SUPREME COURT OF QUEENSLAND

CITATION:	*Prime Infrastructure (DBCT) Management P/L v Vero Insurance Ltd & Ors* [2005] QCA 369
PARTIES:	**PRIME INFRASTRUCTURE (DBCT) MANAGEMENT PTY LIMITED** ACN 097 698 916 (applicant/respondent) **v** **VERO INSURANCE LIMITED (FORMERLY KNOWN AS ROYAL AND SUN ALLIANCE INSURANCE AUSTRALIA LIMITED)** ACN 005 297 807 (first respondent/first appellant) **AMERICAN HOME ASSURANCE COMPANY** ARBN 007 483 267 (second respondent/second appellant) **ZURICH INSURANCE AUSTRALIA LIMITED** (third respondent/third appellant) **QBE INSURANCE (AUSTRALIA) LIMITED** ACN 003 191 035 (fourth respondent/fourth appellant)
FILE NO/S:	Appeal No 9690 of 2004 SC No 8009 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2005
JUDGES:	McMurdo P, Jerrard JA and Mullins J Separate reasons for judgment of each member of the Court, McMurdo P and Mullins J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	INSURANCE - GENERAL - POLICIES OF INSURANCE - CONSTRUCTION - respondent insured under an Industrial Special Risks Insurance Policy issued by the appellants - one of respondent's machines collapsed causing damage to machine and other machinery - parties in a statement of facts agreed the collapse of the machine was initiated by the final severing of an internal fatigue crack in a defective weld in one of the machine's undercarriage legs which was the result of faulty workmanship at the time of its original construction

- policy of insurance contained 'Perils' exclusions - 'Perils' exclusions clause 4 included 'faulty workmanship' and 'gradual deterioration and developing flaws' - 'Perils' exclusions clause 4 contained proviso that 'this Exclusion ... shall not apply to subsequent loss, destruction of or damage ... occasioned by a peril (not otherwise excluded) resulting from any event or peril referred to in this exclusion' - respondent applied for a declaration the appellants were liable to indemnify it under the policy for approximately $8M for the cost of repairing the machinery - primary judge found the application of the proviso did not require two separate causes and would apply where there was subsequent damage that was not excluded by a term of the policy other than 'Perils' exclusions clause 4 - application granted on two alternative bases - first that the damage was subsequent in time and effect to the failure of the defective weld and not otherwise excluded by the policy - second that if 'peril' were interpreted as 'danger' the damage occasioned by the faulty workmanship resulted in the peril that loss of structural integrity would lead to a failure of the entire structure and once that eventuated it caused subsequent damage not otherwise excluded by the policy - whether the primary judge erred in determining that the phrase 'occasioned by a peril (not otherwise excluded)' did not encompass the exclusions in the 'Perils' exclusions clause 4 - whether the primary judge erred in determining the meaning of 'peril' - whether there was subsequent damage to bring into effect the proviso to 'Perils' exclusions clause 4

Acme Galvanizing Co Inc v Fireman's Fund Insurance Company (1990) 221 Cal App 3d 170; 270 Cal Rptr 405, considered
Chadwick v Fire Insurance Exchange (1993) 17 Cal App 4th 1112; 21 Cal Rptr 2d 871, considered
Chalmers Leask Underwriting Agencies v Mayne Nickless Limited (1983) 155 CLR 279, considered
Hamilton, Fraser & Co v Pandorf & Co (1887) 12 App Cas 518, considered
L'Union Des Assurances de Paris Iard v Sun Alliance Insurance Ltd (1995) 8 ANZ Ins Cas ¶61-240, considered
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579, applied
Mercantile Mutual Insurance (Aust) Ltd v Rowprint Services (Victoria) Pty Ltd [1998] VSCA 147, cited
Ranicar v Frigmobile Pty Ltd [1983] Tas R 113, considered
R v Zischke [1983] 1 Qd R 240, considered
Skandia Insurance Co Ltd v Skoljarev (1979) 142 CLR 375, considered
Switzerland General Insurance Co Ltd v Lebah Products Pty Ltd (1982) 2 ANZ Ins Cas ¶60-498, cited
Wilkie v Gordian Runoff Ltd [2005] HCA 17; (2005) 79 ALJR 872, applied

COUNSEL:	D J S Jackson QC, with W Harris, for the appellants D B Fraser QC for the respondent
SOLICITORS:	Minter Ellison for the appellants Freehills for the respondent

[1] **McMURDO P:** At the Dalrymple Bay Coal Terminal, located at Hay Point north of Mackay, coal mined in Central Queensland is stockpiled prior to its loading on ships for export. The respondent is the lessee of the terminal and the owner of the terminal's structures and machinery. The respondent's conveyor belts carry the coal from the stockpile along a jetty to a wharf where the coal is mechanically loaded into the holds of cargo ships. Very large machines called reclaimers lift the coal from the stockpile onto the conveyer belts. The respondent is also the insured under an Industrial Special Risks Insurance Policy ("the policy") issued by the appellant insurance companies for the period 30 June 2003 to 1 September 2004 in respect of loss or damage to the respondent's property at the terminal. On 15 February 2004 one of the respondent's reclaimers collapsed onto two conveyer belts and the reclaimer and belts were extensively damaged.

[2] The respondent sought and obtained a declaration from the primary judge that the appellants were required to indemnify it under the policy for approximately $8M for the cost of repairing the reclaimer and conveyer belts. The appellants appeal from that order contending that the learned primary judge erred in construing the terms of the policy.

The relevant agreed facts

[3] For the purposes of the primary proceedings, the parties through their lawyers signed a statement of agreed facts which, in addition to those already mentioned, included the following.

