SUPREME COURT OF QUEENSLAND

CITATION:	*Solway v Lumley General Insurance Ltd & Ors* [2003] QCA 136
PARTIES:	**KEVIN SOLWAY** (plaintiff/appellant) **v** **LUMLEY GENERAL INSURANCE LIMITED** ACN 000 036 279 (first defendant/respondent) **WADUTUN HOLDINGS PTY LTD** ACN 003 601 901 (second defendant) **BRUCE EDWARD WOTTON and SYLVIA ANNE WOTTON TRADING AS WOTTON & ASSOCIATES INSURANCE CONSULTANTS** (third defendants)
FILE NO/S:	Appeal No 6656 of 2002 DC No 603 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2003
JUDGES:	Davies and Williams JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal allowed, set aside the judgment in favour of the respondent with costs and in lieu thereof order that the application be dismissed with costs to be assessed. The respondent to pay the appellant's costs of the appeal to be assessed.**
CATCHWORDS:	INSURANCE – MARINE INSURANCE – WARRANTIES – where appellant's boat lost at sea – where boat insured by respondent – where implied warranty under s 47 *Marine Insurance Act* 1909 (Cth) that any adventure will be carried out in a lawful manner – where boat required to be registered in Queensland under *Transport Operations (Marine Safety) Act* 1994 (Qld) – where boat registered under both Commonwealth and New South Wales legislation but not under Queensland legislation – whether non-registration was

a breach of implied warranty

STATUTES – BY-LAWS AND REGULATIONS – CONSTRUCTION – PARTICULAR WORDS – where reg 38 *Transport Operations (Marine Safety) Regulation* 1995 (Qld) requires registration in Queensland "unless the owner has a reasonable excuse" – whether "reasonable excuse" limited to excuses based on mistakes of fact alone or whether it could be based on mixed mistakes of law and fact – where conduct of Queensland inspectors arguably represented that requirements of Queensland legislation had been complied with – whether this amounted to a representation which engendered a reasonable belief that appellant's vessel was sufficiently registered

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – SUMMARY JUDGMENT – where respondent obtained summary judgment against appellant – whether the appellant had no real prospect of succeeding on its claim

Marine Insurance Act 1909 (Cth), s 47, s 39(3)
Transport Operations (Marine Safety) Act 1994 (Qld), s 3, s 56, s 57(1)
Uniform Civil Procedure Rules 1999 (Qld), r 293
Transport Operations (Marine Safety) Regulation 1995 (Qld), reg 37(1)(a), reg 38

Doak v Weekes (1986) 82 FLR 334, followed
Taikato v The Queen (1996) 186 CLR 454, followed

COUNSEL: D R M Murphy for the appellant
S C Derrington for the respondent

SOLICITORS: Woodward Lawyers (Coolangatta) for the appellant
Barry & Nilsson for the respondent

[1] **DAVIES JA**: I agree with the reasons for judgment of Williams JA and with the orders he proposes.

[2] **WILLIAMS JA**: The appellant sued the respondent and others consequent upon the loss at sea of the fishing vessel "Tom Dooley" owned by the appellant; the respondent had issued a policy of marine insurance covering the vessel. The respondent raised a number of issues in its defence, and in particular a defence based on s 47 of the *Marine Insurance Act* 1909 (Cwth). That section provides that there is an implied warranty in a contract of marine insurance "that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner". Section 39(3) of that Act provides that such a warranty "is a condition which must be exactly complied with, whether it be material to the risk or not". The respondent contended that the appellant was in breach of the statutory warranty, and that in consequence of s 39(3) thereof it was "discharged from liability as from the date of the breach of warranty".

[3] The "Tom Dooley" was not registered pursuant to the provisions of the *Transport Operations (Marine Safety) Act* 1994 (Qld) and it was the contention of the respondent that that constituted a breach of the implied warranty. Section 56 of the Queensland Act provides that a "regulation may require the owner of a ship to register the ship" and then s 57(1) thereof provides that the "owner … of a ship must not operate the ship if the ship is required to be registered, but is not registered". Regulation 37(1)(a) of the *Transport Operations (Marine Safety) Regulation* 1995 relevantly provides that for the purposes of ss 56 and 57 of the Act "all ships operating in Queensland waters owned … by … an individual whose place of residence, or principal place of residence is in Queensland" must be registered under the provisions of the Queensland legislation.

