

# Pre-risk Proximate Causes

A recent decision in a marine insurance coverage dispute serves to highlight the subject of pre-risk proximate causes, an issue which can also impact upon oil & gas policies.



## Introduction

The case of *Swashplate Pty Ltd v Liberty Mutual Insurance Co (2020) FCA 15* involved damage sustained in transit by dismantled helicopters, stowed in containers, during shipment from the United States of America to Australia.

The proximate cause of the loss was held to be the insufficiency or unsuitability of the stowage of the cargo in the containers.

Stowage of the cargo in one of the containers was carried out prior to the attachment of the insurance. Even though the ocean transit took place during the policy period, the claim was successfully declined by underwriters because the proximate cause of loss was prior to the attachment of the insurance.

The significance of this decision and the issue of pre-risk proximate causes should not be overlooked by oil & gas policyholders.

## Oil & Gas Construction Risks

Unlike operational risks, where the cause and effect of a loss often occur contemporaneously, the nature of construction risks means that a significant period of time may elapse between the cause of the loss and the effect being felt in the form of physical damage. For example, the consequences of faulty workmanship may not come into existence until physical damage is sustained during the testing and commissioning phase of a project.

Accordingly, policyholders should ensure there is no room for doubt in their policy wording should the potential exist for the proximate cause of loss to take place before the attachment of the risk.

For example, the WELCAR 2001 wording, being the standard policy form upon which most insurers underwrite offshore construction risks, seeks to address the issue of pre-risk proximate causes. However, the WELCAR 2001 policy form only expressly affords coverage in respect of the risk of fault in design occurring prior to the attachment date of the policy. For the avoidance of any doubt, it is advisable that the list of pre-risk proximate causes under the WELCAR 2001 policy form

is expressly extended to encompass "faulty materials", "faulty or defective workmanship" and "latent defects".

### Oil & Gas Operational Risks

The Property Damage sections of oil & gas Operational Package Policies ordinarily afford coverage on an "All Risks" basis with certain standard exclusions applying. As stated above, the cause and effect of an operational loss would normally be expected to occur contemporaneously during the policy period. For example, a vessel impacting a platform.

However, the possibility exists that a proximate cause may take place prior to the inception of the Property Damage policy but the effect, in the form of physical damage to the subject-matter insured, does not come into existence until during the policy period.

In order to ensure that the "All Risks" cover includes physical damage to insured property, sustained during the policy period but arising from a latent defect, the policy wording should expressly provide such latent defect cover.

### Oil & Gas Decommissioning Risks

So far as insurance coverage is concerned, dismantling and removal exposures are fundamentally Liability risks. Such Liability coverage ordinarily being afforded on an "Occurrence" basis.

The occurrence or event that triggers Liability coverage can vary from insurance contract to insurance contract. Accordingly, there is an issue of interpretation in each case, especially as one single common policy form for the risk category does not exist.

Historically, at English Law, the Courts have cautioned that, in seeking to identify the time of the occurrence in Liability insurance, a pure analogy with Property insurance is not appropriate. For example, certain case law has held that liability "*arises at the time of the accident, when negligence and damage coincide.*"

Nonetheless, the issue of pre-risk proximate causes can still be relevant to the Decommissioning risk category, especially if the policyholder is seeking effective broad form policy coverage.

For example, in respect of Offshore Dismantling & Removal cover relating to decommissioned platforms, the platform owners may be seeking voluntary Removal of Wreck cover, including Dropped Objects, in order to assist in protecting their reputational risk in the event of a high profile incident. Furthermore, occasionally the property being removed may retain a significant value and require First Party Property Damage cover.

In both the aforementioned instances, a loss during the dismantling and removal exercise may be triggered by a cause prior to the inception of the policy. For example, there may have been an error with early preparatory work that was taking place during preliminary shutdown activity on the platform many months before the heavy lift exercise. The effects of such erroneous initial preparatory work may not be felt until commencement of the heavy lift campaign.

Accordingly, for the avoidance of any doubt, platform owners seeking effective broad form coverage may wish to ensure that their policy wording addresses appropriately the issue of pre-risk proximate causes.

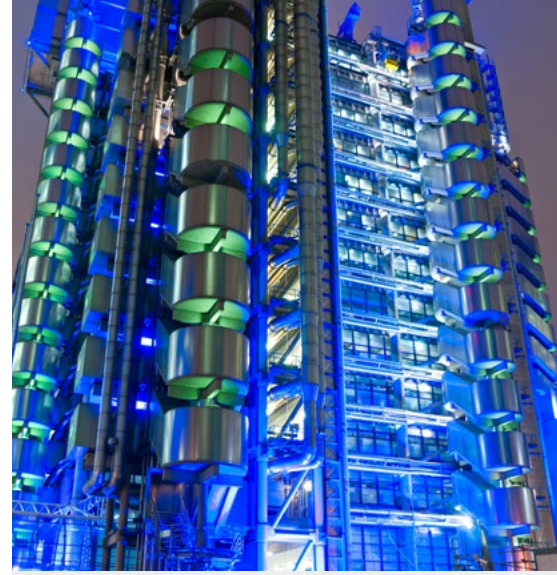
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### Further Details

In addition to advising and representing policyholders in respect of complex and distressed claims, Trident is also available to advise on policy wordings in order to establish if they are fit for purpose in the event of a loss.

For further details and guidance regarding the issues raised in this article please do not hesitate to contact Trident.

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### About Trident Oil & Gas Claims Consultants Limited

*Trident specialise in providing insurance coverage advice to policyholders from within the oil & gas industry. In particular, we offer advice and representation during the preparation, negotiation and settlement of insurance claims. Our experience encompasses exploration, construction and operational risks. For full and further details please visit our website [www.tridentclaims.co.uk](http://www.tridentclaims.co.uk) or contact us directly.*

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