[4] The collapse of the reclaimer was initiated by the final severing of an internal fatigue crack in a defective weld in one of the reclaimer's undercarriage legs. This was the result of faulty workmanship at the time of the original construction or assembly of the reclaimer.[1] Over time this crack grew progressively, detaching connections between the top flange of the leg box from an internal diaphragm. Immediately prior to the accident, the crack had effectively totally severed this connection.[2] With the stabilizing influence of this welded connection removed, the leg structure then buckled, causing the undercarriage to begin to collapse downwards. The resulting motion of the undercarriage rotated the entire superstructure of the reclaimer backwards, elevating the bucketwheel boom. The boom then continued to travel upwards reaching an angle of about 80 degrees to the horizontal before descending again and finally hitting the ground.[3] The major damage to the undercarriage, the bucketwheel boom and associated conveyer, the yard conveyers, and many other components of the reclaimer was caused during the collapse process, subsequent to the ultimate failure of the weld in the undercarriage leg.[4]

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1 Agreed Statement of Facts, 14.1.
2 Above, 14.2.
3 Above, 14.3.
4 Above, 14.4.

[5] The first overtly observable event in the sequence of events in the collapse of the reclaimer was a relatively sudden structural failure of the north-eastern leg of the undercarriage.[5] This was primarily caused by the progressive fatigue cracking of the weld attaching the internal diaphragm at the knee of the north-eastern leg to the adjacent flange. This cracking developed over a relatively long period of time, starting at a weld defect or at several defects and growing progressively larger as the weld was loaded and unloaded in response to cyclical stresses during normal operation of the reclaimer. The developing fatigue crack accelerated as it grew longer. The crack grew quite rapidly immediately before its ultimate failure[6] by which time the fatigue crack had effectively detached the internal diaphragm from the top flange of the leg box over an area of about 1100 mm leaving the diaphragm attached to the flange only at its ends.[7] The fatigue crack developed into a rapid ductile (tearing) fracture and the welds at the end of the diaphragm and along the sides of the top flange progressively failed by ductile fractures as the machine slewed towards its final slew angle of 37 degrees.[8] As the reclaimer's boom rose vertically to 3.1 degrees, loads on its north-eastern leg increased progressively. The reclaimer slewed anti-clockwise towards its pre-accident position placing near maximum loads on the leg of the reclaimer.[9] When the internal diaphragm connection severed, the top flange of the leg box became unstable and deflected upwards leading to a progressive failure of the adjacent welds and a total buckling failure of the reclaimer's leg structure.[10] The collapse of the reclaimer also caused damage to two conveyor belts.[11]

[6] After investigating the collapse of the reclaimer the respondent first learned of the risk of a weld defect inside the concealed box section of all reclaimer undercarriage legs. It arranged for inspections of its three remaining reclaimers at the terminal and discovered and repaired one similar weld deficiency. Had a like inspection and repair been effected on the collapsed reclaimer prior to 15 February 2004 the damage the subject of the respondent's claim (or at least most of it) would not have occurred.[12]

The relevant extracts from the Industrial Special Risks Insurance Policy

[7] The resolution of this appeal involves the construction of portions of the policy to which it is helpful to refer. In the preamble to the policy the insurers agreed " … subject to the terms, Conditions, Exclusions, … limitations and other provisions, contained herein or endorsed hereon, to indemnify the Insured … against loss arising from any insured events which occur during the Period of Insurance stated in the Schedule … ".

[8] Included in the schedule under the heading "Material Loss or Damage" is the following:

> "**The Indemnity**
> In the event of any physical loss, destruction or damage … not otherwise excluded happening at the Situation to the Property

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5 Above, 15(a).
6 Above, 15(b).
7 Above, 15(c).
8 Above, 15(d).
9 Above, 15(e).
10 Above, 15(f).
11 Above, 17.
12 Above, 16.

> Insured described in This Policy the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, indemnify the Insured …"

[9] The "Property Insured" is defined to be:

> "All real and personal property of every kind and description (except as hereinafter excluded) belonging to the Insured or for which the Insured is responsible …"

[10] The parties agree that the damaged reclaimer and conveyor belts were property insured by the policy and that the damage happened at the situation covered by the policy, namely the coal terminal.

[11] The policy contains two sets of exclusions, "Property Exclusions" and "Perils Exclusions", the latter of which is relevant here. The policy provides that "[t]he Insurer(s) shall not be liable under in respect of" the specified perils exclusions in cl 1 - cl 9. Whether the appellants must indemnify the respondent pursuant to the policy turns on the construction of the fourth of these perils exclusions and its proviso:

> "*The Insurer(s) shall not be liable under in respect of*:-
>
> …
>
> 4. *physical* loss, destruction or *damage occasioned by* or happening through:-
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> (a) moths, termites or other insects, vermin, rust or oxidation, mildew, mould, contamination or pollution, wet or dry rot, corrosion, change of colour, dampness of atmosphere or other variations in temperature, evaporation, disease, inherent vice or latent defect, loss of weight, change in flavour texture or finish, smut or smoke from industrial operations (other than sudden and unforeseen damage resulting therefrom)
>
> (b) wear and tear, fading, scratching or marring, *gradual deterioration or developing flaws*, normal upkeep or making good
>
> (c) error or omission in design, plan or specification or failure of design
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> (d) normal settling, seepage, shrinkage or expansion in buildings or foundations, walls, pavements, roads and other structural improvements, creeping, heaving and vibration
>
> (e) faulty materials or *faulty workmanship*
>
> *Provided that this Exclusion 4(a) to (e) shall not apply to subsequent loss, destruction of or damage to the Property Insured occasioned by a peril (not otherwise excluded) resulting from any event or peril referred to in this exclusion*." (my emphasis)

The primary judge's decision

[12] The learned primary judge acknowledged the parties' agreement that the weld which cracked and ultimately resulted in the collapse of the reclaimer was because of faulty workmanship so that perils exclusions cl 4 applied unless the damage came within its proviso.[13] His Honour identified that the words in the proviso "occasioned by or happening through" have a wide meaning.[14] His Honour referred

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13 *Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Limited & Ors* [2004] QSC 356; SC No 8009 of 2004, 14 October 2004, [12].

