SUPREME COURT OF QUEENSLAND

CITATION:	*Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Limited & Ors* [2004] QSC 356
PARTIES:	**PRIME INFRASTRUCTURE (DBCT) MANAGEMENT PTY LTD (ACN 097 698 916)** (applicant) **v** **VERO INSURANCE LIMITED (FORMERLY KNOWN AS ROYAL & SUN ALLIANCE INSURANCE AUSTRALIA LIMITED) (ACN 005 297 807)** (first respondent) and **AMERICAN HOME ASSURANCE COMPANY (ARBN 007 483 267)** (second respondent) and **ZURICH INSURANCE AUSTRALIA LIMITED (ARBN 085 188 923)** (third respondent) and **QBE INSURANCE (AUSTRALIA) LIMITED (ACN 003 191 035)** (fourth respondent)
FILE NO:	SC No 8009 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2004
JUDGE:	Chesterman J
ORDER:	**1. It is declared that the applicant is entitled to indemnity under the Industrial Special Risks Policy of Insurance issued by the respondents.** **2. The respondents are to pay the applicant's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	INSURANCE – GENERAL – POLICIES OF INSURANCE – CONSTRUCTION – where the applicant was the insured under an Industrial Special Risks Policy of Insurance issued by the respondents – where the policy contained a number of

'Property' and 'Peril' exclusions – where the policy contained a proviso to the 'Peril' exclusions, providing that the exclusions '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 the exclusions – consideration of the meaning of 'subsequent loss' and 'occasioned by a peril (not otherwise excluded)'

Acme Galvanising Co Inc v Fireman's Fund Insurance Company 221 Cal. App. 3d 170
Aetna Casualty and Surety Company v Yates 344 F. 2d 939 (1965)
Chalmers Leask Underwriting Agencies v Mayne Nickless Limited (1983) 155 CLR 279
CIC Insurance; re Hygeia Dianthus Industries P/L (601 of 1991, unreported, Supreme Court of Queensland, 29 July 1991, BC 9102489)
L'Union Des Assurances de Paris Iard v Sun Alliance Insurance Ltd (1995) 8 ANZ Ins Cas 61-240
Hamilton Fraser & Co v Pandorf & Co (1887) 12 App Cas 518
Mercantile Mutual Insurance (Aust) Ltd v Rowprint Services (Victoria) Pty Ltd [1998] VSCA 147

COUNSEL: Mr D B Fraser QC, with Mr K F Holyoak, for the applicant
Mr D J Jackson QC, with Ms W Harris, for the respondents

SOLICITORS: Freehills for the applicant
Minter Ellison for the respondents

[1] The applicant is the lessee of the Dalrymple Bay Coal Terminal which is located at Hay Point, north of Mackay. The terminal is a facility for stockpiling coal mined in Central Queensland and for loading it onto ships for export. The applicant owns the structures and machinery necessary for the terminal to function. The ships berth at a wharf several hundred metres from the shore. A jetty connects the wharf to the shore on which the coal is piled, having been transported there by train from the mines. The coal is carried by conveyor belts from the stockpile along the jetty to the wharf adjacent to the ships, where it is loaded mechanically into the ships' holds.

[2] The landward end of the conveyor belts is adjacent to the stockpile. Very large machines, called Reclaimers, lift the coal from the stockpile and dump it onto the conveyor belts.

[3] The respondents are all companies carrying on the business of insurance. The applicant is the insured under an Industrial Special Risks Policy of Insurance issued by the respondents for the period 30 June 2003 to 1 September 2004. Speaking very generally the policy indemnified the applicant against loss of or damage to its property at the terminal. The value of the property insured was agreed at $880,151,662.

[4] On 15 February 2004 one of the applicant's Reclaimers was severely damaged when it collapsed onto the two conveyor belts which were also damaged.

[5] The applicant seeks a declaration that the respondents are, subject to the applicable policy limits and deductibles set out in the policy, liable to indemnify the applicant for the loss suffered by reason of the collapse of the Reclaimer onto the conveyors. The cost of repairing Reclaimer and conveyors is about $8,000,000.

