# How to justify the nature of warranty is a “promissory warranty” or a “delimiting warranty” in which it is written in the policy as an express warranty?

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## *Ocean Masters Inc. v. AGF M.A.T.*, [2007] Nfld. J. No. 190 (C.A.)

**Background**

On August 2, 2001, the fishing vessel, Northern Challenge II, caught fire and sank about forty nautical miles from St. John’s. The vessel, owned by Ocean Masters Inc., was insured by AGF M.A.T. (the “Insurer”) under a policy that was in effect from April 11, 2001 to April 11, 2002. The provision of the insurance policy giving rise to the denial of coverage specifies, under the title “Warranties”, that the vessel must be Canada Steamship Inspection (“CSI”) certified. Ocean Masters held a CSI Class II certificate, that is, a certificate valid for voyages on the east coast of Canada restricted to not more than 120 miles offshore.

In this case, the vessel was fishing crab pursuant to a licence valid for an area farther than 120 miles offshore. The vessel had retrieved crab from fishing grounds outside the 120 mile zone, clearly exceeding the specified limits of its CSI certificate. During the course of returning to port, the vessel caught fire and sank. This occurred approximately forty miles offshore, well inside the limits specified in the certificate.

**Issues**

The Insurer alleges errors in the decision of the trial judge related to:

(1) Whether Ocean Masters breached an “implied warranty” of legality under the insurance policy;

(2) Whether Ocean Masters breached an “express warranty” regarding CSI certification and maintenance; and
(3) Whether Ocean Masters failed to disclose information relevant to the insurance coverage.

**Analysis of the case**

The insurer then sued the assured for 3 things and one was whether the insured breached an “express warranty” regarding CSI certification and maintenance. CSI Class II applies to vessels not more than 120 miles offshore and Class I applies to vessels beyond 120 miles.[1] The loss occurred about 40 miles offshore after the breach of exceeding 120 mile limit.

On the surface, the accusation was seemed to be established and the insurer was seemed to be discharged from liability because of the definition in Section 33(3) of the *Marine Insurance Act (MIA)*:

> (3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

However, the judge, found in favour of assured, found that the warranty with respect to the non-compliance with the CSI certification did not void the insurance. It was because the description in the policy as a “warranty” was not a true warranty (absolute warranty) but a descriptive of risk. That meant it was not a warranty but rather a “limitation of the risk insured against”[2]. Accordingly, Section 30(1) of he *Marine Insurance Act* did not apply and the insurer could not release from liability under the policy.

Section 33(1) of the *MIA:*

> (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

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[1] The Canada Shipping Act, R.S.C. 1985, c. S-9

[2] *Century Insurance Company of Canada et al. v. Case Existological Laboratories Ltd.*, [1983] 2 S.C.R. 47, Ritchie J.

**Implication of the case**

Because the judge in this case interpreted the term "warranty" not simply using the meaning exactly the same as the definition in Section 33(1) of the *MIA*:

> (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

This case brings to a problem of how to distinguish between "promissory warranties" (or "conditions precedent") and "delimiting warranties" (or "suspensive conditions"). The insurer and assured may then question: When is a warranty a "promissory" one or "delimiting the risk"? Does the assured carry out exact compliance of warranty including both "promissory warranties" and "delimiting warranties"? When will a court explain the express warranty using "the plain words" of the policy or comment the words with "what it perceived as fair"? [3]

In fact, this issue exists because the insurer would like to use the term "warranty" to avoid any liability and favour the retention of strict compliance so they can rely on it where necessary to refuse a claim.[4] Sometimes, the clause may even too draconian. The concept of "warranty" has been abused. Many insurers even demand warranties of all manner of matters, many of which would have even had no impact on the underwriting decision.[5]

Therefore, this is still an issue in the insurance market. For the assured, is it fair to strictly comply with the MIA nowadays? The decisions of the courts are not always easy to predict.[6] It is not always fair to the assured in these day and age, because the insurer has more knowledge and understanding of the nature of their contractual

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[3] C Giaschi, 'Warranties in Marine Insurance', *Paper*, Association of Marine Underwriters of British Columbia, Vancouver, 10 April 1997, discussing *Century Insurance Co of Canada v Case Existological Laboratory Ltd (The Bamcell II)* [1984] 1 WWR 97.

[4] Insurers and brokers *Consultation* Sydney 27 March 2000; Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000; J Hare 'The Omnipotent Warranty: England v The World' *Paper* International Marine Insurance Conference Antwerp November 1999 http://www.uct.ac.za/depts/shiplaw/imic99.htm (24 February 2000).

[5] K. Anastasiya, (2008) "Non-disclosure and breach of warranty issures in the light of English Reform of the Marine Insurance Law" *Neptunus revue électronique*, Vol. 12, 2008/2, p.5

[6] W. Han, Mondaq (02 April 2009), *"Construction of Insurance Warranties – A Search For Meaning Is not Always Esay*, Available from: http://www.mondaq.com/article.asp?articleid=77324

obligations. And this against the aim of the Marine Insurance Act 1906 had the intention to address the inherent imbalance of knowledge between the assured and the insurer.[7]

For the court, when the cases do not meet the criterion "to situations where the warranty is material to the risk and the breach has a bearing on the loss"[8], the courts tend to find the clause is not a true warranty at all. A leading case is the *Century Insurance Company of Canada v Case Existological Laboratories Ltd. ("The Bamcell II").*[9]

It may even trouble the insurer that disputes between the meanings of the words in the policy is needed to be solved by the court.

**Conclusion:**

After the discussion above, we can see that the assured and the insurer may doubt whether the warranty stated in the policy is a "promissory warranty" or a "delimiting warranty". It is worth to have detail studies.

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[7] Marine Insurance Review 2006", Clyde and Co news letter 2006, p.10.

[8] Christopher Giaschi, "Warranties in Marine Insurance" (10 April 1997), Association of Marine Underwriters of British Columbia, Vancouver, http://www.admiraltylaw.com/papers/warranties.htm (last visited 23 May 2007).

[9] [1984] 1 WWR 97.