SUPREME COURT OF QUEENSLAND

CITATION:	*Dibb v CGU Insurance Ltd* [2004] QCA 29
PARTIES:	**RAYMOND DIBB** (appellant/applicant) v **CGU INSURANCE LIMITED** ACN 004 478 371 (respondent/respondent)
FILE NO/S:	Appeal No 9026 of 2003 DC No 978 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	17 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2004
JUDGES:	McMurdo P, Davies JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal refused with costs to be assessed.**
CATCHWORDS:	INSURANCE - GENERAL - POLICIES OF INSURANCE - CONSTRUCTION - application for leave to appeal under s 118 *District Court Act* 1967 - where applicant tried to claim legal costs of $16,324.27 incurred over a period of time from his insurance policy - where policy was limited to the relevant "period of insurance" - whether claim of legal costs came within the scope of the insurance policy
COUNSEL:	The applicant appeared on his own behalf C Jennings for the respondent
SOLICITORS:	The applicant appeared on his own behalf Hunt & Hunt for the respondent

DAVIES JA: This is an application for leave to appeal from a judgment of the District Court on 12 September 2003 dismissing an appeal by the applicant from a decision of the Magistrates Court on 10 March 2003. The applicant's claim against the respondent was for $16,324.27 with interest pursuant to a home and contents insurance policy issued by the respondent to the applicant and his wife.

I should say at the outset that the facts that this matter involves a claim for only a little over $16,000 and that the applicant has already had one appeal are facts which tend against a grant of leave to appeal to this Court. In such circumstances this matter would need to have some unusual feature otherwise justifying leave.

It is necessary to say something about the facts and issues in the case in order to determine whether that is so. The applicant's employment was terminated by his employer on 12 August 1996. As a consequence of that termination he commenced proceedings against his employer in the Queensland Industrial Relations Commission in September 1996. He also commenced proceedings in the Federal Court on 12 February 1999 against his employer arising out of that termination.
On 10 April 1997 the applicant and his wife entered into an insurance contract with the respondent in respect of their house and contents. That policy was then renewed from year to

year. During the first period of insurance, in February 1998, the applicant and his wife were advised by the respondent that the policy would thenceforth include a legal costs and expenses benefit in the following terms:

> "We will pay legal costs and expenses you are liable to pay following legal proceedings brought by you, or against you, in Australia. You must advise us of any legal proceedings brought by you or against you. We will only pay claims notified to us during the period of insurance shown on your most recent schedule. We will only pay the legal costs and expenses incurred with our consent. The most we will pay during any one period of insurance is $5,000.
>
> We will not pay legal expenses relating to
>
> ...
>
> - any matter arising out of your business or profession."

The applicant and his wife renewed the policy with that term in it on 10 April 1998. He says that from 13 April 1998 he began to incur legal costs and expenses relating to his claim in the Queensland Industrial Relations Commission. I have a little difficulty in seeing why legal expenses were not incurred from September 1996 when he commenced proceedings, but it is unnecessary to consider that question further.

The applicant and his wife renewed the policy again on 10 April 1999. From 12 July 1999 the applicant says he commenced incurring legal costs and expenses in relation to the Federal Court action. That action apparently also joined

as defendant a superannuation fund for alleged improper rejection of the applicant's nomination as a fund director in October 1998.

In April or May 2001 these legal actions were settled. In the meantime the applicant and his wife had continued to renew the house and contents policy and did so again on 10 April 2001.

By letter dated 28 June 2001 the applicant requested the respondent to indemnify him for legal costs incurred in the legal proceedings to which I have referred.

The policy is a standard buildings and contents policy. Under the heading "What is Insured?" appears the following:

> "Your buildings and/or contents as set out in your schedule are insured if they are destroyed, lost or damaged. They are insured only if you own them, or are liable for them.
>
> If you only insure buildings, the cover provided for destruction, loss or damage does not apply to contents.
>
> If you only insure contents, the cover provided for destruction, loss or damage does not apply to buildings.
>
> Your buildings and contents are insured while at your situation.
>
> Cover for your contents while away from your situation is not provided unless we say so.
>
> We will cover your buildings and contents for any accidental damage or accidental loss including that caused by:
>
> ..."

After that there follow a number of specific inclusions. The policy then states that it will not cover building and contents or accidental damage or accidental loss by other specified clauses. It then provides for additional things which the insurer will pay for when buildings have been insured and additional things which it will pay for when contents have been insured. These are dealt with in Sections 1 and 2 of the policy.

Under the heading "What Section 1 and Section 2 of the Policy do NOT Cover", Section 1 being building and contents, to which I have referred, and Section 2 being valuable items, appears the following:

> "We will not pay claims for loss, damage or liability arising from ...
>
> - any event that does not occur within the period of the insurance..."

