'Marine adventure'

Gibbs v Mercantile Mutual Insurance (Australia) Ltd [2003] HCA 39 and the scope of the Marine Insurance Act 1909 (Cth)

*By the Hon Justice James Allsop**

The ALRC has recently published Report 91 being a review of the Marine Insurance Act. Marine insurance is governed by the *Marine Insurance Act 1906* (Cth) (the MIA). It is not covered by the *Insurance Contracts Act* 1984 (Cth) (the ICA). This paper is only a brief introduction to the topic†.

The MIA came into effect on 1 July 1910 and, with minor differences, was a replica of the United Kingdom parent legislation drafted famously by Chalmers. The MIA has been amended only twice since then. One such amendment was to reflect the introduction of decimal currency. The MIA was said to have codified the law of marine insurance when enacted. However sec 4 specifically preserves the rules of the common law 'including the law merchant'.

In many places the MIA preserves the parties' ability to agree on terms other than those set out in the legislation. Schedule 2 to the MIA contains the Lloyds SG Policy which by the terms of sec 36 effectively becomes a body of rules for the construction of marine insurance policies.

Sections 7 to 9 identify the limits of marine insurance. Section 7 defines a contract of marine insurance as 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.

A 'marine adventure' is defined in subsec 9(2). The High Court in *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* [2003] HCA 39 recently dealt with the definition of marine insurance.

The 'marine adventure' as dealt with by sec 9 refers to the exposure to risk of insured property, of money which may be earned from that property, of money which may be earned from that property or the adventure and to liability that may arise to a third party if that property is lost or damaged. An essential element is the notion of 'maritime perils' which are defined as perils:

> Consequent on, or incidental to, the navigation of the sea, that is to say, that perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils either of the like kind, or which may be designated by the policy.

Thus, a contract of marine insurance may deal with some land risks and may be extended under sec 8 to protect the assured against losses on inland waters or on any land risk 'which may be incidental to any sea voyage':

One of the essential differences between the ICA and the MIA relates to questions of the utmost good faith, disclosure and misrepresentation, dealt with in secs 23 to 27 of the MIA. These matters were reformed substantially under the ICA for general insurance. This reform, which did away with the ability of an insurer to rely upon the notion of the prudent insurer as the test by reference to which it could avoid the policy does not extend to marine insurance. In marine insurance contracts, the law on good faith, subject to the possible issue as to the divergence of the law between the United Kingdom and Australia recently, is as it was unreconstructed prior to the ICA. This difference highlights the importance of an appreciation of the central concept of a 'marine adventure'.

In *Pan Atlantic Insurance Co Ltd v Pinetop Insurance Co Ltd* [1995] 1 AC 501, the House of Lords dealt with the question of non-disclosure. The House of Lords rejected the proposition that the only matters that need to be disclosed are those that if disclosed to the hypothetical prudent underwriter would have caused him to decline the risk or charge an increased premium. Rather it was held, what had to be disclosed was material which would have an effect on the mind of the prudent insurer (being a hypothetical person) in estimating the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk or the amount of premium demanded. Also, the House of Lords engrafted on to the section a further requirement 'implied in the Act' that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation (or non-disclosure) induced the making of the contract (using the word 'induced' in the sense in which it is used in the general law in contract).

Whether or not the views of the House of Lords are entirely conformable with existing Australian authority is a matter yet to be finally determined. In *Akedian Co Ltd v Royal Insurance Australia* (1997) 148 ALR 480 Byrne J considered that since *Pan Atlantic* the question of materiality should be addressed in these two stages. In Australia prior to the ICA, non-disclosure cases in general and marine insurance were run on the basis of the question of the prudent insurer and not by reference to the insurer in question: see generally *Mayne Nickless v Pegler* [1974] 1 NSWLR 228 and *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514.)

The importance of understanding when a policy is covered by the ICA and when by the MIA is reflected by the High Court's recent decision in *Gibbs*. After the events of the litigation in Gibbs the ICA was amended *(Insurance Laws Amendment Act 1998 (Cth)* s77) to provide in effect that the MIA does not apply to a contract of marine insurance made in respect of a pleasure craft defined as a ship which is used or intended to be

* This note is an adaptation of part a paper delivered by Justice James Allsop of the Federal Court to the New South Wales Bar on 24 September 2003. It highlights some of the significant differences between the *Marine Insurance Act 1909* (Cth) and the *Insurance Contracts Act 1984* (Cth) and discusses a recent High Court decision where those differences were critical to the outcome of the parties' dispute.

