
The Ocean Harvester: A Case of Perils of the Seas, Scuttling or Something Else?



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“The question whether the plaintiff’s claim should still have been dismissed if the defence of scuttling had not been made out, is best left for consideration in a case where it arises” (per Perry J in *Winter & Anor v Weekes* (1989) 5 ANZ Insurance Cases 60-896 at 75707).

Introduction

On 15 August 2003, Cullinane J handed down judgment in the matter of *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance*.¹ The matter concerned the “Ocean Harvester”, a seaworthy trawler that sank early on 3 September 2000 in deep water in the general vicinity of Keeper Reef approximately 75km east of Townville without any ascribable cause, or so the plaintiff claimed. The plaintiff alleged that the sinking was an accident. The defendant alleged that the “Ocean Harvester” was scuttled. The case raises two very interesting points, namely, whether the insurance policy was a policy outside the ambit of the traditional marine insurance policy covering “perils of the seas”² and, secondly, if the policy was found to be a “perils of the seas” policy, whether the defendant could defeat the plaintiff’s claim even if it could not positively establish scuttling. In considering this matter Cullinane J was not bound by any authority on the issue.

Cullinane J found for the defendant, despite finding that the defendant failed to establish scuttling. However, he relied on the evidence of scuttling to defeat the plaintiff’s claim that it came within the policy.

The decision was subsequently appealed unsuccessfully by the Plaintiff.³ This paper analyses the comprehensive judgment of Cullinane J and the judgment of the Court of Appeal. An appropriate starting point in the consideration of this case is the insurance policy.

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¹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262.

² *Ibid*, [13] – “Counsel for the plaintiff submitted that, whilst there was a body of authority to that effect, none of the cases were binding upon this court and all of the cases concerned policies in the traditional language of marine insurance policies covering “perils of the sea”, something which, he argued, distinguished those cases from this”.

³ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2004] QCA 41 (27 February 2004 per McMurdo P, Davies JA and Mackenzie J).

Insurance Policy

The plaintiff held a valued policy with the defendant in respect of the trawler “Ocean Harvester” including fittings, machinery, special equipment and other items. The agreed value was \$282,250.00.⁴ The plaintiff’s claim under the policy was, however, for the sum of \$276,555.00, which took into account certain items which were salvaged as a result of the vessel’s sinking. The “Ocean Harvester” was a 15.64 metre wooden hull prawn trawler built in 1974. The relevant event in the policy which the plaintiff relied upon for indemnification by the defendant was loss by accident. Loss by accident was defined in clause 9.2(a) as follows:-

Accident: an unforeseen and unintended happening which caused loss or damage.⁵

The policy also contained exclusion provisions; clause 8.3(d) provided that the policy did not apply to –

any loss, damage or expense caused intentionally by you or by any other person with your knowledge.⁶

Apart from this specific exclusion there was also a general exclusion in clause 13.1(g) with respect to fraud:

any claim, liability, loss or damage in relation to which there is any form of a false or fraudulent misrepresentation or any fraudulent or criminal act or omission.⁷

Pleadings

The plaintiff’s claim of \$276,550.00 was for indemnification under the terms of the policy on the basis that the sinking of the “Ocean Harvester” was an accident as defined in clause 9.2(a). The defendant alleged that the vessel was scuttled by the sole director of the plaintiff with the assistance of the owner of another vessel, the “Shackrali,”⁸ such conduct falling within the exclusionary provisions of the policy.

Burden of Proof

The plaintiff carried the burden of proving that the loss of the vessel “Ocean Harvester” was an accident within the meaning of the policy.⁹ The defendant also carried an evidential burden insofar as it sought a positive finding that the vessel was scuttled.¹⁰ Apart from the relevant insurance policy and the burden of proof on both the plaintiff and defendant, it is necessary to consider the operation of the *Marine Insurance Act 1909*.

⁴ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [1].

⁵ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [6].

⁶ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [12].

⁷ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [12].

⁸ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [7].

⁹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [9].

¹⁰ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [10]. The relevant standard of proof required for establishing scuttling is the civil standard. The applicable principles are found in *Rejtek & Anor v. McElroy & Anor* (1965-1966) 39 ALJR 177; see also *Craig v. Associated National Insurance Company Limited* [1984] 1 Qd R 209.

Marine Insurance Act 1909

The *Marine Insurance Act 1909* sets out the relevant statutory framework in matters of marine insurance, which is defined in section 7.¹¹ Certainly, the policy which Cullinane J. was required to consider fell within the definition in section 7 and the operation of section 9 of the Act.

Part II, Division 5 of the *Marine Insurance Act 1909* (Cth), sections 28-37 deals with policies. The policy of insurance in question was a valued policy as defined in section 33.¹²

There is nothing disclosed in the judgment of Cullinane J (or the judgment in the Court of Appeal) to suggest that the policy fell under section 31 dealing with voyage and time policies.¹³

Section 36 of the *Marine Insurance Act 1909* provides assistance as to how certain terms in a marine insurance policy are to be construed.¹⁴ Section 36 states that a marine insurance policy “may be” in the form set out in the second schedule to the Act (which is a “Lloyds style policy”). The form of the policy in the second schedule to the Act is presumably what Cullinane J was referring to as the “traditional language of marine insurance policies” at paragraph 13 of his judgment in contrast to the policy he was confronted with in the “Ocean Harvester” case. Section 36(2) of the *Marine Insurance Act 1909* provides that the terms and expressions attached to words in the second schedule to the Act shall be construed as having the scope and meaning in that schedule unless “the context of the subject policy otherwise requires”.

Therefore, in the present case a question arose as to whether the policy of insurance was a perils of the seas policy and secondly, if it was found that the policy of insurance was a perils of the seas policy, whether the context of the policy otherwise required that the terms and expressions used there in the policy should have application, as opposed to the meaning attached by virtue of the second schedule to the *Marine Insurance Act 1909*.

The second schedule to the *Marine Insurance Act 1909* is headed “*Rules for Construction of Policy*” and provides as follows:-

The following are the rules referred to by this Act for the construction of a policy in the above or other like form where the context does not otherwise require.

¹¹ *Marine Insurance Act 1909* Section 7 - “A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure”. “Marine adventure” is defined in section 9(1) “ Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance. (2) In particular there is a marine adventure where: (a) any ship, goods or other movables are exposed to maritime perils” ‘ Maritime perils’ means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.”

¹² Section 33(1) *Marine Insurance Act 1909* – “A policy may be either valued or unvalued”. Section 33(2) *Marine Insurance Act 1909* – “a valued policy is a policy which specifies the agreed value of the subject/matter insured”.

¹³ Section 31(1) *Marine Insurance Act 1909* – “where the contract is to ensure the subject matter at and from or from one place to another place or to other places, the policy is called a voyage policy and where the contract is to ensure the subject/matter for a definite period of time the policy is called a time policy. A contract for both voyage and time may be included in the same policy.”

