SUPREME COURT OF QUEENSLAND

CITATION:	*PMB Australia Ltd v MMI General Insurance Ltd & Ors* [2002] QCA 361
PARTIES:	**PMB AUSTRALIA LIMITED** ACN 057 251 091 (plaintiff/ appellant) v **MMI GENERAL INSURANCE LIMITED** ACN 000 122 850 (first defendant/ first respondent) **SUN ALLIANCE & ROYAL INSURANCE AUSTRALIA LIMITED** ACN 005 297 807 (second defendant/ second respondent) **CIC INSURANCE LIMITED** ACN 004 078 880 (third defendant/ third respondent) **ZURICH AUSTRALIAN INSURANCE LIMITED** ACN 000 296 640 (fourth defendant/ fourth respondent) **SUNCORP GENRAL INSURANCE LIMITED** ACN 075 695 966 (fifth defendant/ fifth respondent) **GIO GENERAL LIMITED** ACN 002 861 583 (sixth defendant/ sixth respondent) **QBE INSURANCE LIMITED** ACN 000 157 899 (seventh defendant/ seventh respondent) **FAI GENERAL INSURANCE COMPANY LIMITED** ACN 000 327 855 (eighth defendant/ eighth respondent)
FILE NO/S:	Appeal No 9269 of 2001 SC No 5235 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2002; 30 July 2002
JUDGES:	de Jersey CJ, Jerrard JA and White J Separate reasons for each member of the Court; each concurring as to the order made
ORDER:	**The appeal should be dismissed with costs to be assessed**

CATCHWORDS: INSURANCE – POLICIES OF INSURANCE – CONSTRUCTION OF POLICY – risks insured – doctrine of proximate cause – infectious disease extension to business interruption policy – where trial judge found that the proximate cause applies to whether interruption of business is caused by insured event and whether loss results from that interruption – whether the learned trial judge's construction correct

INSURANCE – BUSINESS INTERRUPTION - DOCTRINE OF PROXIMATE CAUSE – CONCURRENT CAUSES INSURANCE – BUSINESS INTERRUPTION – salmonella contamination of processed peanut product – whether concurrent causes of business interruption – extent to which interruption to business was proximately caused by salmonella outbreak – whether alterations made to plant and processes caused by salmonella outbreak or the need to address the risk of salmonella contamination in the future – where "new awareness' of the risk of contamination should be regarded as a cause of the loss

APPEAL AND NEW TRIAL – APPEAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – whether the learned trial judge was correct in confining the appellant to an indemnity for losses referable to the salmonella outbreak alone – whether the learned trial judge was correct in concluding the onus fell in that respect on the appellant

INSURANCE – BUSINESS INTERRUPTION – PROXIMATE CAUSES – quantification of loss – evidentiary burden – assessment of loss by court where quantification difficult

INSURANCE – BUSINESS INTERRUPTION – characterisation of expenses claimed – whether incurred as a consequence of interruption to business as a result of insured cause – whether costs of mitigating loss recoverable

Australian Casualty Co Ltd v Federico (1986) 160 CLR 513, applied
Director-General of Social Services v Hangan (1982) 70 FLR 213, considered
Hall Brothers Steamship Co Ltd v Young [1939] 1 KB 748, applied
Henville v Walker (2001) 182 ALR 37, considered
HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc (1998) 43 NSWLR 601, applied
Ionides v The Universal Marine Insurance Co (1863) 14 CB(NS) 259, applied
JJ Lloyd Investments Ltd v Northern Star Insurance Co Ltd

("Miss Jay Jay") [1987] 1 Lloyd's Rep 32, applied
Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350, applied
McIntosh v Commissioner of Taxation [1978] Qd R 354, considered
Purkess v Crittenden (1965) 114 CLR 164, approved
Re Mining Technologies Australia Pty Ltd [1999] 1 Qd R 60, considered
Reseck v Commissioner of Taxation (1975) 133 CLR 45, considered
Watts v Rake (1960) 108 CLR 158, approved
Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd [1974] 1 QB 57, applied

COUNSEL: C Gee QC, with M K Studen, for the appellant
S C Williams QC, with K P Kimmons, for the respondents

SOLICITORS: Freehills for the appellant
Gadens Lawyers for the respondents

[1] **de JERSEY CJ** This appeal concerns the proper construction of a contract of insurance. The respondents are a consortium of companies which insured the appellant, a processor (etc) of peanuts, against, broadly speaking, losses because of interruption to business in various circumstances.

