appeal dismissed -- Historical context of collision clause reviewed -- Issue resolved by construction of express language of Cl. 16 -- According to ordinary meaning of words, clause plainly required payment to be made first to third party as condition precedent to recovery -- Language of Cl. 16 too clear to admit application of equitable principles -- Respondent complying with "utmost good faith" requirement imposed by Marine Insurance Act, s. 20 -- Defences raised bona fide except continued reliance on "drunken or impaired operation of vessel" in face of acquittal on such charges -- But latter not motivated by bad faith.

Practice -- Pleadings -- Action for damages arising out of collision between two ships pleading assignment of all claims against respondent insurance company -- Statement of defence expressly denying allegations, putting plaintiffs (appellants) to strict proof thereof -- Pre-trial conference order specifying issues to be tried -- Trial Judge held clause in marine insurance policy rider requiring insured to pay before could claim indemnification from respondent -- Federal Court Rules, 1998, r. 258(1) requiring memoranda of [page422] argument to be filed prior to pre-trial conference -- R. 258(3)(d) requiring such memoranda to contain statement of issues to be determined at trial -- R.

263(b) requiring participants at pre-trial conference "to address simplification of the issues in the action" -- Respondent not explicitly relying on Cl. 16 either in pleading or in pre-trial conference memorandum -- But expressly raised in statement of claim, partially answered in statement of defence denial -- Pleading in statements of claim, defence put whole of Cl. 16 in issue, including "pay to be paid" requirement, not just claim for coverage -- Not improper for Trial Judge to have addressed argument presented by parties notwithstanding not expressly listed in Prothonotary's order -- Appellants not surprised, prejudiced by argument -- R. 174 requiring party to plead "concise statement of material facts" on which relies -- Respondent sufficiently pleaded facts -- Not necessary to state legal result.

This was an appeal from the Trial Division's dismissal of the appellant's action against the respondent arising out of a 1996 collision of the Lady Brittany with the Cape Light II. The appellant Conohan, owner of the Cape Light II, commenced an action in rem and in personam against the Lady Brittany and its owner, Gaudet, for the loss of his vessel and loss of revenue. Gaudet executed an admission of liability and confession to judgment in favour of Conohan and his insurer, to which was attached a letter from his insurer's solicitors in which they maintained that the insurer (the respondent) had no obligation to pay any indemnification unless and until there was a determination of liabilitiy against Gaudet and he had made payment in respect thereof. He also assigned to Conohan and his insurers all rights of claim against his insurance company in respect of his marine insurance policy. That policy contained a Fishing Vessel Wording Rider, Clause 16 of which provided that the insurer would pay the insured for loss of a third party's vessel as a result of collision where the insured in consequence thereof becomes "liable to pay and shall pay by way of damages". A second action was commenced, which pleaded the assignment, and claimed for replacement of the vessel, loss of salvage value and loss of revenue. In paragraph 2 of the statement of defence, the respondent expressly denied the allegations and put the appellants to the strict proof thereof. Following the close of pleadings, a pre-trial conference was conducted. The parties filed memoranda of argument prior thereto pursuant to Federal Court Rules, 1998, subsection 258(1). The Prothono-tary made an order pursuant to rule 265 with respect to conduct of the trial, including a list of specific issues to be [page423] tried. The Trial Judge held that Clause 16 required Gaudet to first pay before he could claim indemnification from the respondent in respect of his liability to the appellant.

The issues were: (1) whether the Trial Judge erred in addressing the Clause 16 "pay to be paid" issue because it was not properly raised by the respondent at trial; and (2) if the issue was properly raised at trial, whether it provided a complete defence to the appellants' action on the policy.

Held, the appeal should be dismissed.

(1) Federal Court Rules, 1998, paragraph 258(3)(d) requires memoranda of argument filed prior to the pre-trial conference to contain a statement of the issues to be determined at trial. Paragraph 263(b) required participants at a pre-trial conference "to address simplification of the issues in the action". The respondent did not explicitly rely on Clause 16 either in its pleading or in its pre-trial conference memorandum. However, it was expressly raised in the statement of claim, which was, in part, answered in paragraph 2 of the statement of defence. Moreover, the respondent's position was well known to the appellants at an early stage, as appeared from the solicitors' letter which was attached to the admission of liability. The clause as pleaded in the statement of claim and statement of defence put the whole of Clause 16 in issue, not just the appellants' claim for coverage thereunder, but the "pay to be paid" requirement as well.

It is essential that parties to an action fully comply with a pre-trial conference order made pursuant to rule 265 unless released therefrom by agreement or by the Court. It was not improper for the Trial Judge to have addressed the argument presented by the parties based on Clause 16. Moreover, there can be no serious suggestion that because it was not expressly pleaded or listed in the order of the Prothonotary, the appellants were taken by surprise and thereby prejudiced in their introduction of evidence or otherwise in the prosecution of their claims at trial.

Rule 174 requires a party to plead a "concise statement of the material facts on which the party relies". The respondent sufficiently pleaded that because Gaudet had not paid anything to Conohan in respect of his liability arising out of

[page424] the collision Gaudet was not, by reason of Clause 16, entitled to be paid anything under the policy. Even if the respondent did not plead the "pay to be paid" requirement of Clause 16, but only the other defences listed in the Prothonotary's order, this did not prevent the respondent from relying on that requirement. It is sufficient for the pleader to state the material facts; he need not state the legal result.