14 Above, [14].

to a number of cases where broadly similar provisos were construed but noted that none was of particular assistance.[15] His Honour considered that the proviso requires that perils exclusions cl 4 does not apply

"(i) to subsequent damage to the insured property
(ii) occasioned by a peril
(iii) not otherwise excluded
(iv) resulting from an event or peril referred to in exclusion 4."[16]

His Honour then considered the three questions arising namely:

"(i) What is subsequent damage?
(ii) What is meant by a peril which occasions the subsequent damage?
(iii) What is meant by the parenthesis '(not otherwise excluded)'?"[17]

[13] After considering the parties' arguments on these issues,[18] his Honour found that the meaning of "peril" in the proviso is loss or damage to the subject matter of the insurance policy and the circumstances in which that loss or damage occurred; a peril is not a cause.[19] The proviso does not require two separate causes (first faulty workmanship and then the peril) to cause subsequent loss. There need only be "an occasion" of subsequent loss, that is, the manner in which the subsequent loss occurred. If the proviso applies, the manner of the occurrence of the subsequent loss must not be excluded by a term of the policy other than perils exclusions cl 4.[20] The proviso does not require that subsequent damage be the result of two cumulative causes.[21] His Honour ultimately concluded that the proviso does not have three separate elements but expresses one composite notion. Here the damage occasioned by faulty workmanship must be followed by other different damage which must be a peril (that is, loss or damage) which occurs in circumstances that are not excluded because of some exclusion clause in the policy, other than perils exclusions cl 4.[22] His Honour considered that:

"… the meaning of the proviso is that it applies where there is damage to the insured property caused by faulty workmanship: there is subsequent damage, ie damage which follows the first damage in time and consequence; the means by which the subsequent damage occurs is not a means excluded from cover under the policy by an exclusion other than 4."[23]

[14] His Honour alternatively considered that "peril" ordinarily means danger, a contingency that some loss or damage will eventuate. If "peril" is given this meaning it follows that the proviso will operate if:

"(i) faulty workmanship results in a danger which, if it eventuates, will further damage the insured property;

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15 Above, [15] - [17].
16 Above, [19].
17 Above, [19].
18 Above, [20] - [38].
19 Above, [40].
20 Above, [40].
21 Above, [41].
22 Above, [41].
23 Above, [42].

> (ii) the danger does eventuate and it does so in a manner or by circumstances that are not excluded from the operation of the insurance policy by an exclusion other than 4;
> (ii) the damage which follows from the eventuation of the danger, the realisation of the contingency, in subsequent damage."[24]

[15] His Honour justified his making of the declaration, that the respondent was entitled to indemnity under the policy, on two alternative bases. First, his Honour determined that the faulty workmanship led to or occasioned the defective weld and the separation of the diaphragm and flange. Buckling of the leg structure and the collapse of the reclaimer were, however, all subsequent in time and effect to the failure of the defective weld. A proper distinction can be made between these two events. One part of the reclaimer was damaged through faulty workmanship (the separation of flange and diaphragm) and the other parts of the reclaimer were subsequently damaged resulting from that faulty workmanship. The policy in perils exclusions cl 4(e) prevents recovery for damage to that part of the leg structure, the flange and diaphragm which were joined by the weld, but the proviso meant that all subsequent damage to the reclaimer was covered by the policy.[25]

[16] Alternatively his Honour concluded that if "peril" in the proviso were interpreted as "danger" then there was damage to the reclaimer occasioned by or happening through faulty workmanship, namely the separation of the flange and diaphragm because of the weld failure. That damage resulted in the peril that the loss of structural integrity arising from that separation would lead to a failure of the entire structure of the reclaimer; once that danger eventuated, the leg of the reclaimer collapsed causing subsequent damage in a manner not otherwise excluded by the policy.[26]

[17] His Honour considered the position even clearer in respect of the damage to the conveyer belts which was subsequent to the faulty workmanship resulting in the failed weld and the collapse of the reclaimer and was not loss occasioned by a manner excluded by some other provision of the policy.[27]

The issue

[18] The faulty weld which ultimately caused the damage to the respondent's reclaimer and conveyor belts was occasioned by faulty workmanship,[28] so that, because of perils exclusions cl 4, the damage to the respondent's property is not covered by the policy unless it is within the proviso to perils exclusions cl 4.

The grounds of appeal

[19] The appellants contend that the learned primary judge erred in many ways but their principal contentions are in essence as follows. First, they submit that the words "occasioned by a peril (not otherwise excluded)" mean that the proviso does not apply to any exclusion in the policy, including those set out in perils exclusions cl 4. Second, they contend that his Honour erred in determining the meaning of "peril" in the proviso. They further contend that the damage to the reclaimer and conveyor

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24 Above, [43].
25 Above, [48] - [49].
26 Above, [50].
27 Above, [51].
28 The appellants also contend that the damage was occasioned by "gradual deterioration or developing flaws" under perils exclusions cl 4(b).

belts was not occasioned by a separate peril not otherwise excluded under the policy so that the proviso does not apply. The appellants' third contention is that all the damage relating to the insured property arose out of the faulty workmanship in the initial defective weld; for there to be subsequent damage, the damage must be separate and distinct; it was not and the proviso has no application. Alternatively they contend that if there was subsequent damage to the insured property occasioned by a separate peril resulting from faulty workmanship otherwise excluded under perils exclusions cl 4(e), then that damage was occasioned by a peril, namely gradual deterioration or developing flaws, which was otherwise excluded under the policy in perils exclusions cl 4(b).

Do the words in the proviso "(not otherwise excluded)" encompass the exclusions in perils exclusions cl 4?