[4] It was not disputed that the "Tom Dooley" was owned by the appellant, who was a resident of Queensland, and was operating in Queensland waters; it was therefore a ship required to be registered pursuant to the Queensland legislation. There was also no challenge in this court to the correctness of the reasoning of Ryan J in *Doak v Weekes* (1986) 82 FLR 334, wherein his Honour held that there was a failure to carry out the adventure in a "lawful manner" within in the meaning of the implied warranty in s 47 of the Commonwealth Act, where an owner knowingly sent a vessel to sea with a crew which did not hold a certificate of competency required by Regulation 8 of the *Navigation (Manning of Fishing Vessels) Regulations* 1974. In accordance with the reasoning in that case it would also be a failure to carry out the adventure in a "lawful manner" within s 47 of the Commonwealth Act where an owner knowingly operated a vehicle in Queensland waters without it being registered pursuant to the Queensland legislation and where that legislation required it to be registered.

[5] Essentially Regulation 38 of the Queensland Regulations requires the owner of a vessel whose place of residence is in Queensland and whose vessel is operating in Queensland waters to register the ship "unless the owner has a reasonable excuse".

[6] As already noted the respondent delivered a defence asserting that it had been discharged from liability under the policy in question because of breach of the warranty. The respondent then took the step of applying for summary judgment pursuant to Rule 293 of the Uniform Civil Procedure Rules. That necessitated the respondent satisfying the court that the appellant had "no real prospect of succeeding" on its claim seeking recovery under the insurance policy. On the hearing of that application the appellant contended that at least there was a triable issue with respect to his assertion that he had "reasonable excuse" for not registering the vessel. The appellant's contentions were rejected by the learned District Court judge hearing the application, and it is from that decision that this appeal is brought.

[7] The appellant's material prima facie discloses that:

(a) the vessel was registered in the Register of Ships pursuant to the *Commonwealth Shipping Registration Act* 1981, even though because of its length it was not required to be;

(b) at all material times the vessel was under survey with the Maritime Services Board of New South Wales (or its successor the Waterways Authority) and was registered in that State under New South Wales legislation.

[8] The affidavit of the appellant relied on in defence of the application for summary judgment contained the following:

> "In the normal course of my operation of the boat from Southport over the period from 1989 to 1997 officers of the Queensland Boat Patrol and from Queensland Transport would regularly attend the Southport Wharf where the boat was normally moored, to check vessel survey and registration. Once I showed the officers my Waterways Authority Permit the officers would acknowledge to me that I was in survey and they would confirm that they were satisfied my boat complied with the Regulations by saying to me at the end of their inspection words to the effect that "You're okay Kevin. See you next time".
>
> Further if I was late in complying with any defects listed issued by Waterways on survey, I would initially receive a notice in writing from Waterways advising that unless the defects list was complied with, that Authority would notify Queensland Transport that my vessel was no longer in survey. The boat was in survey and all defects lists complied with at the time the boat was lost at sea in August 1997".

[9] The appellant contends that the conduct of the inspectors and others responsible for administering the Queensland legislation in those circumstances amounted to a representation which engendered in his mind a reasonable belief that he was not obliged to take any further steps in order to operate the vessel lawfully in Queensland waters.

[10] The real issue in the proceedings is whether or not the appellant had at the material time "reasonable excuse" for not registering the vessel. That expression does not have a universal meaning, and it must be considered in the light of the particular legislation in which it is used.

[11] The phrase was considered by the High Court in *Taikato v The Queen* (1996) 186 CLR 454. The court was there concerned with a provision of the New South Wales *Crimes Act* which made it an offence for a person to possess in a public place anything capable of discharging by any means any irritant, powder, gas or chemical. It was a defence to a charge under that provision that the person had "a reasonable excuse for possessing it or possessed it for a lawful purpose". Brennan CJ, Toohey, McHugh and Gummow JJ considered the meaning of "reasonable excuse" at 464-5. The following extracts from their reasoning are instructive for present purposes:

> "The term "reasonable excuse" has been used in many statutes and is the subject of many reported decisions. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception. One purpose of s 545E is to protect the public from the use of certain dangerous weapons which are analogous to, but not as dangerous as, guns. It strikes at the person who goes into a public place armed with such a weapon. To achieve this purpose it uses language which arguably captures some pharmaceutical and domestic items that are most unlikely to be used to cause harm to members of the public even when they are carried

> in a public place. Without a defence of reasonable excuse or lawful purpose the reach of the section would be intolerable in a free society. … Plainly, a person has a reasonable excuse for possessing a prohibited weapon in a public place if the person is carrying it to surrender it to police officers or other relevant authorities. … It is hardly to be supposed that in enacting s 545E the legislature intended that criminals, hoodlums or members of street gangs should be free to carry the prohibited weapons in public places because they had a well-founded fear of attacks from other criminals, hoodlums or street gangs. … Such an excuse would merely defeat the object of s 93G. … That means that, under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing".