Before the learned District Court judge and in this Court the respondent has submitted that for any of four reasons the claim must fail and so must this application. I should set those reasons out. They are:

1. The phrase "legal costs and expenses" must be read in context, namely in an insurance policy for accidental damage to a home or its contents. So read, it was

submitted, the object of the policy in this respect was to insure against legal expenses relating to any accident causing damage to either the insured's home or its contents;

2. Relies on the provisions which I have already set out that the insurer will not pay claims arising from "any alleged or actual act or omission ... prior to the commencement of the policy" or "any event that does not occur within the period of insurance". It was submitted that the event from which the applicant's liability for legal costs arose was the termination of his employment on 12 August 1996 and that this was prior to both "the commencement of the policy" and "the period of insurance" in which the claim was made;

3. Relies on the exclusions of "any matter arising out of your business or profession" and "arising from any ... business, profession, trade or occupation carried on by you". It was submitted that the claim came within this exclusion because it resulted from the alleged wrongful termination of the applicant's occupation; and finally -

4. Relies on the requirement that the insured persons "advise [the respondent] of any legal proceedings brought" by them and the provision that the respondent "will only pay the legal costs and expenses incurred with our consent". The failure to so advise and to obtain such consent, it was submitted, disentitled the applicant

from recovery. Section 54 of the Insurance Contracts Act 1984 may have been relevant to a consideration of this contended for a reason.

The learned District Court judge to whom these submissions were made did not find it necessary to deal with all of them for he took the view that either the second or the third of those reasons was alone sufficient to exclude liability. The learned magistrate specifically rejected the applicant's claim for the first of the reasons I have set out, although he added that he accepted all of the arguments advanced by the respondent, whatever that may mean.

In his written outline the applicant has criticised the learned District Court judge for not deciding whether the magistrate was correct in the specific reason which he gave for dismissing the claim. That is to misunderstand the nature of an appeal. It is against a decision, the decision to dismiss the claim, not against reasons.

An appellate court may therefore affirm the decision the subject of an appeal to it on some basis other than that on which it was decided in the first instance. This is, of course, subject to adequate opportunity being given to argue the point on which the appellate court later decides and subject in a case in which pleadings have been filed to the

basis upon which the court decides being within the scope of the pleadings.

The appellant says in his oral submissions today that he was not given such an opportunity. Whether that is so or not and given the nature of the basis upon which the learned District Court judge decided and on which, I think, he was correct in so deciding, I do not think that that is of great significance. The applicant was, in any event, given a full opportunity to argue the point in this Court. But the point really is, it seems to me, that, at least in his written outline, the applicant has misconceived the function of a court on appeal.

In his oral submissions to this Court the applicant appears to accept that position, as I have outlined, although that is not entirely clear from the way he argued the matter before us.

The learned District Court judge said correctly that there was a series of yearly policies of insurance running from 10 April 1997. When the policy referred to an event not occurring within the period of insurance, it was referring to an event not occurring within the yearly period of insurance in which the claim was made. The question then is whether the event from which the applicant's liability for costs arose occurred outside that period of one year commencing on

10 April 2001.

If leave were granted the applicant would seek to argue that the event which gave rise to his liability to pay costs was the incurring of those costs. That argument, in my opinion, would conflate the event from which the liability arises with the actual occurring of that liability. It simply does not make sense.

The event within the meaning of the provision must be either the termination of the applicant's employment, which as I have said occurred on 12 August 1996, or the commencement of the proceedings from which liability to pay costs arose, which occurred in the Queensland Industrial Relations Commission in September 1996 and in the Federal Court on 12 July 1999. None of these dates was within the period of insurance commencing on 10 April 2001.

Like his Honour I think that for that reason alone the applicant's claim was bound to fail. It is therefore unnecessary to consider the other bases upon which the respondent contended that the claim must fail, because if leave were granted any appeal would be bound to fail. I would refuse the application.

The question as I have described it involved no complex matter of law nor was it one of general importance, nor does it possess any of the other characteristics which might attract a grant of leave to appeal to this Court. Moreover, as I have already mentioned, it involved a total sum of only a little over $16,000 and the applicant has already had one appeal. For those reasons, in my opinion, it may well have been sufficient to refuse leave to appeal without further considering any of these substantive questions.

For my own part I would not like it thought that the fact that I have considered and expressed an opinion on the substantive questions in this case means that I would do so in any future application for leave to appeal in a case of this kind. It follows from the conclusions which I have reached that the applicant must pay both the costs already ordered to be paid and the respondent's costs of this application.

THE PRESIDENT: I agree. I would only add that the appellant has contended that even if he were unsuccessful in this application he should at least not have any costs orders made against him here and in the District Court because it was the deficiency of the Magistrate's reasons that necessitated his appeal. That submission is without merit and I agree with the orders proposed by Justice Davies.

MACKENZIE J: I agree with the orders proposed by Justice Davies for the reasons given by him.

THE PRESIDENT: The application for leave to appeal is refused with costs to be assessed.