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Pay First Means Pay First: MS Amlin Marine NV v King Trader Ltd & Ors EWCA Civ 1387

MS Amlin Marine NV v King Trader Ltd & Ors [2025] EWCA Civ 1387

Date: 5 November 2025

Judges: Sir Geoffrey Vos, Master of the Rolls, Lord Justice Singh and Lord Justice Males

Key Words:

Marine Insurance, Pay First Clause, Onerous Clause Doctrine, Third Parties Act 2010, Contract Interpretation, Charterers' Liability, Insolvency

Summary

The Court of Appeal dismissed the appeal by King Trader Ltd (the Owner) and The Korea Shipowners' Mutual Protection & Indemnity Association (the Club) [97, 99, 100]. The challenge concerned whether a "pay first" clause (clause 30.13) in a marine insurance policy was enforceable and survived the transfer of rights under the Third Parties (Rights against Insurers) Act 2010 [4-6].

The Charterer, now insolvent, owed over US$47 million under an arbitration award [3]. As the pay first clause required the Charterer to first discharge the liability [4-5, 13-15], and this was impossible, the Insurer obtained declarations of non-liability [4-6]. The Court rejected arguments that the clause was not incorporated, conflicted with the insuring clause, or was onerous under the "red hand" doctrine [8, 64-65, 73-78, 97, 99, 100].

Key Themes:

1. ***Commercial Contract Interpretation:*** *Distinguishing general vs special terms via hierarchy clauses [11, 15-16, 41, 61].*
2. ***Pay First Clauses:*** *Operating as qualifications to indemnity, not contradictions [18-19, 37, 63(i)-(ii)].*
3. ***The 2010 Act:*** *Section 9(6) preserves pay first clauses in non-personal injury marine insurance [36-37, 39-40, 103].*
4. ***Onerous Clause Doctrine:*** *Applies only where clauses are unusual and not brought to attention [65, 69, 84, 91(i)-(ii), 98].*
5. ***Marine Insurance Practice:*** *Pay first clauses are standard and commercially accepted [36-37,*

63(iii), 68-69, 89-90, 91(iii)-(iv), 92, 102].

Background

1. ***Factual*:** The Insurer issued a marine policy to the Charterer on 28 March 2018 [1-2]. Following grounding in 2019, the Owner and Club obtained an award exceeding US$47 million [2-3]. The Charterer entered insolvency and had not paid the Award; the Insurer relied on the pay first clause [4-5].
2. ***Procedural*:** The Insurer sought and obtained declarations of enforceability from Foxton J on 30 July 2024 [6]. The Owner and Club appealed [7].
3. ***Legal (2010 Act)*:** Rights transferred under Section 1. However, Section 9(6) preserves pay first clauses in non-personal injury marine insurance [36-37, 39-40].

Legal Issues and Analysis

The appeal concerned three grounds challenging clause 30.13 [7, 15].

A. The Incorporation Ground

Appellants argued Part 5 (containing clause 30.13) was not incorporated [7-8, 93-94].

Held: Rejected [76-78]. The Certificate referenced the Booklet, and the hierarchy clause (section 25) relied upon by appellants appeared in Part 5 itself [95].

B. The Inconsistency Ground

Appellants argued the pay first clause contradicted the insuring clause [11, 42].

Held: The clauses could be read "fairly and sensibly together" [48, 55-56]. The pay first clause qualified the indemnity by making prior payment a condition [63(ii)-(iii)]. Common marine practice and Parliamentary preservation underlined consistency [63(iii), 36-37].

C. The Onerous Clause Ground (Red Hand Doctrine)

Appellants argued clause 30.13 was onerous and required special notification [7, 65, 72-74].

Held: The clause was not unusual in marine insurance [88-90]. The Charterer had professional insurance brokers; the doctrine does not apply where terms are standard in the market and professionally understood [91(iii)-(iv), 92-93, 101].

Conclusion

The appeal was dismissed [8, 78]. Clause 30.13 was incorporated, enforceable and operated as a condition precedent [15, 63(i)-(ii)]. The statutory override in the 2010 Act did not apply [36-37]. The clause was not inconsistent or onerous in this commercial context [63(i), 88-90, 91(iii)-(iv), 92-93].

Key Takeaway:

Pay first clauses remain enforceable in non-personal injury marine insurance policies [36-37, 63(iii), 102], even where the insured is insolvent. Their survival under the 2010 Act reflects a deliberate legislative policy choice [36, 38-39, 103]. In commercial contexts with professional representation, such clauses are neither unusual nor onerous [69-71, 91(i)-(ii), 101].