(2) A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the insured, in the manner and to the extent agreed in the contract. The collision clause in the policy should be seen in its historical setting. At common law, no action could be maintained on a contract of indemnity until the person seeking indemnification had suffered an actual loss. Equity found a way of relieving against the harshness of this rule by requiring the indemnifier to pay the creditor direct or to pay the indemnified person before he had paid the creditor where the insurance contract did not contain an express "pay to be paid" clause. But equity could not override the clearly expressed contractual terms. What was of foremost importance was the express language of Clause 16 itself. Whether Clause 16 sets up a condition precedent to indemnification was essentially a question of construction of the language appearing in the clause. The ordinary meaning of the words employed in the clause plainly required that payment first be made to the third party as a condition precedent to recovery. The language of Clause 16 is too clear to admit the application of equitable principles. Other language in Clause 16 lends support to this conclusion. The use of the disjunctive "or" in the phrase "any sum which the insured may become liable to pay or shall pay" as opposed to the conjunctive "and" in the phrase in issue suggests that by the former phrase a condition precedent to indemnification had first to be satisfied.

Marine Insurance Act, section 20 provides that a contract of marine insurance "is based on the utmost good faith and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party". The respondent did not lose the protection of the "pay to be paid" requirement by its action in response to the claim and in the conduct of its defence. The defences raised were bona fide and not with a view to delay or refuse to pay a valid claim in any event, except the respondent's continued reliance on the Clause 27 warranty against "drunken or impaired operation of the vessel" despite the fact that Gaudet had been found not guilty of such an offence under the Criminal Code. This insistence, however, was not motivated by bad faith such as to foreclose [page425] the respondent from relying on the "pay to be paid" condition. The Trial Judge carefully considered these defences and did not suggest that the respondent was motivated by bad faith.

Statutes and Regulations Judicially Considered

Collision Regulations, C.R.C., c. 1416, s. 5 (as enacted by SOR/90-702, s. 3).
Criminal Code, R.S.C., 1985, c. C-46, s. 253(b) (as am. by R.S.C., 1985 (4th Supp.), c. 32, s. 59).
Federal Court Rules, 1998, SOR/98-106, rr. 174, 258(1),(3)(d), 263(b), 265.
Marine Insurance Act, S.C. 1993, c. 22, ss. 6(1), 20, 34, 53(2).
Third Parties (Rights Against Insurers) Act, 1930 (U.K.), 20 & 21 Geo. V, c. 25, s. 1(1).

Cases Judicially Considered

Applied:
Firma C-Trade S.A. v. Newcastle Protection and Indemnity Association, [1991] 2 A.C. 1 (H.L.).
Vandervell's Trusts (No. 2), In re, [1974] Ch. 269 (C.A.).
Goole & Hull Steam Towing Co. v. Ocean Marine Insurance Co. (1927), 29 Ll.L.Rep. 242 (K.B.).

Distinguished:
Charter Reinsurance Co. Ltd. v. Fagan, [1997] A.C. 313 (H.L.).
Thomas W. Hooley & Sons v. Zurich General Accident & Liability Insurance Co., 103 So. 2d 449 (La. 1958).
Emile M. Babst Company, Inc. v. Nichols Construction Corporation, et al., 488 So.2d 699 (La. Ct. App. 1986).

Considered:
Richardson, In re. Ex parte St. Thomas's Hospital (Governors of), [1911] 2 K.B. 705 (C.A.).

"Italia Express" (No. 2), The, [1992] 2 Lloyd's Rep. 281 (Q.B.).
Raiffeisen Zentralbank Österreich A.G. v. Five Star Trading L.L.C. and Others (The "Mount I") [2001] EWCA Civ 68, [2001] 1 Lloyd's Rep. 597 (C.A.).
"Mercandian Continent", The, [2000] 2 Lloyd's Rep. 357 (Q.B.).

Referred to:
Wood v. Grand Valley Railway Co. et al. (1915), 52 S.C.R. 283; 22 D.L.R. 614.
Penvidic Contracting Co. Ltd. [page426] v. International Nickel Co. of Canada Ltd., [1976] 1 S.C.R. 267; (1975), 53 D.L.R. (3d) 748; 4 N.R. 1.
R. v. CAE Industries Ltd., [1986] 1 F.C. 129; (1985), 29 D.L.R. (4th) 347; [1985] 5 W.W.R. 481; 30 B.L.R. 236; 61 N.R. 19 (C.A.).
Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd, [1990] 2 NZLR 381 (H.C.).
384238 Ontario Limited v. The Queen in right of Canada, [1984] 1 F.C. 661; (1983), 8 D.L.R. (4th) 676; [1984] CTC 523; 84 DTC 6101; 52 N.R. 206 (C.A.).
R. v. Imperial General Properties Limited, [1985] 1 F.C. 344; (1985), 16 D.L.R. (4th) 615; [1985] 1 CTC 40; 85 DTC 5045; 56 N.R. 358 (C.A.).
Scotsburn Co-operative Services Ltd. v. W.T. Goodwin Ltd., [1985] 1 S.C.R. 54; (1985), 67 N.S.R. (2d) 163; 16 D.L.R. (4th) 161; 57 N.R. 81.
Mercantile Mutual Insurance (Australia) Ltd. v. Gibbs & Anor, [2001] W.A.S.C.A. 271 (S.C.W. Aust.).
Collinge v. Heywood (1839), 9 Ad. & E. 633; 112 E.R. 1352 (K.B.).
County & District Properties Ltd. v. C. Jenner & Son Ltd. and Others, [1976] 2 Lloyd's Rep. 728 (Q.B.).
Total Liban S.A.L. v. Vitol Energy S.A., [1999] 2 Lloyd's Rep. 700 (Q.B.).
MacMillan Bloedel Ltd. v. Youell (1993), 95 B.C.L.R. (2d) 130 (C.A.).