[6] The applicant owned a number of Reclaimers. They are made of steel. Each moves on fixed steel tracks parallel to the conveyor belts. The gauge of the tracks is greater than the width of the conveyor structures so that the Reclaimer straddles the belts. It has a boom at one end of which is a rotating bucket and at the other a counter-weight. The bucket takes coal from the stockpile and drops it onto the conveyor belts. The Reclaimer pivots for that purpose. It has a circular base supported on three legs at the bottom of which are the wheels which run on the tracks. There are two tracks so that two of the legs are on one track and the third leg is on the other track. The circular base supports the boom and super structure. The legs are welded to the base. The superstructure contains the winches and cables for controlling the vertical motion of the boom.

[7] A weld joining one of the legs to the circular base was defective. The parties agree that the defect, a crack, was a result of faulty workmanship during the original construction of the Reclaimer. Over time the crack increased in size. The weld joined the top flange plate of the leg to a diaphragm which was part of the circular base. As the crack extended the weld failed and the plate separated from its adjacent structure, so that there was no connection between the flange plate and the diaphragm. This weakened the leg which then buckled. The other legs followed and the entire structure fell onto the conveyors causing extensive damage.

[8] There is a full description of the mechanism of the failure set out in paragraph 15 of the Statement of Agreed Facts. It appears to have been written by engineers and the detail is not easy to comprehend or to summarise. An understanding of the failure is better had by looking at the photographs and diagrams in Exhibit 1.

[9] The policy of insurance is entitled 'Industrial Special Risks Insurance Policy (Material Damage)'. The applicant is one of the named insured. The insuring clause found in the policy under the heading 'Material Loss or Damage' provides:

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

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 …'. The parties agree that the Reclaimer was property insured by the policy and that the damage happened at the 'situation' which was the Coal Terminal.

[10] The policy contains two sets of exclusions, 'Property Exclusions' and 'Perils Exclusions'. In respect of the first category the policy provides that it 'does not cover physical loss, destruction of or damage to the following property …', which is

then set out in detail. In respect of the second category of exclusions the policy provides that '[t]he Insurer(s) shall not be liable under in respect of' seven defined sets of circumstances.

[11] Whether or not the respondents must indemnify the applicant pursuant to the policy turns upon exclusion 4 of the Perils Exclusions. It provides:

> 'The Insurer(s) shall not be liable under in respect of:-
>
> 4. physical loss, destruction or damage occasioned by or happening through:-
>
> (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
>
> (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'.

[12] The parties are agreed that the weld which cracked, leading ultimately to the collapse of the Reclaimer, had been imperfectly performed. That is to say the weld cracked because of faulty workmanship. The parties therefore agree that exclusion 4 is applicable, the damage to the Reclaimer being occasioned by or happening through faulty workmanship, unless the damage to the Reclaimer and conveyor belts comes within the proviso.

[13] The question which brings the parties to Court for its determination is whether the proviso to exclusion 4 operates so as to prevent the operation of the exclusion. There is no doubt that the function of the proviso is to limit the scope of the exclusion. The exclusion applies only to the extent that the proviso does not apply to the loss in respect of which the applicant seeks indemnity.

[14] The words 'occasioned by or happening through' have a wide meaning. As Callaway JA pointed out in *Mercantile Mutual Insurance (Aust) Ltd v Rowprint Services (Victoria) Pty Ltd* [1998] VSCA 147 (at [247]):

> 'A motor car may be stolen or a shop may be looted, the proximate cause of the loss being theft. The "occasion" of the loss may nevertheless be riot or civil commotion … Loss or damage may also "happen through" a cause that is not the proximate cause. It is a more difficult question whether, and if so in what circumstances, the words include a mere link in a chain of causation that began with a proximate cause, although it is true that such a link may be the immediate occasion of the loss or damage and in a sense the latter happens through it. It is easier to see how the words, and similar expressions, may refer to a cause or set of conditions anterior to the proximate cause or to a concurrent cause, less important than but operating together with the proximate cause.'

