SUPREME COURT OF QUEENSLAND

CITATION:	*Ocean Harvester Holdings P/L v MMI General Insurance Ltd* [2004] QCA 41
PARTIES:	**OCEAN HARVESTER HOLDINGS PTY LTD** ACN 075 521 416 (plaintiff/appellant) **v** **MMI GENERAL INSURANCE LTD** ACN 000 122 850 (defendant/respondent)
FILE NO/S:	Appeal No 8078 of 2003 SC No 863 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	27 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2004
JUDGES:	McMurdo P and Davies JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	INSURANCE – MARINE INSURANCE – RISKS – NATURE OF RISKS COVERED – where appellant's vessel sank – plaintiff alleges this was due to 'accident' within terms of its policy – where evidence of scuttling – whether plaintiff proved loss caused by 'accident' EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY - ONUS OF PROOF – GENERAL RULE - where respondent alleges scuttling – where burden of proof lies – whether respondent if unable to positively prove scuttling may still succeed if plaintiff unable to prove loss caused by accident *Marine Insurance Act* 1909 (Cth), Sch 2 *Craig v Associated National Insurance Co Ltd* [1984] 1 QdR 209, distinguished *Winter v Weekes* (1989) 5 ANZInsC 60-896, considered

COUNSEL: A J Moon for the appellant
R J Douglas SC for the respondent

SOLICITORS: Roberts Nehmer McKee for the appellant
McCullough Robertson for the respondent

[1] **McMURDO P:** The appellant is the owner of the trawler, *Ocean Harvester*, which was lost with its equipment when it took on water and sank in the early morning of 3 September 2000 in waters near Keeper Reef. The appellant brought an action in the Supreme Court at Townsville against the respondent claiming $276,550 under a contract of insurance, which relevantly provided that the respondent would indemnify the appellant for loss or damage to the boat caused by accident.[1] The learned primary judge was not satisfied that the appellant established the *Ocean Harvester* was lost by accident and dismissed the appellant's claim. The appellant now appeals from that decision.

[2] It was common ground that the *Ocean Harvester* sank and that the appellant carried the onus of proving that the loss was by accident. The respondent, however, alleged that the sinking was no accident but that Wade Kerr, the sole director of the appellant and skipper of the *Ocean Harvester*, deliberately caused the vessel to sink, acting in concert with Craig Thompson, the skipper of the *Shackrali*, another trawler in the vicinity of Keeper Reef at the time the *Ocean Harvester* went down. Unsurprisingly, the contract of insurance excluded the respondent from liability in such circumstances.[2]

[3] The appellant's case was that it did not know what caused the vessel to sink; Kerr and Thompson gave evidence of its unexpected and unplanned sinking. The respondent advanced a positive case of scuttling; led evidence of motive, claiming the appellant was in financial difficulties; and called direct evidence of the scuttling from Mr Dobbins, a deckhand on the *Shackrali*.

[4] The learned primary judge found that the appellant was conducting a profitable fishing business, paying a wage to Kerr and a small wage to his wife and was meeting its obligations; his Honour did not find any strong evidence of motive arising from adverse financial circumstances and described the evidence as far from compelling.[3]

[5] His Honour reviewed the evidence of Kerr, Thompson and Dobbins, who were each present when the Ocean Harvester commenced to take water at about 2.30am and sank around 5am. Both Kerr and Thompson denied that they acted in concert to scuttle the vessel. They rejected the claim later made by Dobbins in evidence that, after transferring frozen catch and other property including a computer from the *Ocean Harves*ter to the *Shackrali*, they passed a line from the *Shackrali* under the *Ocean Harves*ter and attached it to its port side and that Thompson then reversed the *Shackrali* so as to pull the port side of the *Ocean Harvester* down into the water, causing it to sink.

---

1 Contract of insurance, cl 9.2(a); "Accident" is defined as "an unforeseen and unintended happening which caused loss or damage.": cl 7.1.