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Parks, Alex Leon: The Law and Practice of Marine Insurance and Average. Centreville, Md.: Cornell Maritime Press, 1987.
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APPEAL from Trial Division's dismissal of the appellant's action for damages arising out of a collision between two ships on the ground that Clause 16 of a rider to the marine insurance policy required the insured to first pay before he could claim indemnification from the respondent in respect of his liability to the appellant (Conohan v. Cooperators, [2001] 2 F.C. 238; (2000), 197 F.T.R. 239 (T.D.)). Appeal dismissed.

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Appearances:

David F.H. Marler, for the plaintiffs/appellants.
D. Spencer Campbell, for the defendant/respondent.

Solicitors of record:

Marler & Associates, Montréal, for the plaintiffs/ appellants.
Stewart McKelvey Stirling Scales, Charlottetown, for the defendant/respondent.

The following are the reasons for judgment rendered in English by

1 **STONE J.A.**:-- This is an appeal from an order of the Trial Division dated November 28, 2000 [[2001] 2 F.C. 238], dismissing the appellants' action against the respondent arising out of a collision of the M.V. Lady Brittany with the M.V. Cape Light II, in the offshore waters of eastern Prince Edward Island on September 21, 1996. At all material times the M.V. Cape Light II was owned by the appellant Conohan. At the time of the collision the M.V. Lady Brittany and its owner Peter K. Gaudet were insured under a policy of marine insurance issued by the respondent, which policy contained the Fishing Vessel Wording rider. The appellants claim that in the circumstances described below they are entitled to be indemnified under the policy for the losses sustained as a result of the collision.

BACKGROUND

2 In April 1997, the appellant Conohan launched an action in rem and in personam in this Court against the M.V. Lady Brittany and its owner Gaudet for the loss of his vessel and for loss of revenue. Less than five months later, Gaudet executed an "Admission of Liability, Confession to Judgment and Assignment of Rights" in favour of the appellant Conohan and his insurer. By that document, Gaudet admitted that he had no defence in the action and that the collision had "resulted exclusively from my errors in navigation" and "my failure to keep an adequate lookout". Gaudet referred to and attached to the document a letter dated May 6, 1997, from the respondent's solicitors in which they maintained that "unless and until there is some determination of liability against Mr. Gaudet and Mr. [page428] Gaudet has made payment in respect of such liability, there is no obligation upon our client to provide any indemnification in respect of Mr. Gaudet, let alone any obligation or duty to defend the threatened proceedings by the insurer of Mr. Conohan's vessel". Gaudet also agreed "to assign to the Plaintiff and his insurers as their interests may be, all my rights of claim and action against The Co-Operators in respect of my policy of insurance", which assignment was accepted by the appellant Conohan. Later, on September 24, 1997, the assignment was accepted by his insurer, the appellant Eastern Marine Underwriters Inc.

3 The action in which the order under appeal was made was commenced by the appellants on this latter date. The assignment was pleaded in the statement of claim. No issue arises with respect to the effect of the assignment or that the appellants, in virtue of the assignment, stand in the shoes of Gaudet in connection with their claim under the insurance policy.

4 The appellants averred in the statement of claim that as a result of the collision the appellant Conohan suffered damages from the total loss of the M.V. Cape Light II in the sum of $66,155.80 for replacement of the vessel, loss of its salvage value and the sum of $40,000 in loss of revenue. Paragraphs 9 and 10 of the statement of claim read:

> 9. In virtue of the said policy of insurance, and in particular clause 16 of the Fishing Vessel Wording conditions thereof, the defendant was obligated to indemnify Gaudet for such sums as he would need to pay as a result of his liability for the damages of any person resulting from a collision, including physical loss or damage to the vessel collided with and property thereon, and delay to or loss of such vessel or property;
>
> 10. Although duly called upon to do so, defendant refused to indemnify Gaudet and now refuses to indemnify the plaintiffs under the assignment.

5 A number of defences were raised by the respondent in its statement of defence based upon alleged alcoholic impairment or drunkenness of Gaudet [page429] at the time of the collision and breach by Gaudet of warranties contained in the Marine Insurance Act, S.C. 1993, c. 22 and in the policy itself. All of these defences failed, and none is directly relevant to the present appeal. In paragraph 2 of its statement of defence the respondent expressly denied the allegations contained in paragraphs 9 and 10 of the statement of claim and put the appellants "to the strict proof thereof".

6 Following the close of the pleadings, in June and July 1999, a pre-trial conference was conducted by the Prothonotary at Montréal. To that end, the parties filed memoranda of argument as required by subsection 258(1) of the Federal Court Rules, 1998 [SOR/98-106]. The Prothonotary made an order pursuant to rule 265 on July 9, 1999, with respect to the conduct of the trial. Paragraph 3 of that order includes a listing of the following "specific legal issues to be tried":

> 3. The specific legal issues to be tried are as follows:
>
> 1. Does the Marine Insurance Act apply to the facts of this case?
> 2. If the Marine Insurance Act applies to the facts of this case, did Mr. Gaudet operate the "Lady Brittany" in a lawful manner within the context of section 34 of the Act?
> 3. If the Marine Insurance Act applies to the facts of this case, was the loss suffered by Mr. Conohan attributable to the "wilful misconduct" of Mr. Gaudet, within the context of section 53(2) of the Act?
> 4. If the Marine Insurance Act applies and the answers to questions 2 and 3 are in the affirmative, is the Defendant required to indemnify Mr. Gaudet and/or the Plaintiffs?
> 5. Did Mr. Gaudet violate section 27 of the policy of insurance?
> 6. If Mr. Gaudet violated section 27 of the policy of insurance, is the Defendant required to indemnify Mr. Gaudet and/or the Plaintiffs?
> 7. If the Defendant is required to indemnify Mr. Gaudet and/or the Plaintiffs, what is the quantum of damages suffered?