[15] Without the proviso exclusion 4 might apply to loss of or damage to property in a manner in which faulty workmanship (taking the example relevant here) was only distantly the cause. The proviso thus plays an important role in defining the extent of the indemnity given by the policy. So much is obvious but the precise meaning of the proviso and its application to the agreed facts is far from easy. Similar provisions have been inserted in Industrial Special Risk Policies and other contracts of insurance for many years, but the parties have not been able to find any case that is of particular assistance.

[16] I was referred to a decision of Moynihan J (see *CIC Insurance; re Hygeia Dianthus Industries P/L* (601 of 1991, unreported, Supreme Court of Queensland, 29 July 1991, BC 9102489) in which there was an exclusion clause relevantly identical to exclusion 4 in the policy with which I am concerned. The insured in that case was a horticulturalist which grew carnations for sale to florists. It had a highly developed and sophisticated system of cultivation designed to produce high quality flowers protected from extremes of weather. A severe storm damaged the insured's greenhouses allowing in 'water and soil particles … carrying … inoculum for the disease fusarium oxysporum.' The insured's entire stock became infected with the disease which meant it had to be destroyed. The policy of insurance in question contained an exclusion numbered 4 in precisely the same terms as those in issue here. The insured's loss was caused by disease. Moynihan J held however that the exclusion had no application, regardless of the proviso, because the proximate cause of the loss of the plants was the storm, not the disease. His Honour therefore had no occasion to consider the meaning of the proviso.

[17] I was also referred to *Chalmers Leask Underwriting Agencies v Mayne Nickless Limited* (1983) 155 CLR 279, but no submissions were directed to the case, no doubt for the reason that the exclusion and proviso considered there are too different from the form of words in exclusion 4 to make the case of any real assistance.

[18] The import of exclusion 4 is that the policy does not indemnify the applicant against damage to property occasioned by or happening through faulty workmanship unless the damage is subsequent; is occasioned by a peril which is not otherwise excluded; the peril results from one of the matters identified in paragraphs 4(a) to (e).

[19] There are three elements of the proviso which give rise to difficulty. Recasting it slightly the proviso says:

> 'Exclusion 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'.

The questions that have to be addressed are:

> (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)'?

Subsequent Damage

[20] The applicant submits that the defective weld is properly described as 'damage' to the Reclaimer. It presented 'a physical alteration or change which impaired the value or usefulness of the Reclaimer'. In fact the machine worked without difficulty for a number of years despite the defective weld, but no doubt it is right that the defective weld meant that the machine was damaged. The applicant further submits that the progressive failure of the weld which extended the crack and reduced the effectiveness of the join between flange and diaphragm also amounted to damage. The applicant's submission, in essence, is that exclusion 4 applies to the costs of repairing the defective weld and reinstating a proper join of the structural parts. Its argument is that the damage which occurred after, and as a result of, the failure of the weld, that is, the separation of the parts, the loss of structural integrity, the buckling of the leg and the collapse of the Reclaimer is subsequent damage.

[21] The argument proceeds that the word 'subsequent' requires a temporal connection 'in the sense that the loss … occurs after the … damage occasioned by or happening through that which consists of the immediate physical loss, destruction or damage'. The word is descriptive of the damage the subject of the proviso. It is damage that occurs after the damage occasioned by or happening through one of the events specified in exclusion 4.

[22] The respondents submit that subsequent damage is damage separate and distinct from, different in kind, to the faulty workmanship, and must be caused by a different mechanism. It submits that when the proviso requires the subsequent loss to be occasioned by a peril there must be a cause of that subsequent loss by a means, or cause ('a peril'), distinct from the faulty workmanship. The submission continues that 'the cracking of the … leg and its ultimate collapse were not separable initial and subsequent damage but, rather, part of the process of a single damage continuum, which occurred progressively and inexorably over time, culminating in the failure of the … leg and (the Reclaimer's collapse). There is no justification – whether as a matter of science or common sense – for regarding one part of that continuum as being separate and distinct from the rest. … There is no "subsequent" damage which could attract the operation of the proviso.'

