Case Notes

Gibbs v Mercantile Mutual Insurance (2003) 199 ALR 497; (2003) 77 ALJR 1396; [2003] HCA 39

Sarah Derrington *

Mr Gibbs was insured on a "Marine Pleasurecraft Policy" which, relevantly, covered third party liabilities; extended to any person navigating or in charge of the vessel; extended to cover commercial paraflying; contained a navigation warranty of "Protected waters of WA as per permit". Mr Gibbs conducted a commercial paraflying operation in the estuarine waters of the Swan River in Perth, Western Australia. Mrs Morrell was injured whilst paraflying and Mr Gibbs claimed on the Marine Pleasurecraft Policy. The insurer alleged that certain matters had not been disclosed and that there had been some material misrepresentations. If the *Marine Insurance Act 1909* (Cth)[1] applied, the insurer was entitled to avoid the policy[2]. If, however, the *Insurance Contracts Act 1984* (Cth) applied, Mr Gibbs may have been able to avail himself of the ameliorating provisions in ss. 28 and 54 of that Act, pursuant to which termination is available to the insurer only where the breach could reasonably be regarded as being capable of causing or contributing to the loss. The insured has the opportunity of showing that the loss was either in part or wholly not caused by the act. In this way, if an act can reasonably be regarded as capable of causing or contributing to a loss the insurer may refuse to pay the claim.

Accordingly, the High Court was called upon to determine whether or not the policy fell within the scope of the *Marine Insurance Act 1909*. Section 7 provides:

> 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.

Section 9(1) provides that every lawful marine adventure may be the subject of a contract of marine insurance and s.9(2) provides that, in particular there is a marine adventure where:…

> (c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils

Section 9 also provides that "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 detainments of princes and

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[1] After the date on which the policy was issued, the *Insurance Contracts Act* was amended to include "pleasure craft" within its ambit (s.9A). "Pleasure craft" is defined in subsection 2 to mean a ship which is used or intended to be used:

(a) wholly for recreational activities, sporting activities, or both: and
(b) otherwise than for reward.

Even if the amendment had been in force at the relevant time, the ship would not have fallen within the definition of a "Pleasure craft".

[2] *Marine Insurance Act 1909* (Cth), ss.24 and 26.

peoples, jettisons and barratry, and any other perils, either of the like kind or which may be designated by the policy.

The Chief Justice, Justice Gleeson, focused on the definition of "maritime perils" in coming to the conclusion that the accident for which relevant cover was provided by the insurance policy was a "peril of the sea" and therefore the policy was one of marine insurance. His Honour held that the "sea" is not limited to the open ocean but extends to waters within the ebb and flow of the tide. This interpretation is consistent with the express definitions of the 'sea' contained in the *Admiralty Act 1988*[3] and the *Navigation Act 1912*.[4] As the accident occurred in estuarine waters of the Swan River His Honour was content to find that the accident occurred on the sea and was, therefore, a "peril of the sea."[5]

Justices Hayne and Callinan, who formed the majority with the Chief Justice, adopted a different route in determining that the policy was one of marine insurance. Their Honours held that "maritime perils", as defined in s.9, are not limited to perils occurring while the vessel is *at sea*. Thus it was unnecessary to determine whether the event took place on "the sea". Rather, what is determinative is the nature of the risk and, in their Honours' opinion, the insured losses were losses incident to marine adventure. Their Honours held that the careless operation of marine craft is a peril properly described as a peril "consequent on, or incidental to, the navigation of the sea" and that the relevant marine adventure was exposing the owner of the craft to liability by reason of maritime perils.[6]

Justice McHugh, like the Chief Justice, thought that whether or not the peril took place on the sea was determinative of the issue, but cam to the contrary conclusion. His Honour held that the Swan River is not the "sea". His Honour said, "In ordinary parlance, however, a river is not the sea. It is a natural stream of water flowing into the sea or into a lake or in some cases into another river. I doubt that any Perth resident who had spent a day picnicking by the shores of the Swan River would regard him or herself as having spent a day at the sea-side."[7] His Honour held that the *Marine Insurance Act* does not cover policies in respect of risks in relation to ships never intended to go on voyages in the open sea.[8] His Honour said that this view was confirmed by the changes incorporated in the Institute Time Clauses (Hull) which specifically add risks from "rivers lakes or other navigable waters." His Honour made no reference to cases such as *Phillips v Barber*[9] in which it was held that damage to a ship lying in a graving dock in the harbour of St John, New Brunswick, when blown on its side, was a loss by the perils of the seas.