[20] The appellants' first contention is that the damage to the respondent's property following the collapse of the leg of the reclaimer was occasioned by a peril which was "otherwise excluded" by perils exclusions cl 4, namely either gradual deterioration or developing flaws (perils exclusions cl 4(b)) or faulty workmanship (perils exclusions cl 4(e)) so that the proviso does not apply.

[21] Gleeson CJ in *McCann v Switzerland Insurance Australia Ltd*,[29] after observing that as a commercial contract a policy of insurance should be given a businesslike interpretation added:

> "Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses and the objects which it is intended to secure."[30]

These observations were recently approved by Gleeson CJ, McHugh, Gummow and Kirby JJ in *Wilkie v Gordian Runoff Ltd*.[31]

[22] Adopting that approach, the construction contended for by the appellants does not sit comfortably with a businesslike interpretation of the words in the proviso. The use of the words "… this Exclusion 4(a) to (e) shall not apply to … damage … occasioned by a peril (not otherwise excluded) resulting from any event or peril referred to in this exclusion" strongly suggests that "occasioned by a peril (not otherwise excluded)" refers to excluded perils under the policy other than those in perils exclusions cl 4. It seems a circular and improbable construction to find, as the appellants contend, that the proviso does not exempt damage from perils exclusions cl 4 if the damage has been occasioned by one peril in perils exclusions cl 4 resulting from another event or peril in perils exclusions cl 4. It is much more likely that, consistent with the observations of the New South Wales Court of Appeal (Sheller JA, Priestley and Handley JJA agreeing) in *L'Union Des Assurances de Paris Iard v Sun Alliance Insurance Ltd*[32] in construing a proviso to an exclusion clause in an insurance policy in broadly comparable terms, that such a proviso:

> "… is not intended to enable recovery for physical loss, destruction or damage caused by a peril which in the circumstances is excluded by *some other provision* in the policy." [33] (my emphasis)

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29 (2000) 203 CLR 579.
30 Above, 589.
31 [2005] HCA 17; (2005) 79 ALJR 872, in the joint judgment, [15] - [16].
32 (1995) 8 ANZ Ins Cas ¶61–240.
33 Above, 75,714.

[23] I consider that the words in the proviso "(not otherwise excluded)" do not encompass perils exclusions cl 4(a) to (e); the words in parenthesis relate to perils excluded by the policy other than in perils exclusions cl 4. Like the learned primary judge, I reject the appellant's contrary contention. My conclusion on this point also disposes of the appellants' alternative third contention.[34]

The meaning of "peril"

[24] The appellants contend that the learned primary judge erred in determining the meaning of "peril" in the proviso.[35]

[25] The Macquarie Dictionary defines "peril" as "exposure to injury, loss, or destruction; risk; jeopardy; danger". A "peril of the sea" has an established meaning in maritime insurance law, namely a fortuitous accident or casualty of the sea as opposed to the natural and inevitable action of wind and waves or ordinary wear and tear: *Skandia Insurance Co Ltd v Skoljarev*.[36] In *Hamilton, Fraser & Co v Pandorf & Co*,[37] Lord Halsbury LC observed in his speech that "peril" in maritime insurance law contemplates the idea "of something fortuitous and unexpected".[38] In the same case, Lord Bramwell observed in his speech:

> "What is the 'peril?' It is that the ship or goods will be lost or damaged … ".[39]

[26] His Honour relied on Lord Bramwell's comments and concluded that "peril" in the proviso means the loss or damage to the subject matter of the insured policy and the circumstances in which the loss or damage occurs, but considered that a peril is not a cause.

[27] In my view, adopting the *Gordian* approach to construction, the preferable meaning of "peril" in the proviso is to apply its ordinary meaning,[40] that is, an exposure to injury, loss or destruction, risk, jeopardy or danger. That meaning is also consistent with the meaning generally given to the term "peril" in the maritime insurance law cases to which I have referred. In my view, for the proviso to apply, there must be damage occasioned by a peril separate to the peril in perils exclusions cl 4.[41] Although this was not the meaning of "peril" in the proviso applied as a first preference by the primary judge, his Honour did concede it was an alternative meaning[42] and ultimately determined to make the declaration in favour of the respondent by an alternative reasoned path based on the ordinary meaning of "peril" with damage occasioned by a peril other than in perils exclusions cl 4. This means that the appellants will only succeed if they demonstrate some error in that alternative path.[43]

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34 Set out in these Reasons at [19].

35 Set out in these Reasons at [13].

36 (1979) 142 CLR 375.

37 (1887) 12 App Cas 518.

38 Above, 524.

39 Above, 526 - 527.

40 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 79 ALJR 872.

41 See *Acme Galvanizing Co Inc v Fireman's Fund Insurance Company* (1990) 221 Cal App 3d 170; 270 Cal Rptr 405, 411.

42 *Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Limited & Ors* [2004] QSC 356; SC No 8009 of 2004, 14 October 2004, [43]; see these Reasons [16].

43 See these Reasons at [14] and [16].

[28] It is useful to now state my view of the effect of the proviso to perils exclusions cl 4 giving its words their ordinary meaning in a commercial contract for insurance purposes. Perils exclusions cl 4 does not apply to damage to the insured property / occasioned by a peril not otherwise excluded in the policy[44] / which is both subsequent damage to the damage excluded in perils exclusions cl 4 / and also damage resulting from an event covered by perils exclusions cl 4. My construction of the proviso differs from his Honour's preferred construction which he bases on his preferred understanding of "peril" (which also differs from my construction of "peril"). It follows that the appellants will succeed in their appeal unless the damage to the insured property was caused by a peril not otherwise excluded under the policy[45] and the damage (which resulted from an event in perils exclusions cl 4) was subsequent damage to the damage excluded in perils exclusions cl 4.