[12] The cases footnoted to that passage as being cases in which the expression "reasonable excuse" has been considered do not assist further for present purposes.

[13] The objectives of the *Transport Operations (Marine Safety) Act* 1994 are set out in section 3; the principal objective spelt out in subsection (1)(a) is "regulating the marine industry to ensure marine safety". Then in subsection (2)(b) thereof the legislation speaks of establishing a system under which:

> "(i) marine safety and related marine operational issues can be effectively planned and efficiently managed; and
> (ii) influence can be exercised over marine safety and related marine operational issues in a way that contributes to overall transport efficiency; and
> (iii) account is taken of the need to provide adequate levels of safety with an appropriate balance between safety and cost."

[14] Subsection (3) refers to "imposing general safety obligations to ensure seaworthiness". Interestingly subsection (4) provides that "a ship may be taken to sufficiently comply with the general safety obligation even though a Certificate of Survey has not been issued for the ship." Thus it is clear that the "purpose" of the Act, and that includes the registration provisions, is to regulate marine safety.

[15] The paragraphs quoted above from the affidavit of the appellant were not challenged in any way. Prima facie those paragraphs establish that Queensland Boat Patrol inspectors on sighting the documentation from New South Wales with respect to the "Tom Dooley" considered that all safety requirements pursuant to Queensland legislation had been satisfied. In other words, prima facie there was an arguable representation that the owner of the vessel had complied with all the relevant requirements of the Queensland Act.

[16] During argument on the appeal there was debate as to whether "reasonable excuse" was limited to excuses based on mistakes of fact alone, or whether such an excuse could be based on mixed mistakes of law and fact. On its face Regulation 38 is not limited to mistakes of fact, as, for example, is section 24 of the Criminal Code. It

was generally agreed that if an owner read the Queensland Act and, without more, wrongly concluded that it did not apply to him, whereas in law it did, that would not afford the owner "reasonable excuse" for failure to register. That accords with the principle that ignorance of the law is no excuse: cf. section 22 of the Criminal Code. But this was not such a case. The appellant's contention, as it was refined during argument in this court, can be stated as follows: The appellant has complied with a system of registration which is as stringent as the system of registration provided under the Queensland legislation. Inspectors acting pursuant to and with the intent of enforcing the Queensland legislation have over a number of years inspected the appellant's vessel and sighted survey and registration papers issued by the New South Wales Waterways Authority with respect to it. They then indicated that the vessel satisfied the requirements of the Queensland legislation for a vessel operating out of a Queensland port. In those circumstances the appellant reasonably believed that he did not have to do more in order to comply with the Queensland legislation, and in consequence he had "reasonable excuse" for not registering the vessel under the Queensland Act.

[17] To the extent that such formulation involves the appellant operating under a mistake of law, I can see no valid reason for concluding that, because of that, there could not be a finding that he had "reasonable excuse" for not registering the vehicle.

[18] Whether or not the appellant had a reasonable belief that it was sufficient for him to have the vessel in survey and registered pursuant to New South Wales law, and not registered pursuant to the Queensland statute, will be a question to be resolved at trial. Given relevant findings of fact it will then be necessary for the trial court to determine whether those facts amount to "reasonable excuse" for not registering the vessel under the Queensland legislation. The material before the learned judge at first instance did, in my view, raise such issues as meant that it could not be said that the appellant had "no real prospect of succeeding" on its claim. If "reasonable excuse" was found it may follow there was no breach of the implied warranty; again that issue can only be addressed in the light of facts found at trial. It follows that the learned judge at first instance erred in reaching the conclusion which he did. The matter should go to trial.

[19] The orders of the court should therefore be: Appeal allowed, set aside the judgment in favour of the respondent with costs and in lieu thereof order that the application be dismissed with costs to be assessed. The respondent should pay the appellant's costs of the appeal to be assessed.

[20] **ATKINSON J:** I agree with the orders proposed by, and the reasons of, Williams JA.