

THE MARINE INSURANCE ACT 1908

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EFFECT OF ATKINSON v. SOUTH BRITISH  
INSURANCE CO. LTD.

REPORT OF THE CONTRACTS AND COMMERCIAL  
LAW REFORM COMMITTEE, NEW ZEALAND

Presented to the Honourable the Minister of Justice in  
November 1970

REPORT OF THE CONTRACTS AND COMMERCIAL  
LAW REFORM COMMITTEE ON THE MARINE  
INSURANCE ACT 1908 - EFFECT OF  
ATKINSON v. SOUTH BRITISH INSURANCE CO. LTD.

To: The Honourable the Minister of Justice

1. The Committee has been asked to consider the effect of the judgment of Richmond J. in Atkinson v. South British Insurance Co. Ltd. [1968] N.Z.L.R. 45 and also certain related matters referred to in correspondence between the Department of Justice and the Council of New Zealand Underwriters Association.

2. The matters which require consideration are as follows:

- (a) The inability of a party to sue on a contract of marine insurance unless a policy has been issued (section 22, subsection (1));
- (b) The obligation to issue a policy within 30 days of the receipt of a premium (section 26, subsection (1));
- (c) The inability to pay out on a claim if no policy has been executed (section 26, subsection (2));
- (d) The inability to effect a policy for a period exceeding 12 months (section 27, subsection (2));
- (e) The contents of the policy (section 23).

3. The requirement of the existence of a policy as a prerequisite to any action on a contract of insurance was first enacted in New Zealand in 1907 and re-enacted in the 1908 Act which when being introduced was said to be adopting the English Act of 1906. This latter Act codifies the common law relating to marine insurance.

It appears that the reason for such a provision (which differs from the English provision in that it prohibits the bringing of an action, opposed to the making inadmissible in evidence of any contract, unless there is a policy) was partly fiscal and partly public policy. This was referred to by the Privy Council in Nagoremul v. Triton Insurance Co. Ltd. (1924) 41 T.L.R. 168 and is also mentioned in Chalmers Marine Insurance Act 1906 5th Edition at p.37.

Whatever the reasoning originally behind this requirement of public policy, the Committee can at the present time see no justification for retaining a provision which as has now been highlighted, may well work an injustice. As the law now stands, a person cannot obtain effective insurance cover at short notice despite the conclusion of a valid contract of insurance. He must depend on the issue by the insurers of a policy if he is to obtain full protection.

The Committee is therefore of the view that there is need for amendment in this regard and considers that this can best be done by a repeal of the whole of section 22 which it accordingly recommends. Consideration has been given to the suggestion of the Underwriters' Association that this section should merely be amended to bring it into line with the English provisions but in our view that would not alleviate the present unsatisfactory position and, indeed, would merely perpetuate it.

4. The next question which must arise, if section 22 is repealed, is whether it is desirable to enact that a contract of insurance to be enforceable, must be in writing. This is particularly pertinent when the question of public policy, as referred to above, is considered. However, the revenue question is no longer of any application and no protection in this regard is required. On balance, the Committee feels that such a restriction

is not necessary bearing in mind that it would be for the "insured" in any case to prove a contract of insurance in the event of any dispute. It is also pointed out that it is only a comparatively short time which would be involved in such cases having regard to our recommendation to retain the obligation of the insurer to issue a policy within 30 days.

5. The repeal we have suggested will mean a consequential amendment to section 26 as subsection (2) prohibits the insurer from paying out on a claim if no policy has been executed. This was one of the matters discussed by Richmond J. in Atkinson's case and it would seem that the position can be met adequately by a simple repeal of that subsection.

The Committee does not agree with the suggestion that the remaining provisions of section 26 should also be repealed. It is felt that the requirement to issue a policy within 30 days is both reasonable and desirable and we have been given no valid reason for altering the provision. However, it will be necessary to provide expressly that non-compliance with this requirement will not operate so as to avoid any contract of insurance.

6. Section 23 at present details matters which must be specified in the policy itself. The Committee has given consideration to the suggestion that paragraphs (b) to (e) be deleted. This would bring the section into line with the equivalent English provision which was amended in this way by their Finance Act 1959. Presumably the matters referred to in those subsections were originally felt necessary for the purposes of computing the stamp duty payable and for that reason were subsequently deleted. However, on consideration the Committee is of the view that all those requirements are matters which could still properly be the subject of statutory requirement

for a marine policy and we can see no need for their deletion. We do however feel that it should be made clear that failure to comply with these provisions or the provisions of sections 24 and 25 does not render the contract invalid or unlawful. This can best be done by:

- (a) inserting in section 26(1) after the words "a policy of such insurance" the words "complying with the provisions of this Act":
- (b) adding a new subsection to section 26 declaring that failure to comply with the provisions of sections 23, 24, 25 or 26 does not of itself invalidate the contract.

7. Section 27 subsection (2) invalidates a policy made for any period exceeding twelve months. The equivalent English provision was repealed by the Finance Act 1959 but when our amendment was made in 1960 this particular provision was not affected.

When our amendment was introduced it was put forward on the basis that we were falling into line with England and that it was an implementation of the policy to abolish stamp duty on marine insurance policies. This present restriction creates very real procedural and administrative difficulties for insurers who desire to be able to give their clients cover from year to year. Now the revenue problem no longer exists we can see no reason for retaining this limitation. This is particularly so in view of the tremendous increase in marine insurance, for example, on small pleasure craft, which has taken place over the past few years.

We would therefore recommend that subsection (2) be repealed also, thus making the way clear for the insurer and the insured to agree on the period of cover without restriction. If there should be difficulties by reason of the change of condition of the boat, for example, we

feel this can be adequately dealt with by the parties making such contract as they think fit. As a suggestion a policy could have a stated expiry date followed by the words "or such other date as may from time to time be agreed upon".

8. In summary therefore the Committee's recommendations are as follows:

- (a) That the prohibition against the bringing of an action unless a policy has been issued be abolished by repealing section 22.
- (b) That subsection (2) of section 26 be repealed so that it will no longer be an offence to make a payment under a contract of marine insurance or settle a claim thereunder unless there is an executed policy.
- (c) That the failure of an insurer to comply with any of the provisions of sections 23 to 26 of the Act shall not of itself render the contract invalid or unlawful and that section 26 be amended accordingly.
- (d) That subsection (2) of section 27 be repealed so that there will be no limit to the period of cover which can be provided by a time policy.

For the Committee



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Chairman

DATED at Wellington this 23rd day of November 1970.

MEMBERS

Mr M.F. Chilwell, Q.C. (Chairman)

Mr B.J. Cameron

Professor B. Coote

Mr D.F. Dugdale

Professor E.P. Ellinger

Mr J.S. Henry

Mr W. Iles

Mr C.I. Patterson

Mr P.E.G. Hosking (Secretary)