¹⁴ Section 36 *Marine Insurance Act 1909* – “Section 36(1) – A policy may be in the form in the second schedule.

Section 36(2) – subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the second schedule shall be construed as having the scope and meaning in that schedule assigned to them”.

As in section 36 of the Act, the applicable rules for construction of a policy are intended to have application to the traditional Lloyd's style policy or "a like form" where the context does not otherwise require. Therefore, the first issue that Cullinane J had to determine was whether the policy he was reviewing was, whilst not in an identical traditional perils of the seas form, to be considered as "an other like form"? We shall deal with this issue further below. Rule 7 of the Rules for Construction of a Policy in the second schedule provides a meaning of the term "perils of the seas" as follows:-

Refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

Therefore, having regard to the operation of the second schedule of the *Marine Insurance Act 1909*, once it is determined that the subject policy is in accordance with the "second form or in another like form", where the term "perils of the seas" is used in such a policy the meaning attaching thereto, namely "fortuitous accidents or casualties of the seas" is to attach as the relevant meaning in the circumstances.

Application of the *Marine Insurance Act 1909* to the "Ocean Harvester" Policy

Cullinane J acknowledged that the policy was not expressed in the traditional language of marine insurance policies covering perils of the seas, but was nonetheless to be regarded as having a similar if not identical import and area of operation.¹⁵ Therefore, by implication, Cullinane J having regard to the operation of section 36 of the *Marine Insurance Act 1909* and the second schedule thereto decided that the subject policy of insurance was in a "like form" to the traditional perils of the seas policy and also by implication that the context of the policy did not require that the applicable rules of construction were to be excluded.

It therefore followed that insofar as was applicable the term "perils of the seas" when used in the policy would have the meaning ascribed to it by virtue of rule 7 of the second schedule of the *Marine Insurance Act 1909*. However, it is clear from the submissions made by the plaintiff, that the term "perils of the seas" simply was not used in the policy and moreover the exact wording applicable to interpreting the meaning of "perils of the seas" in rule 7 of the second schedule was not the wording used in the policy.

Cullinane J was confronted with a situation where, by virtue of the operation of the statute, he could rely on the meaning attaching to "perils of the seas" as defined in the second schedule to the *Marine Insurance Act 1909*. However, the policy in question used another term, "accident". At this point, the observation can be made that there may be some force in the point that the policy was not a perils of the seas policy,¹⁶ particularly given that the term has an acquired meaning in marine insurance and if the term was not used then by implication the policy did not intend to cover perils of the seas.

¹⁵ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [22] – "Whilst it is true that the policy in this case is not expressed in the traditional language of marine insurance policies covering "Perils of the Sea", it must be regarded as having a similar, if not identical, import and area of operation".

¹⁶ As an example of a typically worded valued policy of Marine Insurance see *Jeffery v. Associated National Insurance Company Limited* [1984] 1 Qd R 238, 246 (Thomas J).

Cullinane J solved this problem by concluding there was a very close correlation between the cover provided for in the policy, given the definition of accident and the cover provided for in the traditional perils of the seas policy taken with the definition in rule 7 and that therefore the policy could be said to express in common parlance what is covered by a “perils of the seas” policy.¹⁷ Cullinane J concluded there was a sufficient degree of similarity between the two policies.¹⁸ Interestingly, if the plaintiff’s point was correct and the policy was one which was not a perils of the seas policy, then the applicable principles relating to the operation of a perils of the seas policy would not apply. Therefore “accident” could encapsulate the ingress of water into the vessel by way of the ordinary action of the winds or waves in contrast to the operation of rule 7 of the second schedule of the *Marine Insurance Act 1909*.

It is now appropriate to look at the applicable principles in respect to the operation of the burden of proof issues and the rebuttable presumptions given that the policy was determined by Cullinane J to be in effect a “perils of the seas” policy.

Applicable Principles

Burden of Proof

Cullinane J correctly acknowledged that there was on this issue no binding authority. In typical fashion Cullinane J conducted a comprehensive review of the authorities dealing with the burden of proof issue in the context of perils of the seas policies. His Honour referred to the previous first instance decisions of the Supreme Court of Queensland in the matters *Itohar Pty Ltd v. Mackinnon and Commercial Union Assurance Company PLC*,¹⁹ *Doak v. Weekes*,²⁰ and *Jeffrey v. Associated National Insurance Company Limited*.²¹

The following principles on which Cullinane J. relied can be discerned in these cases, firstly that the ultimate burden of showing that the loss sustained by the plaintiff was due to a cause such as perils of the seas rested with the insured. The standard of proof for the plaintiff in such a case is to establish on the balance of probabilities that the loss was due to a peril of the seas. Secondly, if a defendant pleads scuttling as the cause of the loss, such a claim cannot be sustained unless it is proved by the defendant. The standard of proof required of the defendant in establishing scuttling is on the balance of probabilities. The third principle to be discerned from the cases is that, even if the defendant (insurers) adduce some evidence of scuttling, and even if such evidence is insufficient to sustain a finding of scuttling on the balance of probabilities, such evidence may nonetheless be sufficient to otherwise prevent a finding on the balance of probabilities that the plaintiff’s loss was due to a peril of the seas.²²

¹⁷ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [27]-[28] – “There is thus a very close correlation between the cover provided for in the policy, given the definition of accident, and the cover provided for in the traditional ‘perils of the sea’ policy taken with the definition in rule 7. The present policy might be said to express in a more common parlance what is covered by a ‘perils of the sea’ policy”. See also [29] wherein Cullinane J states – “whether this is the case or not, it seems to me that there is at least a sufficient degree of similarity between the two policies to require the application of the principles to which I have referred”.

¹⁸ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [29].

¹⁹ *Itohar Pty Ltd v. Mackinnon and Commercial Union Assurance Company PLC* (1985) 3 ANZ Insurance Cases 60-610 (Macrossan J).

²⁰ *Doak v. Weekes* (1986) 82 FLR 334 (Ryan J).

²¹ *Jeffrey v. Associated National Insurance Company Limited* [1984] 1 Qd R 238 (Thomas J).

²² The aforementioned principles are drawn largely from English authority, *The Vainqueur* (1974) 2 Lloyd’s Rep 398 (see for example, the comments by Carter J in *Craig v. Associated National Insurance Company Limited* [1984] 1 Qd R 209, 210 – “the onus remains on the insured to prove the fortuitous and accidental

Interwoven into the operation of the above principles is a rebuttable presumption that if a ship which is seaworthy sinks in smooth waters and there is no other evidence as to the cause of the loss, then the causality is attributable to a peril of the seas.²³ This rebuttable presumption can have no application, for example, if it is established that the loss was due to scuttling by the assured person, because such a loss is neither unexplained nor ascribable to a peril of the seas.²⁴

Cullinane J, having regard to the above principles on burden of proof and in the light of the operation of the rebuttable presumption (as the “Ocean Harvester” was seaworthy)²⁵ articulated the issue to be resolved in the case as follows:

if the plaintiff positively satisfies the court that its claim is not excluded because of scuttling, it is entitled to rely upon the presumption or inference in order to bring itself within the policy and succeed in the action.