† Recourse should be had to basic and fundamental texts: ALRC Rep 91, Bennett *The Law of Marine Insurance*, Templeman on *Marine Insurance*, Arnould Law of *Marine Insurance and Average*, Parks *The Law and Practice of a Marine Insurance and Average*, Chalmers' *Marine Insurance Act 1906* (annotated).

used wholly for recreational activities, sporting activities for both and otherwise for reward and legally and beneficially owned by one or more individuals and not declared by the regulations to be exempt from the relevant subsection. It is likely that this amendment would not have applied to the facts in *Gibbs*.

Mr Gibbs and his company (the appellants) conducted a business offering paraflying or parasailing to the public. The corporate entity operated a 17 foot runabout ski boat powered by a 160 horse power sterndrive motor. When paraflying, the boat towed a person wearing a parachute who could ascend to the length of the tow rope while the boat made sufficient speed to generate enough lift under the canopy of the

The Narrows Bridge, spanning the Swan River.
Photo: John Chapman/AAP Image

parachute. Mrs Morrell went paraflying with the appellants in Perth on the Swan River near 'the Narrows Bridge'. She was injured hitting trees on an adjacent island after the party had gone downstream. Mrs Morell sued the appellants. The insurer denied them cover. The appellants sued the insurer. The appellant had arranged insurance for the vessel, its hull, motor and trailer together with equipment and third party legal liability cover. At the time of the injury the only aspect of the policy still on foot was the third party liability cover extended to include commercial paraflying.

The insurer contended that the insured had not disclosed matters that they were bound to and that they had made certain material misrepresentations. If the MIA applied the regime referred to above under the MIA would apply, not the ICA regime.

By majority the High Court found that the policy was covered by the MIA. Gleeson CJ said that, subject to the argument about whether the policy was one where liability to a third person by someone interested in or responsible for insurable property by reason of maritime perils, that is perils consequent on or incidental to, the navigation of the sea, the policy was plainly a marine policy. With the dropping of the hull and equipment cover the scope of the cover purchased was reduced, but the character of the policy was not transformed. The losses remained primarily losses arising out of events occurring in the course of the navigation of the vessel in question.

The appellants argued that neither the original policy nor the renewed policy was a contract of marine insurance because of the locality in which in the contemplation of the parties the vessel was to operate. The vessel was only to operate pursuant to the navigation warranties in it in 'protected WA waters as per permit'. The word 'permit' was a reference to the certificate of survey for the vessel required under the *Western Australian Marine Act 1982* which recorded that the geographical limits of operation of a vessel was 'smooth water only'. In fact, as was intended, the vessel's commercial paraflying activities were conducted in the Swan River area near the Narrows Bridge.

Gleeson CJ described the area of the Swan River in which the appellant operated their vessel as part of a broad expanse of water properly described as an estuary near the conjunction of the Swan River and the Indian Ocean. As one of the judges in the full court had said, an estuary is the interface between the ocean and a river in which salinity changes are found. The waters of the Swan River around South Perth where the activity was intended to take place were affected by tidal movements and were properly described as estuarine. An estuary of this kind where the tide ebbs and flows was found by the full court, and Gleeson CJ agreed, to be part of the sea, being estuarine and to be waters within the ebb and flow of the tide and falling within at least the definition of 'sea' in s3 of the *Admiralty Act 1988* and s6 of the *Navigation Act 1912* (Cth). Gleeson CJ said the word 'sea' is not limited to the open ocean.

Hayne and Callinan JJ formed the balance of the majority. They were of the view that the careless operation of the craft causing injury to the person being towed was a peril of a kind properly described as a peril 'consequent on, or incidental to, the navigation of the sea'. It was not determinative that this did not occur at *sea*. What was determinative was the nature of the risk, not where the event happened. Under the contract of insurance the insurer undertook to indemnify the appellants against marine losses, that is losses incident to marine adventure.

McHugh J and Kirby J dissented.