[29] Very little in this proviso is entirely clear but it can also confidently be stated that the words "occasioned by or happening through" should be given a wide meaning to encompass a wide scope of causal relationships: *Switzerland General Insurance Co Ltd v Lebah Products Pty Ltd*,[46] cited with approval by Callaway JA in *Mercantile Mutual Insurance (Aust) Ltd v Rowprint Services (Victoria) Pty Ltd*.[47]

Was there subsequent damage to bring into effect the proviso to perils exclusions cl 4?

(a) Did the faulty workmanship cause initial damage to the reclaimer?

[30] The appellants contend that the faulty workmanship in the weld was not itself damage to the insured property so that there can have been no subsequent damage when the reclaimer collapsed.

[31] The Macquarie Dictionary definition of damage includes "injury or harm that impairs value or usefulness" and this is also its ordinary meaning. In *R v Zischke*[48] this Court held that property is damaged when it is rendered imperfect or inoperative. In *Ranicar v Frigmobile Pty Ltd*[49] Green CJ considered that damage was "physical alteration or change, not necessarily permanent or irreparable, which impairs the value of [sic] usefulness of the thing said to have been damaged".[50] The faulty weld impaired the value or usefulness of the reclaimer because it weakened it and rendered it more prone to collapse and to damage other adjacent machinery in the collapse process. The faulty weld plainly occasioned damage to the reclaimer within perils exclusions cl 4(e) even though the damage was undetectable by mere external examination.

(b) Was the collapse of the reclaimer subsequent damage?

[32] The appellants contend that "subsequent" damage means not only damage later in time but also distinct and separate damage.

[33] That contention is not consistent with the ordinary meaning of "subsequent". The Macquarie Dictionary definition of "subsequent" is "occurring or coming later or after; following in order or succession". Had the proviso been intended to apply

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44 That is excluded in the policy other than under perils exclusions cl 4.
45 Other than by perils exclusions cl 4.
46 (1983) 2 ANZ Ins Cas ¶60-498, 77,826.
47 [1998] VSCA 147, [24].
48 [1983] 1 Qd R 240.
49 [1983] Tas R 113.
50 Above, 116.

only to damage which was both subsequent and also separate and distinct, it can be expected to have stated so in clear terms. It did not.

[34] The appellants in support of their contention have referred the learned primary judge and this Court to some cases where broadly similar proviso clauses have been interpreted in a manner favouring their argument. The cases are of limited usefulness because each turns on its own facts and the particular wording of the relevant policy. For example, in *Acme Galvanizing Co Inc v Fireman's Fund Insurance Company*,[51] a steel kettle ruptured because of inadequate welding due to defective design spilling molten zinc onto surrounding equipment and damaging it. The discharge of the molten zinc was found not to be a peril separate from and in addition to the initial excluding peril of the welding failure and kettle rupture. The spillage of the zinc was considered to be directly caused by the original peril not a new hazard or phenomenon. The relevant insurance clause provided:

> "The Property Coverage does not insure against loss caused by, resulting from, contributed to or aggravated by … [i]nherent vice, latent defect, wear and tear, marring and scratching, gradual deterioration … unless loss by a peril not otherwise excluded ensues and then the Company shall be liable only for such ensuing loss … "

[35] The Californian Court of Appeal determined that:

> "… the ensuing loss provision [applies] to the situation where there is a 'peril,' ie, a hazard or occurrence which causes a loss or injury *separate* and *independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues.
>
> …
>
> Here, there was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture. The spillage of molten zinc was part of the loss directly caused by such peril, not a new hazard or phenomenon. If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new covered peril with the ensuing loss covered. That did not occur.
>
> We therefore conclude the evidence considered in the light most favourable to the plaintiffs supports the trial court's determination that the kettle rupture and resulting damage did not constitute a covered peril or loss under the policy."[52]

[36] There are important differences between the facts of *Acme* and the facts here. In *Acme* the weld rupture seems to have immediately resulted in the spillage of the molten zinc. In this case, the faulty weld caused a fatigue fracture or fractures which grew over years until finally the flange and diaphragm in the concealed box of a reclaimer leg separated and a rapid ductile (tearing) fracture developed leading to the collapse of the reclaimer legs and then the entire reclaimer onto the conveyor belts. The differing facts mean that *Acme* is of limited assistance in determining whether the proviso to the perils exclusions cl 4 of the policy on the facts here make the appellants liable to indemnify the respondent for all or any of the damage to the

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51 (1990) 221 Cal App 3d 170; 270 Cal Rptr 405.

52 Above, 411.

reclaimers and conveyor belts.[53] Another reason making *Acme* of limited use in this case is that the observations in *Acme* that the damage there had to be separate and independent from the original peril were made in respect of a proviso clause that did not refer to "subsequent" loss or damage.

[37] The New South Wales Court of Appeal in *Sun Alliance*,[54] found that a more comparable proviso to this case than that in *Acme* was "… intended to enable recovery for … damage, subsequent to that caused by … [the excluded event], caused by peril, which in the circumstances is not excluded by some other provision in the policy … ".[55]

[38] This does not suggest that the damage need be anything but "subsequent" in the ordinary sense of that word. In my view, the word "subsequent" in the proviso in this case does not require that the damage be not only later in time but also distinct and separate; "subsequent" has its ordinary meaning, namely, causing or occurring later or after or following in order.

[39] Relying on those observations in *Sun Alliance*, the learned primary judge found that whilst a defective weld occasioned the separation of the diaphragm and flange inside the reclaimer's leg and this damage was excluded by perils exclusions cl 4, the buckling of the leg structure and the collapse of the reclaimer and damage to the conveyor belts were subsequent in time and effect to the failure of the defective weld so that there was then subsequent damage to which the proviso applied.