Whilst appearing to be a straight-forward proposition, it necessarily involves the operation and application of the above principles to the factual matrix of the case. The insured plaintiff in other words needs to establish (successfully) the ultimate burden,

nature of the loss and to exclude on the balance of probabilities the allegation of the insurer that the vessel was scuttled, citing *The Vainqueur* (1974) 2 Lloyd’s Rep 398). See also comments by Cairns LJ in *Palamisto General Enterprises SA v. Ocean Marine Insurance Limited* [1972] 2 QB 625, 647 as follows:- “when a claim is made on marine insurers for the loss of a vessel by perils of the seas and they suspect that the vessel has been scuttled at the behest of the owner there are two possible courses open to them. They can simply traverse the allegations in the points of claim or they can make an affirmative allegation of scuttling ... If scuttling is alleged and the underwriters are going to ask the court to find positively that the vessel was scuttled then they must discharge the onus of proving their allegation and in considering whether they have discharged it the Court must weigh in the balance the fact that the allegation is one of fraud If where loss by peril of the seas is alleged by the owners and scuttling by the underwriters, the court at the end of the day is not satisfied that either story is more probable than the other then the owners fail”. Also comments by Lord Brandon of Oakbrook in the House of Lords in *Rhesa Shipping Company SA v. Edmunds & Anor* [1985] 2 ALL ER 712, 714:- “The first matter is that the burden of proving on a balance of probabilities that the ship was lost by perils of the seas is and remains throughout on the ship owners. Although it is open to the underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they choose to do so there is no obligation on them to prove, even on the balance of probabilities, the truth of their alternate case” and *La Compania Martiartu v. The Corporation of the Royal Exchange Assurance* [1923] 1 KB 650, 655 (Banks LJ) – “If the assured makes out a prima facie case, as the respondents in the present case did, then unless the underwriters displace that prima facie case the assured is no doubt entitled to rely upon the presumption. On the other hand if the prima facie case, which was the foundation on which the presumption was rested, fails because the underwriters put forward a reasonable explanation of the loss, the super structure falls with it. If both the assured and the underwriters put forward an explanation of the loss, the loss is not explained in a sense which would admit of the presumption, merely because the court is unable to say which of the two explanations is the correct one. In my view of the facts for the present case, this conclusion disposes of this appeal because having regard to the case made for the appellants in the court below, I find it impossible to say that the respondents have established to my satisfaction that the loss of the vessel was due to a peril covered by the policy”.

²³ *Doak v. Weeks* (1986) 82 FLR 334, 346. See also *Skandia Insurance Company Limited v. Skoljarev* (1979) 142 CLR 375, 379 (Stephen J) – “the unexplained sinking of a thoroughly seaworthy ship in calm waters cannot support an inference that her fate was the simple result of her inability to withstand the ordinary action of the winds and the waves. On the contrary her seaworthiness distinctly negates such an inference and in the absence of any other evidence, must instead lead to the inference that whatever was the unknown cause of the sudden entry of sea water, it should be regarded as some “fortuitous accident or casualty of the seas”. That is to say, some peril of the seas.

²⁴ *Doak v. Weeks* (1986) 82 FLR 334, 346.

²⁵ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [33]. The plaintiffs served a Notice to Admit seaworthiness of the “Ocean Harvester” on the defendant. There was no Notice of Dispute served and therefore pursuant to Rule 189(3) of the Uniform Civil Procedure Rules, there was a deemed admission by the defendant as to the seaworthiness of the vessel (see *Rigato Farms v. Ridolfi* [2000] QCA 292. See also *Cormie v. Orchid* [2001] QSC 21 as to the operation of Notices to Admit Facts).

that the loss was due to a peril of the seas on the balance of probabilities, and where there is no other evidence as to the cause prima facie the rebuttable presumption has application. Thereafter, a shifting of the evidential burden arises when the defendant mounts a positively pleaded case of scuttling and carries the existent evidential onus of establishing scuttling. If scuttling can be positively established then the defendant's case is made out and the plaintiff fails. Alternatively, even if the defendant's case on scuttling cannot be established on the balance of probabilities, the judge can rely on that evidence in deciding whether the plaintiff has proved on the balance of probabilities that the loss of the vessel was caused by perils of the seas and therefore within the policy, entitling it to succeed.²⁶

Alternatively, and perhaps just as likely, Cullinane J's comments are open to the interpretation that the onus is on the plaintiff to disprove scuttling of the "Ocean Harvester". That appears to be arguably outside the principles applicable in the resolution of the matter.²⁷ If such interpretation is sustainable it raises an issue as to whether Cullinane J. may have misdirected himself as to the application of the appropriate principles.

Apart from the relevant principles, to which Cullinane J. referred in his judgment, there have been some judicial comments of dissent in respect to the operation of these principles.²⁸

Having reviewed the applicable principles touching on the issue of onus of proof, it is appropriate to look at the nature of the cases advanced by the plaintiff and defendant.

²⁶ *Watts v. Rake* (1960) 108 CLR 158 (as explained in *Purkess v. Crittenden* (1965) 114 CLR 164) which deals with the High Court of Australia's distinction between the ultimate onus and the shifting evidentiary onus. In short, the ultimate onus rests on the plaintiff but the evidentiary onus as set out may shift from time to time.

²⁷ For example, see the comments of Ryan J at 346 in *Doak v. Weekes* (1986) 82 FLR 334 – "In the pleadings the defendants have alleged loss by scuttling. They have also traversed the plaintiff's claim that the loss was occasioned by a peril of the sea. An allegation of loss by scuttling will not be sustained unless it is proved by the defendants. But the onus is on the plaintiffs to prove that the loss was due to perils of the seas. A rebuttable presumption arising from the loss of a seaworthy vessel in calm waters is nothing more than that and if evidence is adduced which puts forward as an alternative cause of the ship's loss, the scuttling of the ship by the owner, the insured will fail unless he establishes affirmatively that the loss was due to a peril of the sea".

See also the comments of Macrossan J in *Itohar Pty Ltd v. Mackinnon and Commercial Union Assurance Company PLC* (1985) 3 ANZ Insurance Cases 60-610 at 78, 718 – "There is no doubt that when liability under a policy is denied by an insurer, the onus lies upon the plaintiff of establishing that the loss resulted from a peril insured against. Some relevant matters have been established by the long tradition of marine insurance claim but there are certain difficulties" and also at 78,719 – 78,720 – "But the burden of showing that the loss was due to a cause such as this (perils of the seas) which might thus be regarded as falling within the policy, remains on the insured and if in response to an evidentiary onus arising in the circumstances, the insurers adduce some evidence of scuttling then even if it is insufficient to sustain a finding of scuttling it may still be sufficient to prevent a finding on the balance of probabilities of loss due to perils of the seas". See also the comments of White J in *Winter & Anor v. Weekes* (1989) 5 ANZ Insurance Cases 60-896 at 75,706 – "Where scuttling is alleged, no more than a shifting civil onus arises. If the court is in doubt in the end as above, the original and the ultimate onus remains of excluding scuttling".