Parting Thoughts

The Court of Appeal has now confirmed, with the kind of calm certainty usually associated with someone who has actually read the contract, that the "pay first" clause means exactly what it says. The Owner and the Club attempted to argue that a US$47 million liability should effectively evaporate because clause 30.13 was either (a) hiding in the curtains or (b) somehow cancelled out by the mere presence of an insuring clause elsewhere. The Court was unmoved.

The alleged "inconsistency" collapsed under the weight of contractual logic: the indemnity obligation arises, yes, but the right to recover is conditional upon payment. A qualification, not a contradiction. If the appellants wanted a policy that pays even when the insured cannot, they should have bought one of those. They did not.

The argument that the clause was so shocking it required a neon sign and a marching band fared no better. In commercial marine insurance, a pay-first clause is about as surprising as water being wet. The Charterer had a professional broker; if the clause came as a surprise, that is less a matter of injustice and more a reminder to read what one signs.

And looming above it all is Parliament. Section 9(6) of the 2010 Act did not arise by accident. Legislators looked directly at the precise scenario before the Court—an insolvent insured facing a large liability—and explicitly chose not to remove the effect of pay-first clauses in marine insurance except for death and personal injury. If one finds this policy distasteful, the correct forum is Westminster, not the Court of Appeal.

So the appeal fell. With force, but not drama. The insurer keeps its cheque book shut. The appellants, having argued that contract, statute, and commercial practice should all bend to their misfortune, are reminded that English law is not in the business of rewriting bargains to suit changed circumstances.

A marine insurance policy is not a treasure hunt. The terms do not need to be waved to be found. If the clause is standard, widely recognised, and explicitly preserved by legislation, being surprised by it is not evidence of unfairness. It is evidence of someone having skimmed.

In short: You pay first. Or you do not recover. The Court did not so much decide the point as politely confirm the obvious.

#DisputeResolution #LegalUpdate #CaseLaw #DDAlegal #MSAMLINMarineNV #KingTraderLtd #2025EWCACiv1387 #MarineInsurance #PayFirstClause #PayToBePaid #CharterersLiability #OnerousClauseDoctrine #RedHandDoctrine #ContractInterpretation #ThirdPartiesRightsAgainstInsurersAct2010 #InsolvencyLaw #US47MillionLiability

Authorities

Case Law:

Inconsistency and Contractual Qualification

This theme covers the principles used to determine if a general contractual provision (like the pay first clause) conflicts with or merely qualifies a specific term (like the main insuring clause) within the context of a hierarchy provision.

1. ***Pagnan SpA v. Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep 342 (Pagnan)*** *– It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions, which does not make the latter provisions inconsistent or repugnant. To be inconsistent, a term must*

contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. One should approach interpretation objectively, without predisposition to find inconsistency.

2. ***Septo Trading Inc v. Tintrade Ltd (The Nounou) [2021] EWCA Civ 718 (The Nounou) –*** *Distinguished between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it, requiring the question of inconsistency to be decided practically, having regard to business common sense, and asking whether the clauses can be read together fairly and sensibly. Inconsistency is likely if the printed term effectively deprives the special term of any effect (emasculates it) or if the term detracts from a central feature or main purpose of the contract.*
3. ***Alexander v. West Bromwich Mortgage Co [2016] EWCA Civ 496 (Alexander) –*** *Inconsistency extends to cases where clauses cannot "fairly or sensibly" be read together, in addition to cases where there is a clear and literal contradiction, which should be approached having due regard to considerations of reasonableness and business common sense. The principle depends on being able to identify the "main purpose" or "main object and intent" of the contract.*
4. ***Glynn v. Margetson [1893] AC 351 (Glynn) –*** *In construing a contract, it is legitimate to bear in mind that a portion of the contract may be on a printed form applicable to many situations and that the court is justified in looking at the main object and intent of the contract and in limiting the general words used in view of that object and intent.*
5. ***Coburn v. Colledge [1897] 1 QB 702 at page 705 –*** *Demonstrated that there is no sensible inconsistency between a clause providing for a particular obligation to accrue at one point in time, and another clause giving a defence to enforcement until some further requirement is met.*
6. ***Rolls-Royce Holdings Plc v. Goodrich Corporation [2023] EWHC 1637 (Comm) at [236] –*** *Demonstrated that there is no sensible inconsistency between a clause providing for a particular obligation to accrue at one point in time, and another clause giving a defence to enforcement until some further requirement is met.*
7. ***Apostolos Konstantine Ventouris v. Trevor Rex Mountain (The Italia Express (No 2)) [1992] 2 Lloyd's Rep 281 (per Hirst J) –*** *Cited by the judge but noted that it did not support the inconsistency argument.*
8. ***Lambert Leasing Inc v. QBE Insurance Ltd (No. 2) [2016] Lloyd's Rep IR 163, [15]-[16] –*** *Cited by the judge, who decided he was not minded to follow its holding that a pay first clause as part of the insuring clause was "inherently inimical to the concept of insurance".*
9. ***Scottish Power UK Plc v. BP Exploration Operating Co Ltd [2015] EWHC 2658 (Comm) at [80]) –*** *The court is reluctant to read out one of two clauses in a contract appearing in the same document.*

The Onerous Clause Doctrine (The "Red Hand" Argument)

This theme addresses the high threshold required to determine if an unusual or onerous clause is effectively incorporated into a commercial contract, particularly when the parties are professionally represented.

