SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Australia's First Insurer Class Action has Settled – and it's a Maritime Class Action!

The Federal Court of Australia has handed down a judgment in the first court-approved class action commenced by insurers. This is the first known judgment in a class action where all members of the closed class were subrogated insurers who did not have any litigation funding.

Background

The class action was commenced in January 2021, by the subrogated insurers of cargo owners that suffered losses as a result of a significant container stow collapse onboard the MV APL England during its voyage from Ningbo (China) to Melbourne (Australia) in May 2020. As a result of the collapse, around 40 containers were lost overboard and around 80 containers were damaged onboard the vessel.

Mediation and Settlement

At a court-ordered mediation, the 14 parties to the proceedings resolved the various claims and cross-claims. The settlement sum agreed upon equated to 88% of group members' total loss or on the respondents' view, the settlement amount was more than the quantum of the total losses.

Novel to a class action were:

1. none of the settlement amount was to be paid to group members – instead the settlement sum would be paid to the eight subrogated insurers, pro-rated in accordance with the group members' respective claims who had previously indemnified under goods in transit or other cargo policies
2. the settlement agreement was to be executed by the insurers and the respondents, and not the group members
3. the legal costs of the applicants were not being met by any deduction from the settlement amount to be distributed, rather, the legal costs were met separately by the insurers

Court Approval of Settlement

While the parties had informally agreed to settle the class action, it was necessary to obtain court approval for the parties proposed settlement pursuant to s 33V(1) of the Federal Court Act 1976 (Cth).

In order to obtain court approval, it was necessary to establish the proposed settlement was fair and reasonable having regard to the interests of the group members as a whole. The factors the court took into account when determining whether the settlement was fair included the:

a) complexity and likely duration of the litigation
b) reaction of the class to the settlement
c) stage of the proceedings
d) risks of establishing liability

e) risks of establishing loss or damage

f) risks of maintaining a class action

g) ability of the respondent to withstand a greater judgment

h) range of reasonableness of the settlement in light of the best recovery

i) range of reasonableness of the settlement in light of all the attendant risks of the litigation

j) terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding

In determining the fairness of the settlement, the court commented that unique to previous class actions, the settlement sought to be approved was not made between the applicants and the respondents. Rather, the agreement was made between the insurers exercising the applicants' and group members' subrogated rights and, on the other hand, the respondents. In this way, the proposed settlement did not purport to bind the applicants, nor did it allow the deduction of legal costs.

The court also considered there was no risk to the group members as:

1. their rights regarding the claims brought in the proceeding and settled had been subrogated to the insurers who were the effective claimants in the proceeding
2. further any other claims that the group members might otherwise have, were entirely unaffected by the settlement agreement

In these circumstances, the court was satisfied that the settlement agreement was fair and reasonable, especially in light of the apportionment of the settlement amount pro-rated in accordance with the group members' respective claims.

In pursuing the recovery as a class action versus 100 various proceedings, Mills Oakley was able to efficiently settle all claims together at minimum cost to enhance insurers access to justice.

Implications for Future Market Cargo Recoveries

Legal Practitioners

For legal practitioners, it provides an option for class actions to be commenced on behalf of insurers where there has been a common event that causes loss to multiple insureds who are insured by different insurers. There does not need to be simply a cargo claim for this process to be justified and be of benefit to insurers.

The class action regime allows subrogated insurers to aggregate multiple claims but keep costs to a minimum. For example, in this matter insurers saved approximately A$450,000 in Federal Court filing fees alone by commencing a class action versus commencing 104 individual proceedings.

This is achieved through the class action mechanism which allows the determination of common questions on liability and quantum for one lead class applicant which are binding on the respondents in so far as the common questions impact all class members.

This means there does not need to be multiple liability or quantum trials, which will save significant costs for the insurer class members, increasing their net recovery. Class actions also avoid the risk of inconsistent factual findings in various judgments.

Commencing a class action puts increased pressure on defendants because it means a trial can be run cheaply on liability as the preliminary point with quantum addressed later.

The process also preserves potential rights when not all claimants are known and there may be limitation issues. This is because when a class action is commenced, the running of any limitation

period that applies to the claim of a group member to which the proceeding relates is suspended (ss 33ZE of the Federal Court Act).

At the same time, commencing a class action involves additional procedure such as giving notice to all group members throughout the proceedings and obtaining court approval for any settlement.

Insurers

There are also various benefits of class actions for insurers as a whole, not just in cargo recoveries, given:

- class action costs are low and can be divided between numerous group members
- there is an ability to pool multiple claims and create a class, which provides an opportunity for insurers to seek relief for small amounts of money
- which in turn means, recoveries will be more efficient, uniform and pro-rated in accordance with each insured's losses

Furthermore, the class action process allows a de facto separation of legal issues, which means the liability of parties can be addressed quickly and cheaply. This also allows the quantum of the class to be assessed at a later stage.

Owners and Carriers

For owners and carriers, the class action demonstrates the importance of ensuring a vessel is seaworthy and properly securing cargo with appropriate lashings and supporting structures to prevent a stow collapse.

Containerships are now capable of carrying thousands of containers, increasing the potential for stow collapses.

If a stow collapse does occur, it provides various cargo interests a common event to jointly pursue a class action against owners and/or carriers for loss or damage to cargo.

The judgment can be found here.

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