[2] In the first half of 1996, contamination of peanut butter on retail sale, manufactured from roasted, shelled peanuts supplied by the appellant, was traced to the insanitary condition of an auger within the appellant's production line. There were consequent outbreaks of salmonella poisoning in Victoria. Following involvement of the Queensland Department of Health, the appellant suspended the operation of its roasted peanut plant on 6 July 1996, and embarked upon compliance with a set of departmental recommendations designed to overcome the immediate problem and ensure that similar problems did not arise elsewhere within the appellant's processes. The appellant resumed production on 20 July 1996, subject, unsurprisingly, to its continued compliance with departmental requirements.

[3] The learned trial Judge found that the particular instance of contamination, which was salmonellosis based, led to what was termed a broad "new awareness" of the risk of salmonella contamination within such production processes. Her Honour took the view that the losses indemnified under the contract of insurance were limited to those referable to the particular instance of contamination, or what was termed the particular "outbreak", and did not extend to losses or expenditures referable to revision of the appellant's establishment designed to exclude or minimize the prospect of similar outbreaks elsewhere in the future.

[4] At the trial, the appellant had proceeded on the basis that the amount of all such losses was covered, and by and large had not, by evidence, sought to identify those losses referable to the outbreak, and those referable to the "new awareness". Contending that only the former were recoverable, the respondents submitted that the appellant had not discharged its onus of proof. In respect of some heads of loss,

the learned Judge was able to estimate that portion of the loss attributable to the outbreak, and moulded her judgment accordingly.

[5] The principal issues arising on the appeal are whether the Judge was right to confine the appellant to an indemnity for losses referable to the outbreak alone, and whether she was correct in concluding the onus fell in that respect on the appellant. The appellant's position was that properly construed, the contract of insurance warranted recovery of all losses, whether attributable to the outbreak or the so-called "new awareness"; and that the onus to discriminate, by evidence, was in any event borne, not by the appellant, but by the respondents, ***and that they had not discharged that onus.***

[6] The appellant's claim was made under the "consequential loss" section of the contract of insurance. Its primary provision refers to loss flowing from interruption to the business because of damage to property. But an extension clause enlarged the indemnity to include interruption because of circumstances such as arose here. It is necessary that I set out the primary provision:

> "In the event of any building or any other property or any part thereof used by the Insured at the Premises for the purpose of the Business being physically lost, destroyed or damaged by any cause or event not hereinafter excluded (loss, destruction or damage so-caused being hereafter termed "Damage") and the Business carried on by the Insured being in consequence thereof interrupted or interfered with, the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement."

[7] The extension clause provides:

> "INFECTION DISEASE MURDER AND CLOSURE
>
> The term "Damage" under Section 2 of the Policy is extended to include loss directly resulting from interruption of or interference with the business carried on by the Insured at the premises in consequence of :
>
> (i) Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease or consequent upon defects in the drains and/or other sanitary arrangements at the premises;
>
> (ii) Murder or suicide occurring at the premises;
>
> (iii) Injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the premises."

(No "closing…by order of a Public Authority" occurred in terms of (i): the appellant closed down its operation on its own initiative, albeit no doubt in response to departmental concern.)