1. ***Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd [1989] QB 433 (Interfoto) –*** *If one condition in a set of printed conditions was particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party. Terms that are "common form or usual terms regularly encountered in this business" are not covered by the doctrine.*
2. ***Goodlife Foods Ltd v. Hall Fire Protection Ltd [2018] EWCA Civ 1371, [2018] BLR 491***

(Goodlife) – *Confirmed the "well-established principle of common-law" that an onerous or unusual term will not be incorporated unless fairly and reasonably brought to attention. Between parties of broadly equal bargaining power, the court should be slow to intervene. Not every exclusion or limitation clause is onerous or unusual.*

3. ***J Spurling Ltd v. Bradshaw [1956] 1 WLR 461 (Spurling) –*** *Obiter dictum that "the more unreasonable a clause is, the greater the notice which must be given of it," suggesting some clauses "would need to be printed in red ink on the face of the document with a red hand pointing to it".*
4. ***Thornton v. Shoe Lane Parking Ltd [1972] 2 QB 163 (Thornton) –*** *Obiter dictum confirming that a condition "so wide and so destructive of rights" requires attention to be drawn to it in "the most explicit way," perhaps needing to be printed "in red ink with a red hand pointing to it".*
5. ***Bates v. Post Office Ltd(No 3: Common Issues) [2019] EWHC 606 (QB) (Bates) –*** *The more onerous and unusual a clause, the greater notice must be given; this principle is available to contracting parties who are not consumers, but context and bargaining position are relevant, and it is a "high hurdle" to pass.*
6. ***Blu-Sky Solutions Ltd v. Be Caring Ltd [2021] EWHC 2619 (Comm) (Blu-Sky) –*** *Applied the onerous clause doctrine to a high cancellation charge in a commercial contract, though the Court of Appeal disagreed with the general statement that the usual nature of a clause does not diminish its onerousness.*
7. ***Allen Fabrications Ltd v. ASD Ltd [2012] EWHC 2213 (TCC) (Allen) –*** *A clause in very common use is less likely properly to be regarded as onerous, especially between two commercial parties since that is the business in which they knowingly operate.*
8. ***Parker v. South Eastern Railway Co [(1877) 2 CPD 416] [Parker] –*** *Referred to as the standard for determining whether the bailee did "what was reasonably sufficient to give notice of the conditions".*

Legal Context of Indemnity and Pay First Clauses

This theme establishes the historical and legal context of "pay first" clauses, confirming their validity and interaction with statutory reforms concerning liability insurance.

1. ***Firma C-Trade SA v. Newcastle Protection and Indemnity Association and Socony Mobil Oil Inc v. West of England Shipowners Mutual Insurance Association (London) Ltd (No 2) [1991] 2 AC 1 (The Fanti and the Padre Island) –*** *The House of Lords held that pay first clauses in P&I type covers were effective, meaning payment by the member was a condition precedent to the clubs' obligation to pay. Third parties acquired no greater rights than the members had, thereby defeating their claims.*
2. ***Charter Re v. Fagan [1997] AC 313 –*** *Cited to support the point that pay first clauses traditionally made enforcement of the obligation to pay the indemnity conditional on prior discharge of that liability by the insured. Lord Mustill recorded the submission that they were "long-established contractual provisions" in the insurance and reinsurance industry.*
3. ***Post Office v. Norwich Union Fire Insurance Society Ltd [1967] 2 QB 363 (Post Office) –*** *Authoritatively determined the unsatisfactory effect of the 1930 Act, where, if the policy required the company to indemnify the assured against sums "which the insured shall become legally liable to pay," no right to indemnity arose until the insured's liability had been ascertained by judgment or award.*
4. ***West Wake Price & Co v. Ching [1957] 1 WLR 45 –*** *The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss.*

5. ***Bradley v. Eagle Star Insurance Co Ltd [1989] AC 957 –*** *Further determined the unsatisfactory effect of the 1930 Act, necessitating the reforms eventually encapsulated in the 2010 Act.*

General Principles of Commercial Interpretation

This theme covers general guidelines on how courts should approach the construction of clauses, especially exclusion or limitation clauses, in commercial contracts.