²⁸ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [21]; and also *Winter v. Weekes* (1989) 5 ANZ Insurance Cases 60-896 at 75,707 per Perry J – "I have some hesitation in accepting that in such a case a failed plea of scuttling, that is to say, such a plea which fails in the sense that the Judge is unable to find, on the balance of probabilities, that scuttling is the proximate cause, could then operate to deprive the plaintiffs of a judgment to which they might otherwise be entitled. To allow that result would mean that an insurer could avoid liability by raising a plea of scuttling which he is unable to prove on the balance of probabilities".

Plaintiff's Case

The plaintiff's case through its Counsel²⁹ was that the plaintiff did not know what caused the vessel to sink and did not advance any such cause in evidence. In other words, the plaintiff's case was that the "Ocean Harvester" sank by way of accident, as that word is defined within the subject policy (such policy not being a "perils of seas" policy). That the seaworthy "Ocean Harvester" sank in calm waters without any explanation would alternatively mean that the policy of insurance, if it was a traditional perils of the seas policy, that the sinking of the vessel was by virtue of a fortuitous accident or casualty of the sea ("perils of the seas") and indemnification should be granted under the policy.

The Defendant's Case

The defendant advanced a positive case of scuttling. The defendant led direct evidence that it was the plaintiff by its director who carried out the deliberate act that led to the sinking of the "Ocean Harvester" and additionally relied on evidence of motive arising from what it claimed was the plaintiff's financial difficulties. Secondly, the defendant contended that, even if its case for scuttling could not be positively established, reliance could be placed on such evidence to show that the plaintiff's claim was not within the terms of the policy so as to defeat its claim for indemnification.

Overview of the Evidence

There were four persons present when the "Ocean Harvester" sank. Those people were the skipper of the "Ocean Harvester" and director of the plaintiff, the skipper of the vessel "Shackrali", a deckhand on the "Shackrali" and a deckhand on the "Ocean Harvester".³⁰ Evidence was heard from all except the latter, with the first two being called by the plaintiff and the third by the defendant. There was also evidence called by the plaintiff from the wife of the skipper of the "Ocean Harvester" touching on the financial position of the plaintiff. Cullinane J did not regard the evidence of motive arising from adverse financial circumstances as being strong in the case. In his view it was far from compelling evidence that the plaintiff had a motive to scuttle the vessel.³¹ The essence of the skipper's evidence at the relevant time was that the "Ocean Harvester" was conducting trawling operations and he was at the rear of the vessel checking gear when he heard water slapping and at that time had not heard any bang or unusual sound which might have indicated the vessel had collided with anything. At that point he checked the hatch of the auxiliary engine at the rear and noticed water flapping everywhere and could see water splashing off the main drive shaft. Shortly thereafter, he informed the skipper of the "Shackrali" of the situation and asked him to stand by if necessary. The deckhand on the "Ocean Harvester" was sleeping and he woke him up and asked him to attend to the dinghy and place it in the water (in which there were sharks at that time). The skipper undertook steps to try and restrict the flow of water, including placing a doona near where water was bubbling in the vicinity of the shaft. Apparently, the 24-volt pumps were operating and had been activated by the

²⁹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [40] – "The plaintiff by its counsel made it clear in his opening that the plaintiff did not know what caused the vessel to sink, and, as I have said, did not advance any such cause in evidence".

³⁰ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [42].

³¹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [65]. "I do not regard the evidence of motive arising from adverse financial circumstances as being strong in the present case. It is, in my view, far from compelling the conclusion that the plaintiff had a motive to scuttle the vessel".

skipper, although no attempt had been made to use the whale gusher. The vessel had commenced to list to port.

The skipper of the "Shackrali" offered assistance and a 240 volt pump was handed over in a bucket her deckhand. According to the skipper of the "Ocean Harvester" this pump was powered by a lead attached to a socket on the "Shackrali" and he tried to use the pump in different areas on the "Ocean Harvester" but was unsuccessful because the boats were swinging around, pulling the lead. It was then decided to tie a line from the "Shackrali" to the starboard boom of the "Ocean Harvester" to steady it because it was listing to port. At this time, to avoid the bow of the "Shackrali" being caught up in the wires and gear and the stabiliser on the "Ocean Harvester", the main trawl wire on the starboard side and stabiliser were removed. The "Shackrali" was hanging on the end of the boom and the "Ocean Harvester" started levelling up according to her skipper. The vessel was still taking water and the 24 volt pumps according to the skipper were not "roaming" as well as when first activated.

The net result was that the flow of water could not be slowed and ultimately the skipper and deckhand left the "Ocean Harvester" and went on board the "Shackrali" after transferring some personal items and the night's catch. The skipper's evidence was that he first noticed water at or about 2.30 a.m. and that the boat sank somewhere around 5.00 a.m.³²

The skipper of the "Shackrali" gave evidence that generally supported the account given by the skipper of the "Ocean Harvester", according to Cullinane J.³³ The former confirmed that after the "Shackrali" arrived alongside the "Ocean Harvester" there was a rope tied to the bow rails of the "Ocean Harvester" for a period. He said that after he went on board the "Ocean Harvester" he could see down through the forecabin where the engine room hatch was open that the engine room was half full of water and said it would have been half way up or close to the top of the motor. He also confirmed that the 240 volt pump was handed over to the "Ocean Harvester" but that it was not able to be used successfully because the booms of the vessels started to clash. He also confirmed that following discussion with the skipper of the "Ocean Harvester" it was agreed that a rope should be tied to the starboard boom of the "Ocean Harvester" which was some feet above the bow rail of the "Shackrali" and that because of the Ocean Harvester's gear and stabilisers getting in the way the latter's skipper removed the stabilisers cutting off the wires on the starboard side. The two skippers denied the allegation that the vessel had been scuttled by the two of them in concert. In particular, the skipper of the "Shackrali" rejected the claim that was to be made later in evidence by his deckhand that a line had been passed from the "Shackrali" under the "Ocean Harvester" and attached to its port side and that he had then reversed the "Shackrali" so as to pull the port side of the vessel down into the water and cause it to sink. He thought it would be very difficult to pass a rope under the vessel in the way suggested and that it would probably be necessary for somebody to get into the water, something which given the sharks in the vicinity, would have been highly improbable.

In contrast, the deckhand of the "Shackrali" for the defendant gave a more sinister account of the sinking of the "Ocean Harvester".³⁴ Prior to the sinking on 3 September 2002, the deckhand referred to a meeting between the "Ocean Harvester" and "Shackrali" on 2 September at which the two skippers went on to the deck of the

³² *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [95].