Justice Kirby took an altogether different approach to the issue. His Honour held that the policy was a business third party liability insurance policy and therefore did not fall within the scope of the *Marine Insurance Act*. His Honour said:[10]

> I approach the question to be resolved as one of characterisation. I decide it by reference to the substance of the policy, not merely its form. I look at the policy and view it in its

[3] *Admiralty Act 1988* (Cth), s3(1).
[4] *Navigation Act 1912* (Cth), s6.
[5] (2003) 199 ALR 497, [17].
[6] (2003) 199 ALR 497, [197].
[7] (2003) 199 ALR 497, [91].
[8] (2003) 199 ALR 497, [102].
[9] (1821) 5 B & Ald 161; 106 ER 1151.
[10] (2003) 199 ALR 497, [124-125].

> entirety. I consider the types of losses against which it promised to afford indemnity to the insured.
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> Approaching the subject policy in this way, read together with the proposal form that led to the certificate of renewal, it is clear that although items of a vessel were mentioned in the printed form (that might otherwise give the policy something of a maritime flavour), the actual substance of the insurance contract, as agreed, was that which was stated on the face of the certificate. It was one confined to the provision of indemnity to the insured with respect to "Third Party Liability Cover". That was all that was left in the policy after the deletions. Such indemnity was granted only in respect of the promise contained in Section 3 of the subject policy. The other sections of the policy, involving physical loss or damage to the vessel and salvage charges and other charges (such as the "expense of sighting the bottom after stranding" of the vessel), were specifically excluded from the policy as issued. What remained, and all that remained, was a promise to provide indemnity in respect of the named business' "liabilities to third parties".

His Honour went to say that, if this construction were not accepted, the Court should give the "sea" its ordinary meaning, particularly as the *Marine Insurance Act* draws a distinction between the sea and inland waters. No "sea voyage" was contemplated in this case as that phrase would ordinarily be understood. Nor was there any "navigation of the sea" giving those words their normal meaning. Nor were there any consequences of the "perils of the seas" or other perils of the kind listed in the definition of "maritime perils "as those words are commonly used in the English language.[11] His Honour referred to the Report of the Australian Law Reform Commission (ALRC) on the *Marine Insurance Act 1909*[12] in which it was proposed that, instead of trying to define "the sea" for the purpose of the *Marine Insurance Act*, the opportunity should be taken, by amendment of that Act, to make it clear that the *Marine Insurance Act* "clearly covers risks on inland waters."[13] His Honour observed that, by inference, the ALRC had accepted that the *Marine Insurance Act* did not apply to inland waters.

The two conflicting legislative regimes in Australia continue to promote uncertainty in relation to the law governing the construction of contracts of insurance. The ALRC's proposals, referred to by Justice Kirby, involve amending the *Marine Insurance Act* to make clear that it covers risks on inland waters by inserting in s.8 two new subsections:

> *(3) Unless it expressly provides otherwise, a contract of marine insurance protects the assured against losses on all inland waters*
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> *(4) Unless the contract expressly provides otherwise or the context requires otherwise, all references in this Act and in a contract of marine insurance to the "sea" and the "seas" include references to inland waters*

Were these sections in force at the time when the present case came to be decided, unanimity was still unlikely, but a four to one majority could have been expected.

[11] (2003) 199 ALR 497, [146].
[12] ALRC 91, April 2001.
[13] ALRC 91, April 2001, [8.82].