[8] While we were invited to seek to meld the terms of those two provisions, the reality is that the extension clause is largely self-contained. It needs supplementation only to incorporate reference to payment by the respondents under the applicable "Basis of Settlement". The "Basis of Settlement" provisions contain a number of items

prescribing how particular losses fall to be calculated. Item four, for example, provides:

> "The insurance under this item is limited to increase in cost of working (not otherwise recoverable hereunder) necessarily and reasonably incurred during the indemnity period in consequence of the Damage for the purpose of avoiding or diminishing reduction in Turnover and/or resuming and/or maintaining normal business operations and/or services."

It is important to note that other such items also refer to loss incurred "in consequence of the Damage".

[9] The learned Judge allowed indemnity in respect of interruption to the business over the period 24 June 1996 to 31 March 1997. There is no challenge to the selection of that period. The challenge concerns Her Honour's limitation of the losses subject to the indemnity to those directly referable to the particular outbreak of contamination and the need to address its consequences. As Her Honour put it:

> "The extension covers loss resulting from business interruption in consequence of a specified event. It does not relate to loss incurred in preventing a fresh outbreak of injury, illness or disease from contaminated food provided from the premises from occurring."

[10] The appellant's contrary contention is that, in terms of the extension clause, there having been an interruption to the business "in consequence of" illness arising from foreign matter in food provided from the premises, it became a matter of identifying, or as it was put by Mr Gee QC in submissions, "measuring" losses "directly resulting from" that interruption. It was not appropriate at that stage of the enquiry, he submitted, to discriminate between losses referable to the immediate outbreak, and losses referable to accommodating the so-called new awareness of the risk of contamination: there having been a relevant interruption, all losses resulting from or connected with that interruption should be regarded as falling within the scope of the indemnity.

[11] The composite question arising under the extension clause is what loss directly resulted from the interruption to the business in consequence of the contamination. Breaking that question into parts may lead to error. Her Honour effectively found, as a matter of fact, that the only loss directly resulting from the interruption to the business in consequence of the contamination was loss referable to the outbreak alone. Her reasoning imported the stipulation that an insurer is ordinarily liable only for losses proximately caused by a relevant event (cf. *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513, 534-5), and she considered that the words "in consequence of" in the extension clause invited consideration of whether the cause of the interruption was proximate (cf. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350).

[12] That approach was to my mind unexceptionable, although one might ask whether it served no more than to bolster or reinforce what was in any case the clear interpretation of the words of the provision themselves. It is, I consider, compelling to conclude that losses "directly" resulting from interruption "in consequence of" the contamination should be limited to those particularly referable to the specific instance of contamination, and not extend more broadly to the cost of addressing possible further such outbreaks at another future time or elsewhere.

[13] There is an important additional textual consideration. The amount of the loss has to be assessed in accordance with an applicable "Basis of Settlement". Those items relevantly refer to loss suffered "in consequence of the Damage". (I have extracted item four in para 8 above). We were addressed comprehensively, as was Her Honour, on the meaning of the words, in the items, "in consequence of the Damage".

[14] The learned Judge considered they posited a proximate relationship between the loss and the event triggering the indemnity. Submitting for the contrary position, Mr Gee relied on *Reseck v Federal Commissioner of Taxation* (1975) 133 CLR 45, 51 where Gibbs J, as he was, spoke of the ordinary meaning of the words as involving "an effect or result", with the operative cause not necessarily having to be the dominant cause. See also *McIntosh v Commissioner of Taxation* [1978] Qd R 354, 360 and *Director General of Social Services v Hangan* (1982) 70 FLR 212, 221. The meaning attributed to the phrase in those cases was heavily influenced by a statutory context.

[15] What the words mean here, if there be doubt, is more reliably discerned from insurance cases. Those cases uniformly confirm that such a phrase used in a contract of insurance refers to a proximate, rather than remote, causal relationship. See *Hall Bros Steamship Co Ltd v Young* [1939] 1 KB 748, 761-2; *Ionides v Universal Marine Insurance Co* (1863) 14 CB (NS) 259, 285; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 369-371.