³³ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [96] – [102].

³⁴ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [103].

“Ocean Harvester” and some 14 cartons of frozen catch were passed between the 3 men from the “Ocean Harvester” to the “Shackrali” where the deckhand had placed them into the snap freezer. Both skippers denied that this occurred when it was put to them.

On 3 September 2003, the deckhand said that when the “Shackrali” arrived the “Ocean Harvester” was pretty dark with only navigation lights on. He said that when they got close to the “Ocean Harvester” he saw the latter’s skipper putting the dinghy into the water and then saw the deckhand of the “Ocean Harvester” get into the dinghy with his gear and both came across to the “Shackrali”. He said that for a good deal of the time the two vessels were together he was sorting the catch at the back of the “Shackrali”. According to him, while he was with the deckhand from the “Ocean Harvester” for much of this time, his skipper appeared to be moving the “Shackrali” backwards and forwards through the gears towards and away from the “Ocean Harvester”. As the bow of the “Shackrali” got close to the bow of the “Ocean Harvester” some other items of property including, according to him, a computer were handed over. The deckhand says that later in the night he was told by his skipper to stay in the cabin of the “Shackrali” with the other deckhand. He says he was there for about 20 minutes and when he came out saw a rope leading from the bow of the “Shackrali” at an angle of 45° under the keel of the “Ocean Harvester” which seemed to be attached to the port side of the vessel. He says his skipper put the trawler into reverse a couple of times to try and pull the boat back and on the final occasion the port side stern of the “Ocean Harvester” went down and took on water. The rope was still attached to the “Shackrali” and the skipper of the “Ocean harvester” came running out from the wheelhouse where he and the other skipper had been and took the rope off the bow stump of the “Shackrali”. This occurred as the vessel was sinking. The deckhand said the vessel sank just before dawn and they returned to Townsville with the crew of the “Ocean Harvester”. The deckhand said that some days later on the “Shackrali” when it stopped off Orpheus Reef, the contents of the boxes of the product which had been removed from the “Ocean Harvester” were cooked. The prawns were emptied out of the boxes and he did not know what happened to the boxes. He further said that at no time did he see a pump pass from the “Shackrali” to the “Ocean Harvester”. He said that at no time was a line attached to the starboard boom of the “Ocean Harvester”. It also emerged in cross-examination that there was bad blood between the deckhand and his skipper and that they parted on bad terms. However, he did not know the skipper of the “Ocean Harvester” prior to this incident.³⁵

Assessment of the Evidence

Cullinane J was confronted with a direct conflict of evidence as to the circumstances of the sinking of the vessel.³⁶ Insofar as the evidence of the skipper of the “Ocean Harvester” was concerned, His Honour indicated that whilst he had reservations,³⁷ he was not convinced that there was anything inherently implausible or illogical in the account.³⁸ Justice Cullinane acknowledged that ultimately the issue was not whether the account was plausible or logical but whether it was credible. Justice Cullinane

³⁵ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [103] – [116].

³⁶ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [117].

³⁷ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [131] – [133]: “However it seems to me that there is a significant shifting of ground in relation to the explanations that he gave on the 3 occasions that he was asked about why he failed to attempt to use the forward 240 volt pump, although at all times he emphasised his safety concerns”.

³⁸ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [132].

concluded that the skipper had an obvious interest in the matter and given his reservations about the important aspect of his evidence (regarding the 240 volt forward pump) he was not prepared to accept his evidence in preference to that of the deckhand from the “Shackrali”.³⁹

In contrast, Justice Cullinane determined that the other skipper was a good witness and did not think that his account had been breached in cross-examination.⁴⁰ Justice Cullinane acknowledged that it must be remembered that the skipper of the “Shackrali” was, except for a short period, at all times on the “Shackrali” (as was his deckhand).⁴¹ Justice Cullinane was of the view that his demeanour was quiet and that he gave his evidence in a matter of fact way and overall did not think his evidence lacked credit worthiness.⁴² His Honour thought that the same could be said of the evidence of the deckhand.⁴³ Justice Cullinane indicated that his account also was not breached in cross-examination and that his evidence was impressive in its detail and there was a cogency and credibility about it.⁴⁴ Further, Justice Cullinane indicated that the transfer of the “Ocean Harvester’s” catch on the day before the sinking was an important piece of evidence which suggested some degree of pre-meditation.⁴⁵

His Honour also indicated the evidence as to just how a line could be attached in the circumstances to the “Ocean Harvester” was unclear. He noted there was evidence from a marine consultant who was called by the defendant to the effect that it could have been done in his experience but it was obvious from his description that it was not without difficulty.⁴⁶ Justice Cullinane concluded that whilst there was some evidence of bad blood between the skipper and deckhand of the “Shackrali” the latter did not know the skipper of the “Ocean Harvester” and thought it difficult to accept that his argument with his skipper would motivate him to give a false account involving such serious misconduct and with such serious consequences to the other skipper.⁴⁷ In the final analysis, Justice Cullinane indicated that he was not prepared to accept the evidence of the skipper of the “Ocean Harvester” in preference to that of the deckhand and would if the issue remained between them accept the latter’s evidence in preference.⁴⁸ Justice Cullinane however was still confronted with the evidence of the other skipper, which in his view was not in any way damaged in cross-examination and did not lack creditworthiness.

In conclusion, Justice Cullinane was not satisfied that the defendant had made out a positive case of scuttling and declined to reach such a conclusion.⁴⁹

Nonetheless, Justice Cullinane was of the view that, taking into account the credibility and cogency of the deckhand’s evidence, that the evidence of scuttling stood as a bar to the plaintiff succeeding in its action.⁵⁰ In other words, Justice Cullinane determined that the plaintiff had failed to discharge the ultimate onus of establishing that the sinking of the “Ocean Harvester” was by a peril of the sea, taking into account

³⁹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [133].

⁴⁰ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [134].

⁴¹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [134].

⁴² *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [134].

⁴³ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [135].

⁴⁴ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [135].

⁴⁵ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [135].

⁴⁶ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [136].

⁴⁷ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [137].

⁴⁸ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [142].

⁴⁹ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [147].

⁵⁰ *Ocean Harvester Holdings Pty Ltd v. MMI General Insurance Limited* [2003] QSC 262, [148].

the evidence of the deckhand on the issue of scuttling (even though a positive finding on scuttling could not be made).⁵¹ Accordingly, Justice Cullinane dismissed the plaintiff's action.