[40] This finding was entirely consistent with the agreed facts and the meaning of subsequent damage in the proviso. The fatigue cracking resulting from the faulty workmanship in the weld developed over many years and finally caused the flange and diaphragm in the concealed box in the reclaimer's leg to separate. Although the fatigue cracking was undetectable on a standard inspection, had there been an inspection of the concealed box section of the damaged reclaimer undercarriage leg, as there was of the remaining reclaimers after the collapse on 15 February 2004, the weld and fatigue cracking could have been repaired and the subsequent rapid ductile (tearing) fracture and collapse of the reclaimer's leg structure and damage to the two conveyer belts could have been avoided. Contrary to the appellants' submissions, that subsequent damage was not inevitably occasioned by an inexorable continuum commencing with the cracks resulting from the faulty workmanship in the weld. Only when the fatigue crack or cracks developed over many years and finally severed the flange and diaphragm so that a rapid ductile (tearing) fracture developed, did the collapse of the reclaimer become inevitable. This occurred but moments before the collapse. The appellants' contention, that the judge erred in finding the collapse of the reclaimer and the damage to the conveyor belts was separate damage to the initial weld damage, fails.

Conclusion

[41] There was initial physical damage to the insured property occasioned by or happening through perils exclusions cl 4(e) (faulty workmanship) when the fatigue fracture or fractures developed from the faulty weld, finally severing the flange and

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[53] See also the observations of the learned primary judge in *Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Limited & Ors* [2004] QSC 356; SC No 8009 of 2004, 14 October 2004, [44].

[54] (1995) 18 ANZ Ins Cas ¶61-240.

[55] Above, 75,714.

diaphragm inside the concealed box of the reclaimer undercarriage leg. At this point the fractures became rapid ductile (tearing) fractures resulting almost immediately in the failure of the leg structure, the collapse of the reclaimer and the further damage to the two conveyor belts, all of which was subsequent damage to the initial weld damage occasioned by faulty workmanship. The initial damage was excluded under the policy by perils exclusions cl 4. The subsequent damage to the reclaimer and conveyor belts was occasioned by the faulty workmanship in the weld and was also occasioned by a peril not otherwise excluded under the policy,[56] namely the risk or danger that if the faulty weld and subsequent fatigue cracking was not repaired, over time the internal diaphragm connecting the top flange of the leg box could sever and cause a rapid ductile (tearing) fracture, buckling the reclaimer's leg structure and causing it to collapse on to nearby equipment such as the conveyor belts. This subsequent damage was not inevitable; the respondent's repairs to a similar weld deficiency in another reclaimer subsequent to the collapse of this reclaimer successfully avoided like damage to the repaired reclaimer.

[42] It follows that the proviso means on the facts here the damage consisting of the rapid ductile (tearing) fracture and collapse of the reclaimer leg, reclaimer and further damage to the conveyor belts is subsequent damage to the insured property occasioned by a peril (the risk that the faulty weld and resulting fatigue fracture could sever the flange and diaphragm and develop into a rapid ductile (tearing) fracture causing collapse of the reclaimer leg, reclaimer and damage to other property in the collapse process); that peril was not otherwise excluded under the policy[57] and the subsequent damage resulted from an event referred to in perils exclusions cl 4 (faulty workmanship to the weld). The proviso excludes the subsequent damage from perils exclusions cl 4 so that the appellants are liable to indemnify the respondent in respect of it. The learned primary judge was right to declare that the respondent is entitled to indemnity under the policy.

[43] The appeal should be dismissed with costs to be assessed.

[44] **JERRARD JA**: In this appeal I have read the reasons for judgment of the President, and the orders Her Honour proposes, with which reasons and orders Mullins J agrees. I have come to a different construction from their Honours of the relevant words in clause 4 of the perils exclusions in the policy, and to a different result from their Honours.

[45] I gratefully adopt the description of the relevant facts, and of clause 4 of the policy, in the judgment of the learned President. To those I add that the evidence was that the welding work in the defectively performed weld on the reclaimer had been undertaken some 20 years previously, and the respondent did not make a claim for the rectification costs that it incurred in respect of the similar defective weld damage located on another reclaimer. The agreed statement of facts presented to the learned trial judge, from which the learned President had quoted, describes a progressive fatigue cracking of the weld in the collapsed reclaimer which developed over a "relatively long period of time". It started at a weld defect or at several defects, and grew progressively larger as the weld was loaded and unloaded in response (to) cyclical stresses induced by normal operation of the reclaimer. When that cracking detached the internal diaphragm from the top flange plate of the leg box, the

56 Other than by perils exclusions cl 4.
57 See fn 56.

supporting leg structure buckled and the reclaimer collapsed, damaging it and two conveyer belts onto which part of the reclaimer fell.

Perils

[46] The policy has 9 perils exclusion clauses, describing in perils exclusion clauses 1-7 physical loss, destruction of or damage to the property insured for which the insurer would not be held liable, in clause 8 excluding liability for any legal liability, and in clause 9 liability for consequential loss of any kind. The perils exclusion clauses 1-7 are a rather amorphous group. Clause 1 excludes liability for physical loss, destruction or damage to the property insured caused by, summarising the clause, acts of war or insurrection, or resulting from acts of confiscation or other actions by a Government, public, or local authority. Clause 2 excludes liability for loss or damage to the property insured caused by nuclear waste or weapons, and clause 3 for damage to property caused by flood or sea waters, other than that arising out of an earthquake or seismological disturbance.

[47] Clause 4 is quoted in the President's judgment; clause 5 excludes physical loss etc occasioned by or happening through incorrect siting of buildings for specified reasons, or demolition orders by Government, public, or local authorities due to a failure to obtain necessary permits. Clause 6 excludes the like loss occasioned by or happening through theft, unexplained inventory shortage, or spontaneous combustion, fermentation or heating.