7 At trial, O'Keefe J. agreed that the Marine Insurance Act applied to the facts of the case. He concluded, however, that section 34 of that statute [page430] creating an implied warranty that the "marine adventure ... will be carried out in a lawful manner", did not apply. O'Keefe J. determined as well that there was no indication of "any wilful misconduct" on the part of Gaudet and, accordingly, that the loss was not excluded by subsection 53(2) of the Marine Insurance Act. Nor in his view did the warranty against "drunken or impaired operation of the vessel" contained in Clause 27 of the policy have any application on the facts as found by him. O'Keefe J. accepted that the sum of $66,155.80, agreed upon by the parties, represented the total loss of the M.V. Cape Light II, but held that the claim for loss of revenue had not been established on the evidence. He dismissed the appellants' claim for punitive or exemplary damages.

8 O'Keefe J. next addressed the respondent's argument at trial that the respondent was not obliged to indemnify Gaudet under the policy in respect of liability arising out of the collision because Gaudet had failed to comply with the so-called "pay to be paid" requirement in Clause 16 of the Fishing Vessel Wording rider. That clause reads:

> 16. 4/4ths Collision Liability
>
> It is further agreed that if the vessel hereby insured shall come into collision with any other vessel and the insured shall in consequences thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision for:

a. loss of or damage to any other vessel or property on any other vessel;
b. delay to or loss of use of any such other vessel or property therein; or
c. general average of, salvage of, or salvage under contract of, any other vessel or property thereon.

The insurer will pay the insured such sums so paid provided always that their liability in respect of any one such collision shall not exceed the value of the vessel hereby insured, and in cases in which, with the prior consent in writing of the insurer, the liability of the vessel has been contested or proceedings have been taken to limit liability, they will also pay the costs which the insured shall thereby incur or be compelled to pay; but when both vessels are to blame, then, unless the liability [page431] of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the insured in consequence of such collision.

Provided always that this clause shall in no case extend or be deemed to extend to any sum which the insured may become liable to pay or shall pay for in respect of;

a. removal or disposal, under statutory powers or otherwise, of construction, wrecks, cargoes or any other thing whatsoever;
b. any real or personal property or thing whatsoever except other vessels or property on other vessels;
c. pollution or contamination of any real or personal property or thing whatsoever (except other vessels with which the insured vessel is in collision or property on such other vessels);
d. the cargo or other property on or the engagements of the insured vessel;

e. loss of life, personal injury or illness.

O'Keefe J. concluded that Clause 16 required Gaudet to first pay before he could claim indemnification from the respondent in respect of his liability to the appellant Conohan. He rested this conclusion on the decision of the House of Lords in Firma C-Trade S.A. v. Newcastle Protection and Indemnity Association, [1991] 2 A.C. 1.

9 The appellants assert two discrete errors with respect to O'Keefe J.'s conclusion that non-compliance with Clause 16 discharged the respondent from liability under the policy. First, that he erred in addressing the Clause 16 "pay to be paid" issue at all because it was not properly raised by the respondent at trial. Second, that even if the issue was properly raised at trial, O'Keefe J. erred in determining that non-adherence to the clause constituted a defence to a third party liability claim under the policy. Two additional issues were raised by the appellants. They assert that O'Keefe J. erred in finding that the appellant Conohan's loss of [page432] revenue claim had not been proved. In their submission where, as here, liability has been admitted, O'Keefe J. erred in not assessing the damages and that he ought to have done so as best he could on the evidence adduced even if the amount thereof was a matter of guesswork: Wood v. Grand Valley Railway Co. et al. (1915), 51 S.C.R. 283; Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd., [1976] 1 S.C.R. 267; R. v. CAE Industries Ltd., [1986] 1 F.C. 129 (C.A.). See also S. Waddams, The Law of Damages, looseleaf ed., Toronto: Canada Law Book Inc., 2000, at pages 5-40 to 5-43, 13-2 to 13-4. They argue as well that the respondent should have been condemned in exemplary or punitive damages or in solicitor-and-client costs in order that the respondent be penalized for refusing the claim under the policy and insisting that the "pay to be paid" requirement be complied with when the respondent well knew that Gaudet was not financially able to do so.

10 The respondent supports the judgment below but argues that the appeal be dismissed for the additional reason that Gaudet's conduct before and at the time of the collision was in breach of the implied warranty contained in section 34 of the Marine Insurance Act that a marine adventure be "carried out in a lawful manner". According to the respondent, Gaudet was not operating the M.V. Lady Brittany in a "lawful manner" within the meaning of that section in that at the time of the collision Gaudet had such a concentration of spirits in his blood as exceeded "eighty milligrams of alcohol in one hundred millilitres of blood" contrary to paragraph 253(b) [as am. by R.S.C., 1985 (4th Supp.), c. 32, s. 59] of the Criminal Code, R.S.C., 1985, c. C-46, and in any event that he failed to keep a proper look-out contrary to section 5 (as enacted by SOR/90-702, s. 3] of the Collision Regulations, C.R.C., c. 1416. The decision of the High Court of New Zealand in Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd, [1990] 2 NZLR 381 is relied on in support of the second [page433] aspect of this argument. It will not be necessary to consider these arguments.