Observations

That Cullinane J could not make a positive finding of scuttling is not surprising in light of the difficulties in establishing such a case. In this instance he specifically negated the motive evidence regarding the adverse financial circumstances of the plaintiff. The evidence therefore largely fell into a credibility contest between the corroborative evidence of the two skippers on behalf of the plaintiff as opposed to that of the deckhand on behalf of the defendant. It is acknowledged that scuttling is hard to prove because it is a secretive activity undertaken with a view to making a substantial fraudulent claim later.⁵² Cullinane J found himself in a similar position to the court in *Rhesa Shipping Co. SA v. Edmunds and Another* (1985) 2 ALL ER 712 and concluded that the ultimate onus had not been discharged by the plaintiff.⁵³

Having regard to the plaintiff's submissions in this case and the way in which ultimately Cullinane J reached his conclusions in this matter, the proceedings fell fairly and squarely into the category of case identified by Perry J. in *Winter v. Weekes* (1989) 5 ANZ Insurance Cases 60-896. In that case, Perry J called into question the operation of the shifting civil onuses in a case of the present nature. It is appropriate to note Perry J's comments in total as relevant:

The question whether the plaintiffs' claim should still have been dismissed if the defence of scuttling had not been made out is best left for consideration in a case where it arises.

The plaintiffs may always seek to prove loss by perils of the seas by relying on the presumption that the otherwise unexplained entry of sea-water into a ship, which is shown to have been seaworthy when it commenced its last voyage, may be attributed to such a cause.

I have some hesitation in accepting that in such a case a failed plea of scuttling, that is to say, such a plea which fails in the sense that the judge is unable to find, on the balance of probabilities that the scuttling is the proximate cause, could then operate to deprive the plaintiffs of a judgment to which they might otherwise be entitled. To allow that result would mean that an insurer could avoid liability by raising a plea of scuttling which he is unable to prove on the balance of probabilities.

I realise that the decision of the House of Lords in *Rhesa Shipping Co. SA v. Edmunds* (1985) 3 ANZ Insurance Cases; (1985) 2 ALL ER 712 and in particular the speech of Lord Brandon in that case, has been interpreted in a way that might allow that result: see for example, Templeman on Marine Insurance Sixth Edition 1986 at page 200

⁵¹ See also, *Rhesa Shipping Co SA v. Edmunds* [1985] 2 ALL ER 712, 718 (Lord Brandon) – "The judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take".

⁵² *Winter v. Weekes* (1989) 5 ANZ Insurance Cases 60-896, 75,707. See also the comments of Lord Birkenhead LC in *The Arnus* (1924) 19 LILR 95, 96 – "those who contrive crimes do not as a rule summon witnesses. There are certain crimes which are especially easy to conceal and therefore especially difficult to discover". See also the same judge's comments in *The Olympia* (1924) 19 LILR 255, 257 – "It must never be forgotten that in this class of case (scuttling) almost every source of evidence is available to the plaintiffs, almost every source of evidence can be closed by the plaintiffs and almost every source of evidence can be influenced by the plaintiffs".

⁵³ *Rhesa Shipping Co SA v. Edmunds & Anor* [1985] 2 ALL ER 712 – see especially the comments of Lord Brandon of Oakbrook at 718 (see n 51 above).

et seq. But in *Rhesa* the cause of the ingress of water was clearly established and the particular presumption to which I have referred was not of application.

In *La Compania Martiartu v. The Corporation of the Royal Exchange Assurance* (1923) 1 KB 650 Scrutton LJ said (at page 657):

“The presumption may well be, when nothing is known except that the ship has disappeared at sea, that her loss was by perils of the sea: *Green v. Brown* Stra 1199. But when, though it is known she has sunk, there is evidence on each side as to the cause of the admission of the sea water, which leaves the Court in doubt whether the effective cause is within or without the policy, the plaintiff, the assured, fails, for he has not proved a loss by perils insured against.

I have underlined what I perceive to be the critical words, for present purposes. Those words are not of application when there is no evidence of the cause of entry of sea water and the insurer pleads scuttling in the context of an otherwise unexplained admission of sea water.⁵⁴

The comments of Perry J have some force in respect to the proposition that a failed plea of scuttling, and the evidence which sustained the plea, should not be allowed to then operate to deprive the plaintiffs of a judgment to which they would otherwise be entitled to. The consequential outcome benefiting insurers, it could be argued, would conceivably become an operational reality in marine insurance claims. The import of Perry J’s comments is also to be considered within the confines of the operation of the Uniform Civil Procedure Rules 1999 (Qld) in rules 149 and 150.⁵⁵ Under the Uniform Civil Procedure Rules, if a party after having pleaded the material facts in support of its case is unable to sustain the pleading by way of verification of evidence at trial, the claim fails. Accepting that a claim for scuttling has failed, the issue to be resolved is whether that evidence of scuttling which was not sufficient to result in a positive finding should be then considered to otherwise deprive a plaintiff of a favourable verdict.

Certainly in the context of a perils of the sea policy, the view of Perry J would operate in a way that, if a positive finding of scuttling could not be established and accepting the plaintiffs’ evidence was sufficient on the balance of probabilities to establish a loss of the vessel by perils of the sea, the plaintiff must succeed in its action. However, what is the significance of such a view if an “accident” policy is not a “perils of the seas” policy?

Appeal

The plaintiff appealed the decision of Cullinane J,⁵⁶ although not the findings of fact made by his Honour.⁵⁷ Turning now to the appellant’s submissions. In essence, the appellant’s appeal turned on the construction of the ‘policy’ of insurance, whether in

⁵⁴ *Winter v Weeks* (1989) 5 ANZ Insurance Cases 60-896, 75-707.

⁵⁵ Rule 149(1)(b) of the Uniform Civil Procedure Rules 1999 (Qld) (UCPR) states that “Each pleading must contain a statement of all material facts on which the party relies but not the evidence by which the facts are to be proved.” Rule 150(1)(f) UCPR provides that fraud “must be specifically pleaded”. See also the comments of Macrossan J in *Itobar Pty Ltd v. MacKinnon and Commercial Union Assurance PLC* (1985) 3 ANZ Insurance Cases 60-610, 780,7819 where it is stated that “although the onus lies upon the insurer to prove that the loss falls within the terms of the policy, the practice has developed when a scuttling is to be relied upon of the defendants pleading this in positive fashion, rather than merely relying upon a defence denying the plaintiff’s entitlement. This is clearly a highly desirable approach in the interests of raising the real issues and giving the claimant appropriate notice of the matters to be tested or alleged.”

⁵⁶ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41 (CA No: 8078 of 2003, 27 February 2004; McMurdo P, Davies JA and Mackenzie J).

⁵⁷ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [7].

fact it was a “perils of the sea” policy, and secondly on the operation of the relevant onus of proof principles.