[48] Various of the clauses described so far have provisos attached to them, limiting the extent of the exclusion of liability otherwise effected by the clause. For example, in clause 3 there is a proviso that its perils exclusions do not apply to earthquake or seismological disturbances; there is the clause 4 proviso; and in clause 6, with respect to physical loss etc happening through spontaneous combustion, fermentation, or heating, there is a proviso which reads:"

> "Provided that Perils Exclusions 6(c)(i) and 6(c)(ii) shall be limited to the item or items immediately affected and shall not extend to other property damaged as a result of such spontaneous combustion, fermentation or heating or process involving the direct application of heat."

That proviso resembles the one considered in *Chalmers Leask Underwriting Agencies v Mayne Nickless Limited* (1983) 155 CLR 279. Had the proviso in clause 4 been similarly worded to that in clause 6, then whatever else it achieved, that proviso would have resulted in the policy responding to the damage to the conveyer belts upon which the inadequately supported reclaimer collapsed.

[49] Clause 7 excluded physical loss etc occasioned by or happening through (in summary) fraud by the insured or its employees; abuse of its computer system by persons other than itself or its employees; strikes; earth movement; or bomb threats or like offences. Clause 7 contains within it two provisos; the second is in similar terms to that in clause 4, reading

> "Provided that this Exclusion 7(a) to (d) shall not apply to subsequent loss, destruction or damage to the Property Insured occasioned by a peril (not otherwise excluded) resulting from any event or peril referred to in this exclusion."

[50] There are thus a disparate collection of perils, consisting of invasive political acts by others; acts of nature; contamination by radioactivity or damage from the use of nuclear weapons; consequences of adverse environment or ageing factors, or of human error (clauses 4 and 5); dishonesty; fire; industrial action, movement of the earth; or hostile criminal conduct. Liability for physical loss, destruction of or damage to the property insured caused by any of those is excluded in the part of the policy headed "Perils Exclusions"; clauses 8 and 9 add legal liability and consequential loss to those. It follows from those clauses that in the policy a "peril" is a cause, having an element of chance, that exposes the insured to damage, as submitted by Mr Jackson QC for the appellants. Accordingly I generally agree with what the President has written in her judgment as to the meaning of "peril", and disagree with the construction reached by the learned trial judge.

Perils exclusion clause 4

[51] That the perils exclusion clauses in the policy exclude liability for physical loss, destruction of or damage to the property insured resulting from the variety of perils specified in clauses 1-7, and liability for the perils specified in clauses 8 and 9, aids in construing the proviso in perils exclusion clause 4. It is also relevant to that construction to note that it was common ground between the parties both before the learned judge and on this appeal, that perils exclusion clause 4 applied to the collapse of the reclaimer and the damage it caused to the conveyer belts; the parties were agreed that the weld which cracked, leading ultimately to the collapse, had been imperfectly performed and that the damage to the reclaimer – happening on its collapse – was "occasioned by or happened through" faulty workmanship. The appellants' senior counsel agreed that on the proper construction of clause 4, there was a much larger "genus" of loss, destruction, or damage to the property insured occasioned by perils described in clause 4, that "genus" having within it a smaller subgroup or species of loss, destruction or damage which fell within the proviso. The issue therefore was only whether or not the collapse of the reclaimer, and the damage to the conveyer belt, fell within the proviso and not whether it fell within the exclusion; it was agreed that damage otherwise fell within exclusion clause 4. That agreement resulted from the breadth of the expression "occasioned by or happening through", remarked on in the authorities referred to by the President and by the learned trial judge.

[52] Perils exclusion clause 4 describes in 4(a) to 4(e) the perils for which the insurer's liability under the policy was excluded by that clause when physical loss, destruction or damage was occasioned by or happened through those specified perils. Clause 4 then provides that "this Exclusion 4(a) to (e) shall not apply to:

- subsequent loss, destruction of or damage to the Property Insured;
- occasioned by a peril (not otherwise excluded);
- resulting from any event or peril referred to in this exclusion."

I agree with the President that the reference to "subsequent" loss, destruction of or damage to in the proviso is to damage which happens later or after something else; reading the proviso as a whole I consider that the subsequent loss, destruction of or damage to the property insured must be occasioned by a peril (not otherwise excluded) which peril must result from an event or peril referred to in clause 4(a)-(e). I disagree with the respondent's submission that the phrase "resulting from any

event or peril referred to in this exclusion" qualifies "subsequent loss destruction of or damage to the Property Insured", and not the phrase "occasioned by a peril (not otherwise excluded)". On the construction I prefer, there must be a peril (a "proviso peril") which proviso peril itself results from an event or peril referred to in clause 4 ("an excluded peril"); and the policy responds to, and the insurer is obliged to indemnify the insured for, the (subsequent) loss, destruction of or damage to the property insured which is occasioned by that proviso peril. That subsequent loss, occurring after or later, will usually be readily capable of being described as separate or distinct, simply because it is subsequent.

[53] I respectfully disagree with the President that the requirement the proviso peril be "not otherwise excluded" means it must not be a peril for which, when physical loss, destruction of or damage to the property insured is occasioned by it, liability is excluded by clauses 1-3 and 5-7 of the policy, but not a peril for which, when loss destruction or damage is occasioned by it, liability is excluded by any of the provisions of clauses 4(a)-(e). What the appellants argue is that where an excluded peril, such as faulty workmanship, caused another excluded peril, such as a developing flaw, the insurer should not be in any worse position regarding damage occasioned by the second excluded peril which had resulted from another excluded peril, than it would have been if all damage resulted from only one excluded peril. That, with respect, is a construction which should be objectively imputed to the parties as a matter on which they agreed; since the insured respondent agreed to the insurer's liability being excluded for loss occasioned by any one of the excluded perils, it is reasonable to conclude it agreed to liability being excluded when an excluded peril itself resulted from another excluded peril.