ANALYSIS

11 The issues surrounding the application of Clause 16 should first be considered. They are whether the "pay to be paid" issue was properly raised at trial and, if it was, whether it affords a complete defence to the appellants' action on the policy.

The procedural issue

12 It will be convenient to first address the appellants' procedural objection. As the appellants maintain, by subsection 258(1) of the Rules the parties were required to file memoranda of argument prior to the pre-trial conference. Indeed, by paragraph 258(3)(d) such memoranda had to contain "a statement of the issues to be determined at trial". In addition, paragraph 263(b) requires participants at a pre-trial conference "to address ... simplification of the issues in the action". As has been seen, in his order of July 9, 1999, the Prothonotary listed the issues as set forth in the respondent's pre-trial conference memorandum filed May 27, 1999. In their pre-trial conference memorandum dated May 31, 1999, the appellants described the issues in more general terms, as "whether the Defendant is required to indemnify its insured ... and to satisfy the claims made by the Plaintiffs".

13 The respondent did not explicitly rely on Clause 16 either in its pleading or in its pre-trial conference memorandum. However, as has been noted, it was expressly raised in paragraph 9 of the statement of claim which was, in part, answered in paragraph 2 of the statement of defence. It is clear that paragraph 2, while not expressly referring to the "pay to be paid" requirement of Clause 16, effectively raised that requirement as a defence by denying the plea contained in paragraph 9 of the statement of claim. Moreover, it is apparent that the respondent's position was well known to the appellants at an early stage, as appears from the [page434] solicitors' letter of May 6, 1997 which was attached to the "Admission of Liability, Confession to Judgment and Assignment of Rights". Again, as the respondent has pointed out, the "pay to be paid" requirement of Clause 16 was addressed in argument at trial, first by the appellants, then by the respondent and finally by the appellants in rebuttal. The appellants state that their reliance on the clause in their pleading was only for the purpose of claiming coverage under the policy. In my view, however, the clause as pleaded in paragraph 9 of the statement of claim and in paragraph 2 of the statement of defence put the whole of Clause 16 in issue, not just the appellants' claim for coverage thereunder but the "pay to be paid" requirement as well.

14 It is of course essential that parties to an action fully comply with a pre-trial conference order made pursuant to rule 265 unless released therefrom by agreement or by the Court. Otherwise this very useful rule will be rendered of little or no utility. Given the circumstances I have just described, I am of the view that it was not improper for O'Keefe J. to have addressed the argument presented by the parties based upon Clause 16 of the policy. It is an important and relevant clause. Moreover, there can be no serious suggestion that because it was not expressly pleaded or listed in the order of the Prothonotary, the appellants were taken by surprise and thereby prejudiced in their introduction of evidence or otherwise in the prosecution of their claims at trial.

15 Rule 174 requires a party to plead "a concise statement of the material facts on which the party relies", which is a fundamental principle of pleading. In my view, the facts touching on the Clause 16 defence are few and straightforward.

The respondent sufficiently pleaded that because Gaudet had not paid anything to the appellant Conohan in respect of his liability arising out of the collision Gaudet was not, by reason of Clause 16, entitled to be paid anything under the policy. Even if it could be said that the respondent did not plead the [page435] "pay to be paid" requirement of Clause 16 but only the other defences listed in the Prothonotary's order, in my view this did not prevent the respondent from relying on that requirement. As Lord Denning M.R. explained in Vandervell's Trusts (No. 2), In re, [1974] Ch. 269 (C.A.), at pages 321-322:

> It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit.

See also 384238 Ontario Limited v. The Queen in right of Canada, [1984] 1 F.C. 661 (C.A.), at page 678. R. v. Imperial General Properties Limited, [1985] 1 F.C. 344 (C.A.), at pages 351-352. Compare, Scotsburn Co-operative Services Ltd. v. W.T. Goodwin Ltd., [1985] 1 S.C.R. 54, at page 65.

The substantive issue

16 In approaching the issue under discussion it is well to recall, as indeed subsection 6(1) of the Marine Insurance Act emphasizes, that a contract of marine insurance "is a contract whereby the insurer undertakes to indemnify the insured, in the manner and to the extent agreed in the contract" (emphasis added). This fundamental characteristic of marine insurance runs through the decided cases, of which Goole & Hull Steam Towing Co. v. Ocean Marine Insurance Co. (1927), 29 Ll.L.Rep. 242 (K.B.) is an illustration. In that case, McKinnon J. stated, at page 244:

> A marine insurance policy is often said to be a contract of indemnity, but I think it must always be remembered that it is not a contract of indemnity ideally, but of an indemnity according to the conventional terms of the bargain. When a loss has happened, the question is hardly ever--I think, probably never, certainly hardly ever--how much is the assured out of pocket? That might be the proper question if the object of the contract was to provide an ideal indemnity. The real question in the case is: what is the measure of indemnity that by the convention of the bargain has been promised to the assured? [Emphasis added.]