[16] Applying item four, one must first note, therefore, the need for a proximate relationship between the loss claimed and "the Damage". Transposing the relevant, extended meaning of "the Damage" into the terms of item four is not literally convenient. The extension enlarges "the Damage" to include "loss directly resulting from interruption…in consequence of" illness arising from the contamination. Item four relevantly refers to "increase in cost…in consequence of the Damage". Inserting the terms of the extension, item four would read: "increase in cost…in consequence of loss directly resulting from interruption…in consequence of" the illness arising from the contamination. Probably "the Damage" should in item four be read as referring to the triggering event, which was the learned Judge's approach. For present purposes, what should be stressed is the need for proximity between the loss and that triggering event. It might also be felt that reading item four together with the extension, one should also import into the item the concept of directness expressed in the extension. The end point is a plain need for a close rather than a remote connection between the triggering event (the illness arising from the contamination) and the loss claimed. Hence Her Honour's conclusion that the indemnity covered only costs directly related to the specific instance of contamination.

[17] Mr Gee submitted alternatively that if both the outbreak and the "new awareness" should be regarded as causes of the loss, they were each proximate, so that, in accordance with authority, the appellant should recover in respect of the entire loss: cf. The "*Miss Jay Jay*" [1987] LI.L.R 32, 37; *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57, 68-9; *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* (1998) 93 NSWLR 601, 612. The reality was, however, that two influences (the outbreak, the "new awareness") led in this case to respective losses which the appellant chose to combine in its claim upon

the respondents. It fell to the appellant at the trial to identify the loss relating only to the outbreak.

[18] The appellant separately submitted that wider recovery was in any event contemplated because of the terms of item four of the Basis of Settlement provisions, which refers to "increase in cost of working (not otherwise recoverable hereunder) necessarily and reasonably incurred…in consequence of the Damage for the purpose of avoiding or diminishing reduction in turnover and/or resuming and/or maintaining normal business operations and/or services". Item four does not avail the appellant in its claim for wider based recovery because of the limiting effects of the words "in consequence of" and the other textual considerations mentioned in para 16 above.

[19] I turn to the issue of the onus of proof. Was the learned Judge right to regard the onus of identifying the loss particularly relevant to the outbreak as being borne by the appellant? Relying on *Watts v Rake* (1960) 108 CLR 158, 160 and *Purkess v Crittenden* (1965) 114 CLR 164, 170-1, the appellant submitted that it fell to the respondents to do the "disentangling". But the Judge took the view that the appellant had not in certain respects by evidence established even a prima facie entitlement to the whole of the loss, such as would – had it occurred – have obliged the respondents then to dissect out any parts for which they contended they should not be held liable. On that basis Her Honour distinguished the approach established by *Watts* and *Purkess*: it was for the appellant to establish what loss directly resulted from interruption to the business in consequence of the contamination, being the loss referable to the specific instance of contamination, not extending to the broader "new awareness" aspect. To the extent to which the appellant's claim failed, the Judge took the view that the appellant had not reached a prima facie level of proof. Again, I regard her approach as justified.

[20] It is helpful to have regard to what the High Court, in the later case of *Purkess v Crittenden*, said of *Watts v Rake* (p 168):

> "We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on that issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial. It was, we think, with the character and quality of the evidence required to displace a plaintiff's prima facie case that *Watts v Rake* was essentially concerned. It was, in effect, pointed out that it is not enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive

> evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence."

[21] In this case, as the learned Judge held, the appellant – to the extent to which its claim failed – had not reached the prima facie level of proof to which the High Court there referred.