[23] The respondents rely upon a number of American cases to support their position. Their primary case is *Acme Galvanising Co Inc v Fireman's Fund Insurance Company* 221 Cal. App. 3d 170 in which the insured, as its name suggests, engaged in the business of coating base metals with zinc. In its factory was an eighty-four tonne capacity galvanising kettle. One of the welded seams of the kettle failed, it ruptured and several tonnes of molten zinc escaped, damaging or destroying surrounding equipment in the factory including the furnace burners, floorboards and the fire brick structure that enclosed the kettle.

[24] A clause in the policy on which *Acme* sued provided that it:

> '[d]oes not insure against loss caused by, resulting from, … [i]nherent vice, latent defect, wear and tear, … unless loss by a peril not otherwise excluded ensues and then the Company shall be liable only for such ensuring loss … .'

[25] The Court concluded that the welding defect was latent so that the exclusion applied. The insured argued that the discharge of molten zinc which damaged the surrounding equipment was an 'ensuing loss' not excluded from the cover. The court said:

> 'We interpret the ensuing loss provision to apply to the situation where there is a "peril", i.e., 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 ensuring loss covered.'

[26] The respondents relied also on a decision of the United States Court of Appeal's fifth circuit, *Aetna Casualty and Surety Company v Yates* 344 F. 2d 939 (1965) which does not appear to be either relevant or helpful. The plaintiffs, who were the insured, suffered loss when the joists, sills and sub-flooring of the house became rotten. The cause was that the space beneath the floor was inadequately ventilated so that '[c]ontact between air trapped in the … space and the subfloors … which had been chilled by air conditioning, produced condensation of moisture and consequent rotting.'

[27] An exclusion in their policy meant that the insurer was not liable for loss caused by 'rot … fungi … dampness of atmosphere', which the court held was the cause of the loss. There was a proviso to this exclusion of liability. The exclusion was said not to apply to 'ensuing loss caused by … water damage …'. The insured argued that the loss was caused by water damage but the court rejected this submission because the policy required 'rot and water damage be in some sense separable events. We do not think that a single phenomenon that is clearly an excluded risk under the

policy was meant to become compensable because in a philosophical sense it can also be classified as water damage.'

One can respectfully agree. The rot may have been caused by water but the term 'water damage' in the policy clearly meant a cause of damage other than rot. The case has no bearing on the present.

[28] The words of the proviso offer little help in understanding what is meant by 'subsequent loss'. It is clear that it is loss or damage subsequent to loss or damage occasioned by (in this case) faulty workmanship. The applicant relies on the dictionary meanings which stress temporality. The Australian Concise Oxford Dictionary and in the Shorter Oxford English Dictionary suggest as meanings 'following in order or succession; coming or placed after, especially immediately after.' The adjective in its context suggests elements of both temporality and causality. Damage, to be subsequent, will occur later in time and be somehow a consequence of the first damage, that caused by the faulty workmanship. This exposition is of little help in deciding in a particular case what is damage caused by faulty workmanship and what is subsequent damage. The word gives little assistance in deciding how to identify and differentiate between the two types of damage.

[29] The applicant's answer is to say that any loss or damage subsequent to, that is, which follows in time, is subsequent loss or damage for the purposes of the proviso. The answer would limit the operation of the exclusion in this case to the cost of repairing the poor work, or the diminution of value to which it gives rise. The exclusion would apply only to the defective weld. By contrast the respondents' answer is that the subsequent loss must be something quite separate and distinct from damage which can be seen to be occasioned by, or caused by, faulty workmanship. They submit that the catastrophic collapse of the Reclaimer and the damage to the conveyor belts was caused by the defective weld and is not, relevantly, subsequent. There is logic in both approaches.

Not Otherwise Excluded

[30] The respondents submit that what is meant by the expression 'occasioned by a peril (not otherwise excluded)' is that the peril which must cause the subsequent damage may not be one of those identified in exclusion 4(a) to (e). If the peril is excluded by any provision of the policy, including exclusion 4, the proviso does not apply. This cannot be right. If it were the proviso would have no operation. It could not limit the scope of the exclusion if the proviso itself did not apply where the loss in question was occasioned by one of those matters which gave rise to the exclusion. To give the expression this meaning would be to require the loss to be caused by something wholly different in kind from any of the causes of damage described in exclusion 4. If this were the case the exclusion would have no operation and the proviso would have no role. The parenthetical exception must, as the applicant submits, mean perils not excluded by any of the other Perils Exclusions. The respondents object that if this is its meaning it is unnecessary. That may be so but it was probably inserted to make it clear that the proviso was not meant to override those other circumstances of exclusion. It is to make it clear that the proviso applies, according to its terms, but only to the extent that subsequent damage was not caused by a peril excluded from the policy cover by an exclusion other than number 4.