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17 The collision clause evolved in England during the nineteenth century after the courts had determined that marine insurance policies of the day did not, in collision cases, respond to the liability of the insured in negligence to a third party. A portion of this vacuum was filled by the insurance market which agreed in their contracts of insurance to cover three-fourths of the amount of such liability leaving the excess amount to be covered by shipowners mutual insurance associations (P & I Clubs): see A. Parks, The Law and Practice of Marine Insurance and Average, Vol. II (Centreville, Md.: Cornell Maritime Press, 1987), at pages 832-833; Mercantile Mutual Insurance (Australia) Ltd. v. Gibbs & Anor, [2001] W.A.S.C.A. 271 (S.C.W. Aust.), at paragraphs 71-79. In the present case, as we have seen, Clause 16 covered the full four-fourths of potential liability to a third party arising from a collision. A clause of this kind has become increasingly common in the marine insurance market: M. Mustill and J. Gilman, Arnould's Law of Marine Insurance and Average, 16th ed., Vol. II (London: Stevens & Sons, 1981), at page 664 ff.

18 The collision clause in the policy should thus be seen in its historical setting. At common law, no action could be maintained on a contract of indemnity until the person seeking indemnification had suffered an actual loss: Collinge v. Heywood (1839), 9 Ad. & E. 633; 112 E.R. 1352 (K.B.). Subsequently, in Richardson, In re. Ex parte St. Thomas's Hospital (Governors of), [1911] 2 K.B. 705 (C.A.), Cozens-Hardy M.R. stated, at page 709:

> It is settled at common law that, given a contract of indemnity, no action could be maintained until actual loss had been incurred. The common law view was first pay and then come to the Court under your agreement to indemnify.

As the Master of the Rolls went on to point out, equity found a way of relieving against the harshness of this [page437] rule by requiring the indemnifier to pay the creditor direct or to pay the indemnified person before he had paid the creditor. The insurance contract did not contain an express "pay to be paid" clause. See also County & District Properties Ltd. v. C. Jenner & Son Ltd. and Others, [1976] 2 Lloyd's Rep. 728 (Q.B.) where earlier case law on the same point is collected and discussed, and the concurring views of Lord Goff of Chieveley in Firma, supra, at page 33 et seq. See also S. Hazelwood, P & I Clubs: Law and Practice, 3rd ed. (London: Lloyd's, 2000), at pages 351-355.

19 The appellants contend nevertheless that O'Keefe J. erred in holding that no obligation on the respondent could arise under Clause 16 unless Gaudet first paid the claim of the appellant Conohan and that O'Keefe J. misconceived the legal requirement imposed by the clause by relying on the decision of the House of Lords in Firma, supra. That case was concerned with whether the plaintiffs had a direct right of action under the Third Parties (Rights against Insurers) Act, 1930 (U.K.), 20 & 21 Geo. V, c. 25 against two P & I Clubs in which the ships were entered and whose members had been wound up. By subsection 1(1) of that statute, in the case of the winding up of an insured "his rights against the insurer under the contract in respect of the liability shall ... be transferred to and vest in the third party to whom the liability was so incurred". The main issue in Firma, supra, turned on the construction of two rules of the P & I Clubs, which constituted a policy of insurance. By those rules the Clubs undertook to protect and indemnify their members in respect of losses or claims for which the member "shall become liable to pay and shall have in fact paid". It was argued that the requirement of prior payment to the third party loss did not amount to a condition precedent to recovery under the contracts of insurance and, if it did, that the plaintiffs were entitled to equitable relief against the harshness of that result.

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20 The House of Lords disagreed. In discussing the issues posed, Lord Brandon of Oakbrook asked himself three questions. The first of these questions was: What rights, if any, did the members have against the Clubs under their contracts of insurance in respect of liabilities previously incurred to third parties immediately before the members were wound up? Lord Brandon answered this question as follows, at pages 27-28:

> With regard to the first question, on the ordinary and natural construction of those rules of the clubs which contained the "pay to be paid" provisions, the members were not entitled to be indemnified by the clubs in respect of liabilities to third parties which they had incurred, unless and until the members had first discharged those liabilities themselves. In other words payment by the members to the third parties was a condition precedent to payment by the clubs to the members. That interpretation of the relevant rules appears to have been accepted before Saughton J. and Saville J. In the Court of Appeal, however, it was argued for the first time on behalf of the third parties that under equitable principles the members were entitled to be indemnified by the clubs as soon as the existence and the amounts of the liabilities had been established and without any need for them to discharge such liabilities first themselves.
>
> There is no doubt that before the passing of the Supreme Court of Judicature Acts 1873 and 1875, there was a difference between the remedies available to enforce an ordinary contract of indemnity (by which I mean a contract of indemnity not containing any express "pay to be paid" provision) at law on the one hand and in equity on the other. At law the party to be indemnified had to discharge the liability himself first and then sue the indemnifier for damages

> for breach of contract. In equity an ordinary contract of indemnity could be directed to be specifically performed by ordering that the indemnifier should pay the amount concerned directly to the third party to whom the liability was owed or in some cases to the party to be indemnified. Johnston v. Salvage Association (1887) 19 Q.B.D. 458, 460, per Lindley L.J.; British Union and National Insurance Co. v. Rawson [1916] 2 Ch. 476, 481-482, per Pickford L.J. There is further no doubt that since the passing of the Supreme Court of Judicature Acts 1873 and 1875 the equitable remedy has prevailed over the remedy at law.
>
> The difficulty in the way of this argument for the third parties, however, lies in the express "pay to be paid" [page439] provisions in the relevant rules of the clubs. In principle it is difficult to see how equity could disregard or override those express provisions, and no authorities were cited to your Lordships which supported the contention that it could. The Court of Appeal rejected this argument based on equitable principles put forward for the third parties for that reason and I consider that they were right to do so.
>
> In the result I would answer the first question by saying that immediately before the members were ordered to be wound up they had only contingent rights against the clubs in respect of the liabilities to third parties incurred by them. The rights were contingent in that it was a condition precedent to the members being indemnified by the clubs in respect of those liabilities that they should first have been discharged by the members themselves.