[22] The appellant also relied on *Henville v Walker* (2001) 182 ALR 37, which concerned the onus of proof under s 82 of the *Trade Practices Act*. As to a case of loss caused by a number of factors, Gaudron J said (p 53):

> "**[69]** At the very least, to require that a claimant under s 82(1) of the Act prove which component of his loss or damage is referable to contravening conduct would be to confine recoverable loss to that *directly* resulting from that conduct, and, thus, to impose a gloss on the words of the subsection. At the other extreme, it would be to deny any remedy at all in those cases where loss results from two or more acts or events but the claimant is unable to identify the precise component or components of the loss referable to contravening conduct. That consequence is inconsistent with the concept of causation upon which s 82(1) is predicated, namely, that the contravening conduct should only have materially contributed to the loss or damage suffered."

Her Honour's first sentence supports the position taken here by the respondents. That aside, contractual and statutory approaches to such an issue are not necessarily the same.

[23] This was not the case, as for example in The "*Miss Jay Jay*", where the claimed loss was indivisible. The extent to which the learned Judge dissected out parts of the claim itself illustrates that. This was simply a case where, to the extent the appellant's claim failed, the appellant had failed to discharge its onus (cf. *Lake v Hartford Fire Insurance Co Ltd* [1966] WAR 161, 168).

[24] There is one additional matter to be considered. During submissions following the conclusion of the evidence at the trial, the appellant sought to rely on *Re Mining Technologies Australia Pty Ltd* [1999] 1 Qd R 60 for the implication into the contract of insurance of a term providing that the appellant should be reimbursed for the cost of mitigating loss. (This related particularly to "yield loss", the appellant having to utilize substantially larger quantities of peanuts, post-contamination, in order to achieve the same level of output as previously.) The respondents submitted to Her Honour that because such a basis for the claim had not been pleaded by the appellant, it should not be entertained. The learned Judge held there was "no room" for the implication of such a term, and subsequently refused a formal application for leave to amend. On the hearing of the appeal, the appellant challenged that approach.

[25] Mr Gee referred us to a condition of the contract of insurance which, in conventional terms, obliged the appellant to "take all reasonable precautions to prevent loss, destruction or damage to the property insured by (the) policy", submitting that provided the base or springboard for the implication of the term. While not in terms apt to deal with the extended risk, the provision is not dissimilar from that from which Davies JA, in *Mining Technologies*, was prepared to imply the requisite term. As Mr Williams QC reasonably pointed out, Davies JA was the only member of the Court prepared to do so. That said, the verbiage of the term Davies JA proposed itself indicates the inappropriateness of making such an implication here. The term His Honour proposed reads (p 72):

> "Where loss, damage or liability, which would otherwise have occurred, is avoided by the exercise of reasonable care, including the reasonable expenditure of money or performance of work, on the part of the insured or any person acting on the insured's behalf, that expenditure or the value of that work…" (my underlining).

The loss or damage sought to be avoided by the "new awareness" based expenditure here was not in that sense certain to occur.

[26] In so far as the other members of the court touched on the issue, McPherson JA referred (p 88) to "authority that expenses incurred in averting or warding off the imminent happening of the insured risk or peril are capable of being considered within the indemnity of the cover afforded against the loss itself", and Pincus JA was (p 67) prepared to contemplate an implication to cover "extraordinary" expenditure to avoid "imminent damage". Those features do not characterize this case.

[27] The proposed amendment would not have raised a basis for the claim which could have succeeded, and the learned Judge was right to refuse leave to amend.

[28] No ground for interfering with Her Honour's judgment has been sustained. I would dismiss the appeal, with costs to be assessed.

[29] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment of de Jersey CJ and White J and the orders proposed.

[30] **WHITE J:** I have read the Chief Justice's reasons for judgment with which I agree. I would only comment, that as the Chief Justice has said, the learned trial judge's approach to the construction of the policy of insurance was correct and that if it were necessary to go beyond the contract itself, the line of insurance cases referred to by his Honour offer more assistance than cases such as *Reseck v Federal Commissioner of Taxation* (1975) 133 CLR 45 and *McIntosh v Commissioner of Taxation* (1978) Qd R 354 which construed taxation legislation.

[31] I agree that the appeal should be dismissed with costs assessed.