Appellant’s Submissions

The appellant advanced two arguments in support of its appeal. Firstly, it was contended that, given that Cullinane J was unable to positively determine that the two skippers had scuttled the *Ocean Harvester*, it followed that His Honour was obliged to conclude that the vessel sank by accident.⁵⁸

The second argument advanced by the appellant was that because the expression “perils of the sea” was not used in the insurance policy, it should not have been construed as if the words were in fact used. Further, the appellant argued that, whilst the ordinary action of the wind and waves was excluded from the meaning of “perils of the sea” under schedule 2 of the *Marine Insurance Act 1909* (Cth), there was no reason why the ordinary action of the wind and waves should be excluded from the meaning of “accident” in the insurance policy. The appellant contended that once it was established that the insured vessel at the relevant time was seaworthy and that it sank because it took on water, it had satisfied its onus of establishing that the loss was by accident under the contract of insurance. Accordingly, if the respondent wished to avoid liability by asserting that the event was not an accident, but rather by scuttling, then the burden of proof lay on the respondent in that respect.⁵⁹

In advancing the above submissions the appellant conceded, quite correctly, that the balance of authority⁶⁰ did not support its contention, but placed particular reliance upon the decision of Carter J in *Craig v Associated National Insurance Company Limited*,⁶¹ which distinguished the burden of proof in cases of perils of the sea from that in allegations of arson.⁶²

The appellant further placed reliance on the obiter comments of Perry J in *Winter v Weekes*,⁶³ which questioned the operation of the principle that allows a marine insurer to

⁵⁸ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [8]. As was noted by McMurdo P, the trial judge rejected this contention and held that, whilst the evidence of scuttling was insufficient to positively establish such claim, nonetheless the evidence was sufficient to prevent the appellant from establishing “accident” based on a number of authorities which dealt with ships lost by perils of the seas, namely *Itohar Pty Ltd v McKinnon and Commercial Union Assurance Company Plc* (1985) 3 ANZ Ins Cas 60-610, 78-719 and 78-720, *Doak v Weekes* (1986) 82 FLR 334-336, *Jeffrey v Associated National Insurance Company Limited* [1984] 1 Qd R 238-246, *Rhesa Shipping Company SA v Edmonds & Anor* [1985] 2 All ER 712 and *La Compania Martiartu v The Corporation of the Royal Exchange Assurance* [1923] 1 KB 650. “Whilst recognising that all of the aforementioned cases concerned ships lost by perils of the sea rather than “accident” His Honour applied them by way of analogy because the terms of this policy had a similar if not identical import and area of operation” (McMurdo P).

⁵⁹ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [9].

⁶⁰ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [8].

⁶¹ [1984] 1 Qd R 209.

⁶² Presumably the appellant’s basis for advancing this authority in support of its contention were the comments by Cullinane J at [11] of *Ocean Harvester v MMI General Insurance Limited* [2003] QSC 262 where he stated “In *Craig v Associate National Insurance Co Ltd* [1984] 1 Qd R 209, Carter J, in a case involving somewhat similar issues to those which arise here, after referring to the judgement in *Rejfeek v McElroy* (supra) said at page 211: “I perceive the law to be that the defendant must prove to my satisfaction on the balance of probabilities that the plaintiff fraudulently set fire to the vessel and in determining whether the defendant has induced in my mind that degree of persuasion, I must examine closely the clarity and cogency of the proof offered by the defendant in the knowledge that an allegation of fraudulently setting fire to the vessel is one which is serious and grave.”

⁶³ *Winter v Weekes* (1989) 5 ANZ Ins C 60-896, 75-707.

avoid liability by raising a plea of scuttling which it is unable to sustain on the evidence.⁶⁴

Respondent's Submissions

Whilst there is no direct reference in the Court of Appeal judgment to the respondent's submissions, it nonetheless can be inferred (from the reasoning of the Court of Appeal) that they would have included the argument that the insurance policy described in common parlance what is covered by a perils of the sea policy.⁶⁵ Secondly, it would have been asserted that Cullinane J identified the operation of the appropriate principles in respect to the issue of burden of proof and applied them correctly in disposing of the plaintiff's claim.

Judgment of the Court of Appeal

Only ten days after hearing the appeal, on 27 February 2004, the Court of Appeal through McMurdo P in a succinct and erudite judgment of thirteen paragraphs, dismissed the appellant's appeal. In respect to the appellant's first submission that the respondents, by not positively establishing scuttling, compelled the trial judge to conclude that the vessel sank by accident, for which the appellant drew support from the decision in *Craig v Associated National Insurance Company Limited*,⁶⁶ the Court of Appeal noted that the decision in Craig's case was neither analogous nor of assistance to the appellant.⁶⁷ McMurdo P noted, that in Craig's case the insured was required to establish that the loss was caused by fire, not accidental fire, and that it was thereafter for the insurer to establish its claim that it was not liable under the policy because of the insured's "wilful misconduct" in deliberately setting fire to the boat.⁶⁸ In other words, the reasoning of McMurdo P quite correctly and properly distinguished the present case from Craig's case, in that the policy required the appellant (plaintiff) to establish that the sinking of the "Ocean Harvester" was due to accident and that the allegation of scuttling advanced by the respondents (defendants) was for the latter to establish.

⁶⁴ See n 22 above.

⁶⁵ *Ocean Harvester v MMI General Insurance Limited* [2003] QSC 262, [28] (Cullinane J) : "The present policy might be said to express in a more common parlance what is covered by a 'perils of the sea' policy".

⁶⁶ *Craig v Associated National Insurance Company Limited* [1984] 1 Qd R 209.

⁶⁷ *Ocean Harvester v MMI General Insurance Ltd* [2004] QCA 41, [10].

⁶⁸ *Craig v Associated National Insurance Company Limited* [1984] 1 Qd R 209, 210 (Carter J). This case concerned a vessel "Tiki Too", which was insured against certain perils, one of which was fire. The issue for the purposes of the decision was the burden of proof and of the standard of proof in such a case. The plaintiff's case (as advanced by Dr Michael White QC) was that the vessel had been destroyed by fire, and the defendant alleged that the loss suffered by the plaintiff was as a result of his deliberately setting fire to the vessel (see section 61(1(a) *Marine Insurance Act 1909*). The issue confronting Carter J in respect of the defence of wilful misconduct was whether it was for the plaintiff to disprove the allegation that he had deliberately set fire to the vessel as well as proving the facts necessary to entitle him to be indemnified, or whether the onus was on the insurer to prove the allegation of wilful misconduct as particularised. His Honour acknowledged that the same question had arisen in cases involving "perils of the sea" policies when allegations such as scuttling and unseaworthiness had been made by insurers. His Honour stated at 210 "These cases, however, are of little assistance in this case although there would appear to be a clear analogy between an allegation of scuttling when the risk insured against is perils of the sea and an allegation of deliberately setting fire to a vessel when the relevant risk insured against is one of fire. The former cases, however, turn on the fortuitous nature of the risk inherent in the risk of perils of the sea and on the nature of the proof which the insured must undertake when an allegation of scuttling is made by the insurer." Accordingly, the plaintiff proved that the vessel was destroyed by fire and thereafter a shifting of the onus occurred on to the defendant to prove on the balance of probabilities that the insured had fraudulently set fire to the vessel.

In Craig's case the policy of insurance required the plaintiff to show the vessel sank as a result of a fire, not that the fire which caused the vessel to sink was accidental, and thereafter it was for the insurer to prove that the plaintiff deliberately set fire to the vessel. There appears to be overwhelming force in McMurdo P's comments that Craig's case did not assist the appellant.

