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THE "PAY TO BE PAID" RULE

The position in Canada that contracts are to be enforced in accordance with their terms was reinforced by the Federal Court of Appeal in *Conohan et al v. The Cooperators*, in which the court upheld the insurer's right to refuse to pay under the policy because its assured had failed to pay compensation to a victim of its wrongdoing.

Conohan, suffered the loss of his vessel and lost revenues arising out of a collision between his fishing vessel and the fishing vessel operated by the Defendant's assured, who not only admitted liability but also assigned his policy to the Plaintiff!

The sole issue before the appeal court was whether the Defendant insurance company was justified in refusing to indemnify its assured under the policy because the assured failed to comply with the "pay to be paid" requirement stipulated in the policy.

The reason the rule was being challenged was that the marine risk policy at issue did not involve mutual insurance and it was argued the considerations in the House of Lords decision in *The Fanti and Padre Island* did not apply.

The court dismissed the argument that a distinction was to be drawn between mutual and non-mutual insurance contracts, as the distinction did not as a matter of construction of the proper meaning of the contract "dictate a different result". In the court's view, interpretation of the clause at issue was a question of construction of the language appearing in the clause, and it was clear that the clause containing the "pay to be paid" rule set up a condition precedent to indemnification.

Consequently, it was held that the ordinary meaning of the clause imposed an obligation on the assured to pay the damages incurred by the Plaintiff by reason of the collision before the assured could collect under the policy. The Court noted that once it was determined that the provision admitted only one construction, then that was effective to displace any rules or remedies in equity.

The fact that the insurer participated in the trial on the merits of the claim itself did not prevent the insurer, when all else failed, to rely on the enforcement of the "pay to be paid" clause stipulated in its favour.