1. ***Photo Production Ltd v. Securicor Transport Ltd [1980] AC 827 –*** *In commercial contracts negotiated between businessmen capable of looking after their own interests, it is wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only, especially since Parliament provided relief for consumer contracts via the Unfair Contract Terms Act 1977.*

Legislation:

Direct Applicability and Statutory Carve-Out

This theme includes the legislation central to the appeal, determining whether the rights transferred to the third parties (Owner and Club) were subject to the "pay first" clause, particularly highlighting the specific exception created by Parliament for marine insurance.

Third Parties (Rights against Insurers) Act 2010 *(The 2010 Act) – This Act allows a third party to issue proceedings directly against an insurer, resolving all issues including the insured's liability, thus removing the need for multiple sets of proceedings. Section 1 of the Act provides for the transfer and vesting of the Charterer's rights under the Policy to the Owner and the Club. Section 9(5) generally outlaws pay first clauses in transferred rights by providing that they are "not subject to a condition requiring the prior discharge by the insured of the insured's liability". Crucially, Section 9(6) adds a qualification: in the case of a contract of marine insurance, Section 9(5) applies only if the liability is in respect of death or personal injury. Because the liability in this case was not for death or personal injury, the statutory override of the pay first clause does not apply.*

Historical Context and Precursors

This theme includes the earlier legislation that created the mischief the 2010 Act sought to address, providing necessary context for understanding the need for reform and the current legal structure concerning third-party rights.

Third Party (Rights against Insurers) Act 1930 *(The 1930 Act) – This was the precursor to the 2010 Act. It was found to have a major flaw in that under the 1930 Act, a third party could not issue proceedings against an insurer without first establishing the existence and amount of the insured's liability. It was unsatisfactorily determined that, if a policy indemnified against sums the insured "shall become legally liable to pay," no right to indemnity arose until the insured's liability had been ascertained by judgment or award.*

Contractual Fairness and Consumer Protection Context

This theme includes legislation referenced to distinguish the treatment of commercial contracts from consumer contracts, particularly relevant to the discussion of the Onerous Clause Doctrine.

Unfair Contract Terms Act 1977 *– This Act made consumer contracts subject to regulations concerning unfair contract terms. Lord Diplock cited it to explain that Parliament's introduction of this*

Act banished the necessity for "judicial distortion of the English language" (i.e., strained construction of exclusion clauses) in consumer and adhesion contracts. It is cited in the context of commercial contracts between businessmen, where courts should be slow to place a strained construction on clear words.

Legal Texts & Commentary:

Legal Reform and Policy Justification

This theme includes academic and official commentary that discusses the historical context and justification behind the legislative decisions (specifically the 2010 Act) regarding the controversial nature of pay first clauses.

1. ***Explanatory Note to the Third Parties (Rights against Insurers) Act 2010*** **–** *The 1930 Act had a major flaw because under it, a third party could not issue proceedings against an insurer without first establishing the existence and amount of the insured's liability. The 2010 Act removed this need by allowing the third party to issue proceedings directly against the insurer and resolve all issues, including the insured's liability, within those proceedings.*
2. ***Mr Justice Mance, article entitled Insolvency at Sea –*** *The article questioned the P&I Clubs' justification of pay first clauses in The Fanti, highlighting the injustice created by such clauses.*
3. ***Law Commission Consultation Paper 152*** ***(CP152) –*** *The Commission consulted on reforms to the 1930 Act and pay first clauses in 2001. It noted concern that pay first clauses were being used more widely than just by P&I Clubs by mutual insurance companies. It also noted that the standard collision clause in the Institute Time Clauses (Hulls) provided that the insured must have paid sums due before being entitled to an indemnity.*
4. ***Law Commission Report No. 272*** ***(LC 272) –*** *The report repeated the concern regarding pay first clauses. It recorded conflicting views of consultees and concluded that the Law Commission was "reluctant to recommend that a new Act should intervene in the field of marine liability insurance" to avoid conflict with potential international measures. Consequently, the draft Bill only nullified the effect of pay-first clauses in marine insurance if the claim was for death or personal injury.*

General Principles of Contractual Interpretation

This theme covers commentary addressing the general rules of construction, particularly concerning boilerplate clauses and the court's reluctance to read out terms appearing in the same document.

1. ***Lewison on The Interpretation of Contracts 7th edition –*** *Cited to support the proposition that the court is reluctant to read out one of two clauses in a contract appearing in the same document.*
2. ***Chitty on Contracts 35th edition 2023 –*** *Cited in the discussion of the Onerous Clause Doctrine, identifying essential elements: (i) the burdened party was not actually aware of the clause, and (ii) the relying party had not done all that was fairly and reasonably sufficient to bring the clause to the attention of the other party.*

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