The observations of McMurdo P (and of Kelly SPJ in Craig's case) in short answered the appellant's submissions in reliance on Craig's case as the basis for asserting that a failure by Cullinane J to make a positive finding of scuttling should have entitled the plaintiff to judgment.

Further, with respect to the reliance that the appellant placed on the obiter comments of Perry J in *Winter v Weekes*,⁶⁹ questioning the operation of the onus of proof principles to a perils of the sea policy, McMurdo P noted that "this was not however a case where the allegation of scuttling was merely raised; it was supported by compelling evidence which threw doubt on the evidence of the appellant's witnesses so that the appellant did not establish its case."⁷⁰

Based on the observations of McMurdo P, one can only agree that the strength of the evidence of the deckhand on the "Shackrali" was not of such a magnitude so as to allow Cullinane J to make a positive finding that the plaintiff had scuttled the "Ocean Harvester". It may be argued that this is the situation Perry J⁷¹ was envisaging when questioning the application of the accepted burden of proof principles to policies of marine insurance.

Further, in respect of the burden of proof principles in relation to a plea of scuttling in the context of perils of the seas policies McMurdo P appears to have accepted⁷² that those principles as reviewed by Cullinane J are the applicable principles. As noted above, the authorities on this point in England and followed in Australia are of long standing, logical and highly persuasive.

It appears that McMurdo P did not directly deal with the appellant's second submission, although it can be inferred from the reasoning advanced with regard to the operation of the burden of proof principles that the Court of Appeal accepted the primary reasoning of Cullinane J, namely, that the policy had a similar if not identical import and area of operation (that is, no material difference) even though the words "perils of the sea" were not used.⁷³

In dealing with the appellant's submissions, McMurdo P considered that they were misconceived.⁷⁴ McMurdo P was of the view that the burden of proof principles referred to earlier operated in such a way that, where the insured could not satisfy the trial judge as to the ultimate onus, the sinking of the "Ocean Harvester" was caused by way of accident and its claim should fail.⁷⁵

⁶⁹ *Winter v Weekes* (1989) 5 ANZ Ins Cas 60-896, 75-707.

⁷⁰ *Ocean Harvester v MMI General Insurance Limited* [2004] QCA 41 at paragraph 11.

⁷¹ *Winter v. Weekes* (1989) 5 ANZ Ins Cas 60-896, 75-707.

⁷² *Ocean Harvester v MMI General Insurance Limited* [2004] QCA 41, [11]-[12].

⁷³ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [12] - "The learned primary Judge's reasoning was unimpeachable."

⁷⁴ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [12].

⁷⁵ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [12] (McMurdo P): "Under the contract of insurance the appellant had to establish the ship sank by accident; this was a matter to be determined by His Honour on the evidence at trial, which included Dobbins evidence that Kerr and Thompson scuttled the boat. On the accepted evidence, His Honour was not persuaded on the balance of probabilities that Kerr and Thompson had scuttled the boat, a criminal offence, but nor did the evidence satisfy him on the balance of probabilities that the boat was accidentally sunk; the appellant's claim was

McMurdo P further noted that judges would be less likely to be in Cullinane J's position where a respondent merely made unaccepted and unsupported allegations, but ultimately each case would turn on the strength of evidence called.⁷⁶ In this case, the defendants had mounted a positive case that the plaintiff had scuttled the vessel, although the evidence was not sufficient to allow Cullinane J to make a positive finding, and that consequently the trial judge could rely on the burden of proof principles to determine whether the plaintiff had discharged its ultimate burden of proof, which it had not done, thus preventing it from succeeding on its claim.

In conclusion, McMurdo P decided that the learned trial judge's reasoning was unimpeachable and that the appeal should be dismissed with costs, a finding with which Davies JA⁷⁷ and MacKenzie J⁷⁸ agreed.

Conclusion

As considered by three senior Supreme Court Justices and the President of the Court of Appeal, it seems that an "accident" policy is not materially different to a perils of the seas policy. This, however, does not mean that "accident" equates to "perils of seas" in the context of marine insurance policies.⁷⁹

Nonetheless, it is interesting that even though the words "perils of the sea" were not used in the specific insurance policy, this was not determinative of whether the policy was a perils of the seas policy.

As far as the operation of the applicable burden of proof principles is concerned, it appears that both Cullinane J and by inference the Court of Appeal accepted that the long line of English authorities and non-appellate Australian decisions are correct and that the obiter comments of Perry J in *Winter v Weekes* do not provide a sound basis for challenging the operation of such principles.

No doubt, the issue of indemnification under policies of marine insurance as exemplified by the "Ocean Harvester" decision, with the spectre of allegations of scuttling, highlights the complexity in this area of the law, as was acknowledged by Mason J in *Skandia Insurance Company Limited v Skoljarev* (1979) 142 CLR 375 where he noted with respect to the issue of scuttling: "The onus of proof in such a case has its own difficulties and they have not yet been completely resolved."⁸⁰

It appears the Court of Appeal decision in "Ocean Harvester" has served to galvanise the operation of the burden of proof principles with respect to policies of marine insurance. Nonetheless whilst there was no significant review of the applicable authorities, on the operation of the burden of proof principles, the Court operated on the

unproved and failed. Whilst it is unusual for judges to be left in such a state of uncertainty as to evidence, it is not uncommon in cases of this sort where judges are not lightly persuaded to accept that protagonists have acted with criminal intent but nor are they necessarily satisfied to the civil standard that the claim is made out: *La Compania Martiartu v The Corporation of the Royal Exchange Assurance*; *Compania Naviera Vascongado v British and Foreign Marine Insurance Company Limited (the Gloria)*; *North Western Mutual Life Insurance Company v Linard Edinburgh Assurance Company (the vainqueur) and Regina Fur Company Limited v Bossom*".

⁷⁶ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [12]: "A judge would be less likely to be so uncertain where a respondent merely made unaccepted and unsupported allegations (something less likely to occur in Queensland under the UCPR), but each case will turn on the strength of the evidence called in it."

⁷⁷ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [14].

⁷⁸ *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Limited* [2004] QCA 41, [15].

⁷⁹ See Sea Watch Newsletter, September 2003 <www.seasia.com.sg> which suggests that "accident" may equate to "perils of the sea".

⁸⁰ *Skandia Insurance Company Limited v Skoljarev* (1979) 142 CLR 375, 382 (Mason J).

basis of the correctness of such principles and therefore this appellate level authority is binding on Queensland Courts in respect to a consideration of these principles to policies of marine insurance. The decision is otherwise a highly persuasive authority for other Australian Courts on this issue.

At the time of writing, there has not been any notable reaction to the Ocean Harvester appeal decision by the marine insurance industry and if there is a response it may well be anticipated to be to acknowledge the correctness of the operation of the long established principles on burden of proof in the context of scuttling.