21 Lord Goff of Chieveley, concurring, was even more emphatic as to the effect of the "pay to be paid" clause. In rejecting an argument that the plaintiffs were entitled to indemnity under the rules of the clubs because they could not pay themselves, he stated at page 31:

> I do not deny that I was from the beginning startled by the point, and closer acquaintance did not make me any better disposed towards it. It is, to my mind, fundamentally flawed. I start from the position that what is transferred to and vested in the third party is the member's right against the club. That right is, at best, a contingent right to indemnity, the right being expressed to be conditional upon the member having in fact paid the relevant claim or expense. If that condition is not fulfilled, the member has no present right to be indemnified by the club. Here the relevant claim or expense was never paid, by the member or indeed by anybody else on his behalf. That condition not having been fulfilled, the member had no present right to indemnity, and the statutory transfer of his right to a third party cannot put the third party in any better position that the member. It is as simple as that.

He also agreed that equity could not override the clearly expressed contractual agreement contained in the clubs' rules. As he put it, at page 36: "Equity does not mend men's bargains". It was also his view, at page 37, that [page440] the inability to pay the third party claim created by the winding up of the insureds was immaterial: "Following the insolvency of any member, or a winding up order, his contractual rights remain the same; there is a contingent right of reimbursement as before, though it is one which the member is, in the new circumstances, less able to exercise". For a recent application of Firma, supra, see Total Liban S.A.L. v. Vitol Energy S.A., [1999] 2 Lloyd's Rep. 700 (Q.B.). It seems to me that the reasoning in Firma, supra, provides a framework for analysis in the present case.

22 The appellants contend that Firma, supra, does not contain a principle of broad application such as governs liability under a collision clause in a non-mutual marine insurance policy. They point out that Firma was concerned with determining the meaning of a P & I Club rule, part of a mutual insurance contract, rather than of a clause in an ordinary marine policy available in the open market. I am not persuaded, however, that this difference should dictate a different result. What is of foremost importance, in my view, is the express language of Clause 16 itself covering collision

liability where the insured "become liable to pay and shall pay by way of damages". Indeed, these words are strikingly similar to those which required construction in Firma, supra. In my view, whether Clause 16 sets up a condition precedent to indemnification is essentially a question of construction of the language appearing in the clause.

23 Perhaps surprisingly, very little may be found in the decided cases of whether a "pay to be paid" clause constitutes a barrier to recovery under a collision clause outside of the mutual marine insurance context. In one of these cases it was pointed out that the purpose of the "pay to be paid" requirement of P & I Club rules "is to meet the special needs of a mutual insurance scheme in a member's association or club" and that such a rule is "entirely inappropriate in the non-club environment of a commercial insurance contract": "Italia Express" [page441] (No. 2), The, [1992] 2 Lloyd's Rep. 281 (Q.B.), at page 298. The issue there was whether the P & I clause in a commercial market policy incorporated all of the rules of the P & I Club in which the vessel was entered including the "pay to be paid" rule. The Court concluded that as a matter of construction this rule was not incorporated into the policy. The case does not, in my view, support the argument that when an express "pay to be paid" requirement is present in a non-mutual insurance policy it should not receive the same interpretation as when it appears in a mutual insurance policy.

24 In Charter Reinsurance Co. Ltd. v. Fagan, [1997] A.C. 313 (H.L.), an issue arose under excess loss contracts of whether the reinsurers would only be liable "if and when" the ultimate net loss sustained by the insured exceeded a specific amount, "net loss" being defined in the contracts as being "the sum actually paid". Lord Mustill was of opinion, at page 386, in the light of the policy as a whole that the "'the sum actually paid'... is not to impose an additional condition precedent in relation to the disbursement of funds, but to emphasise that it is the ultimate outcome of the net loss calculation which determines the final liability... under the policy". He went on to state that "'actually' means 'in the event when finally ascertained', and 'paid' means 'exposed to liability as a result of the loss insured'". In expressing this view, Lord Mustill noted, at page 386, that this may be "far from the ordinary meanings of the words, and they may be far from the meanings which they would have had in other policies" but that the words were to be interpreted "in a very specialised form of reinsurance". Again, as is apparent, the meaning of the clause there in issue was clearly a matter of construction in the light of the intended purpose. Lord Mustill distinguished Firma, supra, on the basis that a condition precedent was found to have been intended in that case but not in the case before him. In my view, [page442] Charter Reinsurance, supra, is of no assistance in determining whether compliance with the "pay to be paid" requirement in Clause 16 of this ordinary marine insurance policy should be viewed as a condition precedent to recovery thereunder.

25 Some authorities in England are to the effect that the "pay to be paid" requirement of a collision clause means what it says, namely, that the liability must be discharged by the insured before the insurer becomes liable to indemnify the insured. In Raiffeisen Zentralbank Österreich A.G. v. Five Star Trading L.L.C. and Others (The "Mount I"), [2001] EWCA Civ 68, [2001] 1 Lloyd's Rep. 597 (C.A.), the Court was called upon to interpret a clause in a policy of marine insurance under which the underwriters agreed to indemnify for "any sum or sums paid by the assured to any other person or persons by reason of the insured becoming legally liable by way of damages". Lord Justice Mance expressed the view, at page 615, that although the terms of the collision insurance was not as "crystal clear" as those considered in Firma, supra, they "probably mean that Five Star could not recover from the insurers in respect of collision liability except in respect of sums previously 'paid', in the sense of disbursed, to the third party claimants by reason of such liability". In H. Hurd, The Law and Practice of Marine Insurance, 2nd ed. (London: Sir Isaac Pitman & Sons, 1952), at page 107, the learned author stated that in general:

> The words "become liable to pay and shall pay" further restrict the right of recovery under the collision clause, inasmuch as the liability of the underwriter is contingent upon not only the liability of the assured for the collision but also [page443] the actual payment of the damages arising out of the collision... .