[54] For example, it would be unsurprising if an error or omission in a design, plan or specification, or a failure of design – all clause 4(c) excluded perils – led to a gradual deterioration or a developing flaw – a clause 4(b) excluded peril. Likewise rust or oxidation or corrosion – clause 4(a) excluded perils – would be likely to lead, almost by definition, to a gradual deterioration or a developing flaw in the property insured. If the corrosion, rust or oxidation leading to that gradual deterioration itself resulted from faulty materials, in combination with a failure of design, so that a total of four excluded perils combined to cause the same collapse of another reclaimer as occurred here, a construction of the proviso that would hold the insurer liable because more than one excluded peril had occurred and combined to cause catastrophic loss is a construction that fails to supply a congruent operation to the various components of the whole policy, contrary to the observations of the High Court in *Wilkie v Gordian Runoff Limited* (2005) 214 ALR 410 at 413.[58] I construe "not otherwise excluded" as referring to a peril for which liability, when that peril causes physical loss, destruction of or damage to property insured, is not (otherwise) excluded by any of the perils exclusion clauses 1-7.

[55] The appellants are entitled to judgment in their favour if the collapse of the reclaimer, whether or not it can be described as "subsequent" damage to the property insured, was occasioned by a clause 4 excluded peril, and whether or not that excluded peril had itself resulted from any other excluded peril. The appellants argue that once the defective weld had occasioned a developing flaw, namely the

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58 The insured would have an argument available to it about sudden and unforseen damage resulting from the clause 4(a) excluded perils, based on the decision in *L'Union Des Assurances de Paris Iard v Sun Alliance Insurance Limited* (1995) 8 ANZ Ins Cas 61-240 at 75,714

internal fatigue crack which had grown progressively larger over time and at an accelerating rate, resulting in the cracking detaching the internal diaphragm from the top flange plate of the leg box, then the collapse of the reclaimer was inevitable. Until the moment when that detachment of the internal diaphragm happened there was a developing flaw, occasioned by faulty workmanship. Once that moment was reached, with the inevitability of collapse immediately after, there was no longer a peril in the sense in which that term is used in insurance law to describe a cause that has an element of fortuity or chance. There was simply inevitable damage for which the insurer had not agreed to indemnify the respondent.

[56] There is merit in that argument. The respondent argued that it overlooks that it took 20 years for the developing flaw resulting from the faulty workmanship to reach that described point at which collapse of the reclaimer was inevitable and about to occur immediately. They contend that for some period of time, which may have been years, the reclaimer lacked structural integrity such that there was a risk that non-defective welds would come apart. That lack of structural integrity, in which a collapse was a risk but not an inevitable event, would have existed until the crack detached the internal diaphragm from the top flange plate of the leg box. Until that latter moment, the reclaimer was capable of repair, just as a similar defective weld in another reclaimer was in fact repaired. That absence of structural integrity, perhaps existing for years, was not a clause 4 excluded peril, nor a peril excluded by any of the other perils exclusions clauses. It resulted from clause 4 excluded perils in combination, and itself occasioned subsequent damage to the property insured, albeit avoidable damage had there been an inspection of that part of the reclaimer.

[57] The appellants contend that the respondent's argument is the sort of sophistry by insureds that was condemned in appropriate terms by the Court of Appeal in California in *Chadwick v Fire Insurance Exchange.*[59] In that case Mr Chadwick and another were insured persons under a home owner's insurance policy in which coverage was denied by an exclusion clause excluding liability "for loss from wear and tear; …deterioration; inherent vice; latent defect; … cracking ... of walls, floors, roofs or ceilings; …". Mr Chadwick and his co-owner noticed cracking in the walls of their house, the cause of which was found to be substandard design and construction of the wall and floor framing of the house. On appeal they argued that the defective framing, even if deemed a latent defect or inherent vice, was merely the result of another, non-excluded peril, namely negligent construction. They argued that that negligent construction was the efficient proximate cause of their loss.

[58] The Californian Court held that:

> "When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterisations, the efficient proximate cause analysis has no application. An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterisation to the act or event causing the loss … [i]f every possible characterisation of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless. An earthquake, it could be said, was merely the immediate cause of loss and was itself the result of 'changing

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[59] 17 Cal App 4th 1112; 21 Cal Report 2d/871; 1993 Cal App Lexis 826

> tectonic forces,' a nonexcluded peril. Wear and tear on floor boards would be covered as the result of nonexcluded 'friction'. An exclusion for freezing plumbing could be avoided by the simple observation the pipes would not have frozen absent 'very low temperature,' a nonexcluded and, hence, covered peril."

[59] The Californian Court added a footnote in explanation of their examples. It read:

> "Lest these hypothetical examples be thought entirely fanciful, we note the first, at least, has apparently been successfully asserted in a trial court. According to a recent law review comment, a Fresno County Court 'required coverage of loss of resulting from the 1983 Coalinga earthquake in spite of the express exclusion of earthquake damage from the policy after an expert witness explained that the earthquake had been caused by 'plate tectonics'…. Because the insurer….had neglected to list tectonic slippage as an excluded peril, the court held that the policy would cover the damage."

Bearing those structures in mind, I am not satisfied that the respondents did identify a non-excluded peril, namely the lack of structural integrity of the reclaimer, which had existed for an unknown length of time and which risked substantial further damage to the reclaimer and other property of the respondent. I do not accept the respondent's argument that that absence of structural integrity was a proviso peril, not an excluded peril excluded by any of the perils exclusion clauses including 4(a)-(e). It was simply a developing flaw, which the respondent's argument has dignified by the appellation that it was an absence of structural integrity. Accordingly, the respondent was not entitled to indemnity for the subsequent damage to the retainer when its collapse was occasioned by that absence of structural integrity ultimately reaching the point where one supporting leg simply buckled. I would allow the appeal.

[60] **MULLINS J:** I agree that the appeal should be dismissed with costs for the reasons given by McMurdo P.