2 Above, cl 9.5(d) and cl 13.1(g); see also s 61(2) *Marine Insurance Act* 1909 (Cth).

3 Reasons for judgment, [63]-[65].

[6] His Honour found that whilst Kerr's evidence was not inherently implausible or illogical, he shifted his ground in explanations given on three occasions as to why he failed to attempt to use the forward 240V pump;[4] of the three witnesses he was the least impressive and had an obvious interest in the matter; his Honour was not prepared to prefer the evidence of Kerr to that of Dobbins. His Honour was impressed with the evidence of both Thompson and Dobbins who gave opposing accounts and noted that Dobbins' evidence "had an undeniable cogency and credibility".[5] His Honour determined that the appellant on whom the burden of proof lay had not discharged its onus in establishing accident but given the serious nature of the respondent's allegations against the appellant to which Thompson was said to be a party, his Honour was not prepared to reach a positive conclusion that the vessel had been deliberately scuttled.

[7] There is no appeal from any of his Honour's findings of fact.

[8] The appellant contends that as the respondent failed to affirmatively satisfy the court that Kerr and Thompson scuttled the vessel, his Honour was obliged to conclude the vessel sank by accident. His Honour rejected that contention and held that whilst the evidence of scuttling was insufficient to positively prove that claim, it was sufficient to prevent the appellant from establishing accident, relying on a number of cases which dealt with ships lost "by perils of the sea": *Itobar Pty Ltd v Mackinnon and Commercial Union Assurance Co plc*;[6] *Doak v Weekes*;[7] *Jeffrey v Associated National Insurance Co Ltd*;[8] *Rhesa Shipping Co SA v Edmunds & anor*[9] and *La Compania Martiartu v The Corporation of the Royal Exchange Assurance*.[10] Whilst recognising that these cases all 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.

[9] The appellant contends that because the expression "perils of the sea" was not used in the insurance policy it should not be construed as if the words were used; whilst the ordinary action of the wind and waves is excluded from the meaning of "perils of the sea" under Sch 2 *Marine Insurance Act* 1909 (Cth), there is no reason why the ordinary action of the wind and waves should be excluded from the meaning of "accident" in this contract of insurance; once it established that the insured vessel at the relevant time was seaworthy and that it sank because it took on water, it satisfied its onus of establishing that the loss was by accident under the contract of insurance. If the respondent wished to avoid liability by asserting that the event was not an accident but by scuttling, then, the appellant contends, the onus of proof was on the respondent to do that.

[10] The appellant concedes that the balance of authority referred to by his Honour and set out earlier in these reasons[11] does not support its contention but places reliance upon the decision of Carter J in *Craig v Associated National Insurance Co Ltd*[12] which distinguished the onus of proof in cases of perils of the sea from an allegation

---

4 Above, [131].
5 Ibid, [144], [148].
6 (1984) 3 ANZInsC 60-610, 78-719 and 78-720.
7 (1986) 82 FLR 334, 346.
8 [1984] 1 QdR 238, 246.
9 [1985] 2 AllER 712.
10 [1923] 1 KB 650.
11 At [8].
12 [1984] 1 QdR 209.

of arson. *Craig* is neither analogous nor of assistance; the insured there was required to establish the loss was caused by fire, not accidental fire; he did so and it was then 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.

[11] The appellant also places reliance on the obiter comments of Perry J in *Winter v Weekes*[13] questioning the accepted principle that allows a marine insurer to avoid liability by merely raising a plea of scuttling which it is unable to prove on the balance of probabilities. 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 of accident.

[12] The appellant's submissions are misconceived. 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 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 Royal Exchange Assurance*;[14] *Compania Naviera Vascongado v British and Foreign Marine Insurance Co Ltd (The Gloria)*;[15] *Northwestern Mutual Life Insurance Co v Linard Edinburgh Assurance Co (The "Vainqueur")*[16] and *Regina Fur Company Ltd v Bossom*.[17] 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[18]), but each case will turn on the strength of the evidence called in it. The learned primary judge's reasoning here was unimpeachable.

[13] It follows that the appeal should be dismissed with costs.

[14] **DAVIES JA:** I agree with the reasons for judgment of McMurdo P and with the order she proposes.

[15] **MACKENZIE J:** I agree with the order proposed by the President for the reasons she gives.

---

13 (1989) 5 ANZInsC 60-896, 75-707.

14 [1923] 1 KB 650, 657, approved in *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375, 391-392.

15 [1936] 54 LlR 35, 50-51.

16 [1974] 2 LlR 398, 402-403.

17 [1958] 2 LlR 425, 434.

18 See r 166, especially (4) and (5).