



# LILLEHAMMER ENERGY CLAIMS CONFERENCE 2009

## WARRANTIES AND CONDITIONS PRECEDENT

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## WHY SO TOPICAL?

- No less than ten decided cases in 2008 on this or closely related subject matter.
  - Legal minefield.
  - Normal contractual principles regarding hierarchy of contractual terms not wholly applicable to insurance.
  - Controversy over what is necessary to create such terms and how they may be waived.
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## WARRANTIES

- Promise as to future or present position.
  - Breach automatically terminates insurers' liability or stops insurer coming on risk.
  - Premium returnable in second case but not first.
  - No causative connection required between breach and loss.
  - Burden of proof usually lies with insurer.
  - Cf: misrepresentations
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## CONDITIONS PRECEDENT

1. Three types
    - to inception of risk – if breached no policy comes into being – eg: survey prior to attachment.
    - to insurers' liability – if breached no right to claim – eg: timely notification/claims cooperation.
    - to recovery of claim – breach can be remedied – eg: prior payment of loss.
  2. Burden to prove breach lies with insurer.
  3. Causative connection to loss not required
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## ISSUES (1)

1. Courts reluctant to give effect to them, read them restrictively, contra proferentum.
  2. Whether clause is or is not described as “condition precedent” or “warranty” is not decisive either way.
  3. Condition precedent broadly depends upon likely extent of prejudice to insurers.
  4. Warranties must (a) go to root of transaction (b) bear materially on risk and (c) damages = unsatisfactory/ inadequate remedy.
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## ISSUES (2)

5. Most effective clauses define in detail the consequence of breach.
  6. Unlike misrepresentation and non-disclosure, cannot be waived by election only by estoppel. Established for BOW in 1992 but for condition precedent in 2008 following two cases in the year.
  7. Law commission has published recommendations for reform of position relating to warranties.
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## THE AUSTRALIAN APPROACH

### CONDITION PRECEDENT – ICA 1984 554

- If relevant act/omission is capable of causing or contributing to loss, insurer may decline claim.
- Otherwise liability reduced in proportion to prejudice caused.
- Doesn't apply to marine insurance or reinsurance.

### WARRANTIES – ICA 1984 S24

- Warranties as to present facts (eg: basis of contract clause) treated as representations.
  - Contract voidable not automatically terminated.
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## OTHER JURISDICTIONS

### US

- No real distinction made between condition precedent and warranty.
- In Marine Insurance situation like England.
- In Non-Marine a causative connection to loss required.

### NORWAY

- No similar concept.
  - Duty of disclosure with proportionate remedy for breach.
  - Use of “safety regulations”.
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