

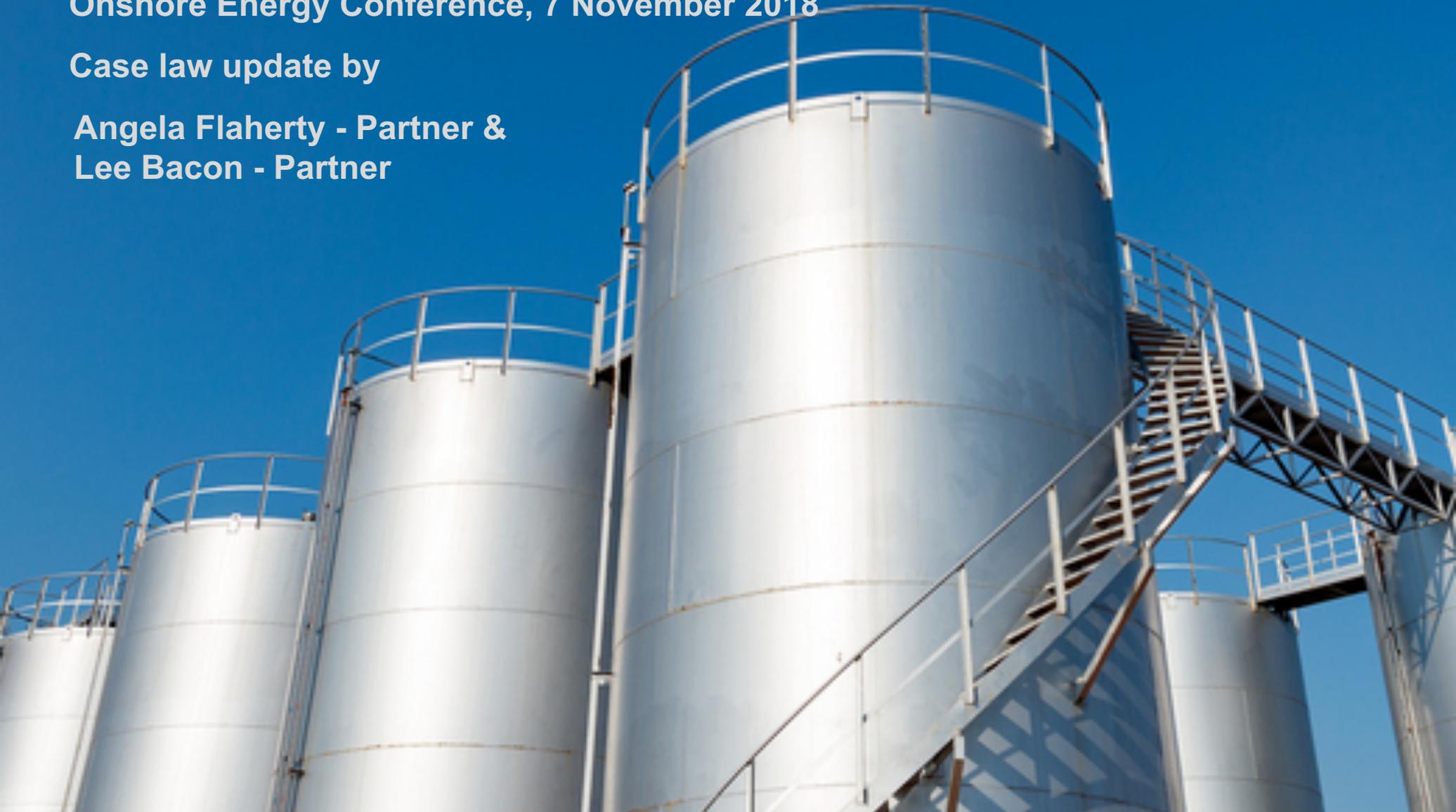
Judge for Yourself

Onshore Energy Conference, 7 November 2018

Case law update by

**Angela Flaherty - Partner &
Lee Bacon - Partner**

CLYDE&CO



Background: Case Law

Accidental Damage – *Leeds Beckett University v Travelers Insurance Company [2017]*

Concurrent Proximate Cause – *Navigators Insurance Company v Atlasnavios Navegacao [2018]*

Fraudulent Devices – *Versloot Dredging BV v HDI Gerling Industrie Versicherung [2016]*

Subrogation – *Haberdashers Askes Federation Trust v Lakehouse Contracts [2018]*

Case Study

- CAR Policy
- Gas Turbine Power Plant – handed over 1 January 2017
- Planned operational life of 15 years
- 24 month maintenance period
- Blade failure 1 November 2018 due to sulphur induced corrosion
- RCA findings: two contributory causes of use of sub-standard fuel contrary to OEM recommendation plus selection by OEM of vulnerable blade material

Leeds Beckett v Travelers: Factual Background

Student accommodation built on historic watercourse – building's concrete supporting blocks 'turned to mush' leading to demolition.