A somewhat similar view was expressed in Arnould's Law of Marine Insurance and Average, 16th ed., Vol. 3 (London: Sweet & Maxwell, 1997), at page 69. Here in Canada, too, the British Columbia Court of Appeal has held that Firma, supra, "stands for the simple proposition that the obligations of a contract of indemnity comes from its words": MacMillan Bloedel Ltd. v. Youell (1993), 95 B.C.L.R. (2d) 130 (C.A.), at paragraph 30.

26 It seems to me that the issue under discussion reduces itself to one of construction. Did the "pay to be paid" requirement of Clause 16 impose an obligation on Gaudet to pay the damages incurred to the appellant Conohan by reason of the collision before he could collect under the policy? In my view, the ordinary meaning of the words employed in the clause plainly required that payment first be made to the third party as a condition precedent to recovery. In my opinion, the ratio of Firma, supra, applies to the construction of Clause 16, the language of which is too clear as to admit the application of equitable principles. Here, I would adopt by way of analogy the views of Lord Jauncey of Tullichettle in Firma, supra, at page 42, as to the purpose and effect of a clearly worded "pay to be paid" clause in a contract of insurance: "I therefore conclude that the provisions of the relevant rules do not merely repeat what is already the position at common law but that they add a specific provision to what would otherwise be an ordinary contract of indemnity. This provision which admits of only one construction is effective to displace the rule of equity."

27 Finally, I would observe that other language in Clause 16 appearing after the proviso towards the end of the clause lends support to this conclusion. There the phrase employed is "any sum which the insured may become liable to pay or shall pay". The use of the disjunctive "or" is in marked contrast to the conjunctive "and" in the phrase in issue, and again suggests that by [page444] the former phrase a condition precedent to indemnification had first to be satisfied.

28 The appellants urged that the Court be guided by American case law interpreting the so-called "no action" clause in a general liability insurance policy. Such a clause generally stipulates that no action shall lie against the insurer unless "as a condition precedent ... the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written argument of the insured, the claimant and the company". Courts in the United States have held the "no action" clause to be of no effect where the insurer denies coverage in a case where coverage exists or unjustifiably delays settlement, forcing the insured to settle separately: Thomas W. Hooley & Sons v. Zurich General Acc. & Liability Ins. Co., 103 So. 2d 449 (La. 1958); Emile M. Babst Co., Inc. v. Nichols Const. Corp., 488 So. 2d 699 (La. App. 1 Cir. 1986). In the first of these cases the denial of liability was found to have been unjustified and that the right to reimbursement was clearly covered by the insurance contract. Again, in the second, the insured's claim was clearly covered by the policy.

29 The appellants submitted that the "pay to be paid" requirement of Clause 16 should be similarly viewed, and particularly that the respondent should not have the benefit of that requirement because of the manner in which it responded to the claim and conducted its defence. I am unable to derive assistance on this point from the American jurisprudence referred to above, which interpreted a differently worded clause in a non-marine insurance context.

30 Moreover, while it is true that by virtue of section 20 of the Marine Insurance Act a contract of marine insurance "is based on the utmost good faith and, if the utmost good faith is not observed by either party, [page445] the contract may be avoided by the other party", I cannot see that the respondent failed to live up to the obligation so imposed. The content and application of the "utmost good faith" concept was usefully explained by Aikens J. in "Mercandian Continent" (The), [2000] 2 Lloyd's Rep. 357 (Q.B.), at pages 368-379. I am not persuaded that by its action in response to the claim and in the conduct of its defence the respondent lost the protection of the "pay to be paid" requirement. While a number of defences raised were not successful such defences, with one possible exception, appear to have been raised bona fide and not with a view to delay or of refusing to pay a valid claim in any event. The exception, if there is one, was the respondent's continued reliance on the Clause 27 warranty against "drunken or impaired operation of the vessel" despite the fact that for some period of time before trial Gaudet had been found not guilty of such an offence under the Criminal Code by the courts of Prince Edward Island. However, I do not see that this insistence was motivated by bad faith such as to foreclose the respondent from relying on the "pay to be paid" condition in Clause 16. It is to be noted that each of these defences was carefully canvassed by O'Keefe J. before being rejected, and that he did not in any respect suggest that the respondent was motivated in its defence by bad faith.

Other issues

31 The loss of revenue claim is asserted on the basis that if the "pay to be paid" requirement of Clause 16 did not apply the respondent should in turn indemnify the appellant Conohan for that loss. In view of the conclusion I have reached on the Clause 16 interpretation issue, the loss of revenue issue which does not arise for decision. Additionally, I can find nothing in the manner in which the respondent dealt with the claim in the action that would justify an award of costs, much less costs on a solicitor-and-client basis. Similarly, no basis has been shown for awarding exemplary or punitive damages in this unsuccessful appeal.

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DISPOSITION

32 For the foregoing reasons, I would dismiss the appeal with costs.

EVANS J.A.:-- I agree.
MALONE J.A.:-- I agree.

cp/d/qllls