C.A.R – Waiver of Subrogation Clauses

National Oilwell (UK) Ltd v Davey Offshore Ltd (1993) – UK
Woodside Petroleum Development Pty Ltd v H&R - E&W Pty Ltd (1999) – Supreme Court of Western Australia

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THE QUESTION OF THE IMPACT OF waiver subrogation clause in C.A.R Insurance Policies has been the subject of two decisions, one in England (*National Oilwell (UK) Ltd v Davey Offshore Ltd* [1993] 2 Lloyd's Rep 582) and most recently in Australia by the Full Court of the Supreme Court of Western Australia in *Woodside Petroleum Development Pty Ltd v H&R - E&W Pty Ltd* (1999) 10 ANZ Ins Cas 61 431.

In the *National Oilwell* case, the Court considered that the waiver clause was confined to claims for losses which are insured for the benefit of the party claimed against, i.e. the benefit is only available for insured losses. The Court in this case suggested that for that reason the waiver clause was arguably superfluous, as the same result would ensue merely by a party being a joint insured under the policy.

Were this decision to have found support in this country, the ability of a party to take the benefit of the policy would depend upon it having coverage in respect of the particular loss sought to be revisited on it.

However, in the *Woodside Petroleum* case the Court, in declining to follow *National Oilwell* on the point (and instead preferring a US authority), held that there was no basis for limiting the ambit of the waiver clause to the cover provided, i.e. the Court rejected the argument that the waiver was commensurate with cover.

On the basis of this authority, it is clear that if a blanket waiver clause is inserted, it is likely to have the effect of totally obviating any rights which might otherwise exist under the contract to bring subrogated proceedings against a co-insured.

As the Court of Appeal doubted the implication of the term contended for by the Court in the *National Oilwell* case, it seems that, in the absence of such a waiver clause, there is scope to argue an entitlement to bring subrogated proceedings against a co-insured in respect of loss for which that insured is not entitled to coverage under the policy (i.e. because the principle of circuity should only apply in respect of insured losses).

Similarly, if the waiver clause is itself expressly limited in scope (e.g. there is a proviso in respect of losses for which the co-insured is responsible under the Construction Contract) then the same result should ensue. ■

Patrick Mead's article originally appeared in Carter Newell's *Constructive Notes* bulletin (May 2000) and is reprinted with permission.