Policy excluded, among other things, inherent vice, latent defect, gradual deterioration, wear and tear and defective design

Issue: Was the 'accidental damage' to the blocks within the meaning of the policy?

- Gradual deterioration
- Faulty / defective design

Leeds Beckett v Travelers : Judgment

‘Accidental’ means “*an event that occurs by chance, which is non-deliberate*”.

The event does not need to be “*extraordinary, unusual or calamitous to qualify as accidental: it is enough that the event is non-inevitable*”.

‘Gradual deterioration’ requires a lengthy period of time, and cannot be “*sudden, dramatic or catastrophic*”

Design not fit for purposes – design fault exclusion applied

Result: Insured’s claim not covered under policy.

Application of *Leeds Beckett* to Case Study

- Was the blade failure inevitable during the Policy Period?
- Will the defective design exclusion apply?

Navigators v Atlasnavios: Factual Background

A vessel loaded in Venezuela was seized and detained after a smuggled bag of cocaine was found strapped to its hull.

Policy covered capture and seizure caused by “*any terrorist or any person acting maliciously...*”

Policy excluded confiscation caused by “*infringement of any customs... regulations*”

Issue: Did the smuggling of the cocaine constitute a ‘malicious’ action under the policy?

Navigators v Atlasnavios: Judgment

“What the context and authorities indicate is that an element of spite, ill-will or the like is required. But I would not limit the concept to conduct directed towards the insured interest. An act directed with the relevant mental element towards causing the loss of or damage or injury to other property or towards a person could lead to consequential loss of or damage to an insured interest”

"Here, the two potential causes were the malicious act and the seizure and detainment. The malicious act would not have caused the loss, without the seizure and detainment. It was the combination of the two that was fatal. The seizure and detainment arose from the excluded peril of infringement of customs regulations, and the owners' claim fails".

Result: Insured's claim not covered under policy.

Application of *Atlasnavios* to Case Study

- It was the combination of the fuel and the vulnerable blade material that gave rise to the blade failing during this Policy period.
- In the absence of either, would have taken much longer to fail.
- Is the loss excluded?

Versloot Dredging: Factual Background

Marine insurance claim for flooding of engine of the vessel

During investigation, insured falsely claimed that crew had ignored bilge alarm during the insured event.

Loss in fact had nothing to do with bilge alarm so the lie was irrelevant to the loss.

Issue: Does a 'fraudulent device' defeat the claim?

Versloot Dredging: Judgment

“The lie is dishonest but the claim is not.”

“The position is different where the insured is trying to obtain no more than the law regards as his entitlement and the lie is irrelevant to the existence or amount of that entitlement.... I do not accept that a policy of deterrence justifies the application of the fraudulent claim rule in this situation“

The fraudulent device rule only protects the insurer *“from the obligation to pay, or to pay earlier, an indemnity for which he has been liable in law ever since the loss was suffered”*

Materiality?

Deterrence?

Result: Insured entitled to full payment of claim.

Application of *Versloot Dredging* to Case Study

- Assured is asked by the loss adjuster to submit the original OEM invoice for the supply and installation of the turbine.
- A copy of the contract is available and is supplied to the adjuster but the assured is unable to locate a copy of the invoice so, in order to accelerate payment of the claim, it fabricates an invoice for the correct purchase price and submits it to the insured.
- The invoice is identified by the adjuster as being fraudulent.
- Is the assured prevented from recovering under the Policy?

Haberdashers v Lakehouse: Factual Background

Parties

Main Contractor – took out CAR policy

Sub-Contractor – took out separate third party liability cover as required by sub-contractor contract clause

Underlying claim: £8.75m

CPR policy limit: £5m

Issue: Is subcontractor a co-insured under the CAR policy and, if so, can the main contractor claim against another co-insured?

Haberdashers v Lakehouse: Judgment

“*No doubt*” that subcontractor would normally implicitly be covered under the CAR

BUT exception was that subcontract separately and expressly agreed that subcontractor would have its own insurance.

“To the extent that CPR and Lakehouse expressly agreed in the roofing subcontract terms that CPR was required to have its own individual insurance cover, CPR is not entitled to the protection of the Project Insurance”

Result: CAR insurers recovered full amount from subcontractor’s policy.

Application of *Haberdashers* to Case Study

- Policy is stated to cover the operator, its contractors and suppliers and their sub-contractors.
- Can insurers subrogate against the OEM?

415

Partners

2200

Legal
professionals

3800

Total staff

50+

Offices* worldwide

* Includes associated offices