[31] The applicant's submission appears to be supported by the judgment of the New South Wales Court of Appeal in *L'Union Des Assurances de Paris Iard v Sun Alliance Insurance Ltd* (1995) 8 ANZ Ins Cas 61-240. An abattoir had taken out two policies of insurance, an Industrial Special Risks Insurance Policy with the appellant and Engineering Plant Insurance with the respondent. The abattoir plant included a refrigeration system designed to lower the temperatures of a freezer room and a chiller room. The system operated by circulating ammonia under pressure. The pressure came from a rotary booster, consisting of rotating vanes, and a compressor. The rotary booster was damaged when one of the vanes fractured and punctured the internal lining of the water jacket fitted around the booster. The escaping water contaminated first the circulating ammonia and then oil which lubricated the compressor. The respondent, the insurer under the Engineering Plant Insurance policy paid to repair and reinstate the damaged equipment. It then sought contribution from the appellant who had issued the Industrial Special Risks Policy. That insurer relied upon exclusions which are similar to the one in question here. Exclusion 7 provided that the insurer should not be liable in respect of physical loss, destruction or damage directly or indirectly caused by the mechanical breakdown of any machine. A proviso to the exclusion was in these terms:

> 'Providing that the exclusion 7(a) … shall not apply for further loss, destruction or damage to the machine, immediately affected by such breakdown, which results from or is occasioned by any peril (not otherwise excluded) nor the subsequent loss, destruction or damage caused by any peril (not otherwise excluded) to other property insured by the policy, such other property being external to the machine, device or processing system in which such loss, destruction or damage occurs.'

[32] Exclusion 8 was in these terms:

> 'Physical loss, destruction or damage directly or indirectly caused by …
>
> (a) … contamination (other than sudden and unforeseen damage resulting therefrom).
>
> Provided that exclusion 8 … shall not apply to subsequent loss, destruction or damage to property insured by the policy occasioned by a peril (not otherwise excluded) resulting from any event, occurrence or peril referred to in this exclusion.'

It was accepted that the damage to the rotor vanes and booster was mechanical breakdown and was thus excluded by exclusion 7. The issue was whether the cost of repairing the compressor and decontaminating the refrigeration system was excluded from the Industrial Special Risks Policy.

[33] An argument summarily dismissed was that the damage to the compressor and the contamination of the refrigeration system was not 'a subsequent loss but a continuation … of the mechanical breakdown.' The Court of Appeal held that the mechanical breakdown was the fracturing of the rotor vane. The gas which became contaminated, and the compressor, were external to that booster. The sequence of

events which flowed from and followed the mechanical breakdown could not be described as part of it.

[34] Another argument was that the interplay between exclusions 7 and 8 meant that the Industrial Special Risk Policy did not cover the loss. The insurer's argument was that damage caused by contamination was excluded from the policy by exclusion 8. The proviso to exclusion 7, on the Court's view of the facts, applied so that damage to the compressor and contamination of the refrigeration system was not caught by exclusion 7. The insurer argued that the proviso to exclusion 7, that the peril must not be 'otherwise excluded' came into play. The peril was 'otherwise excluded' by exclusion 8. The argument was rejected. The Court held that exclusion 8 related to contamination that was not sudden and unforeseen. The contamination in question was both sudden and unforseen. The proviso to exclusion 7 was not therefore rendered inapplicable by reason that the peril was excluded by exclusion 8. Having expressed that opinion Shellar JA (with whom Priestley and Handley JJA) agreed said (75,714):

> 'This is entirely consistent with the philosophy of the exclusion. The 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. On the other hand the proviso is intended to enable recovery for physical loss, destruction or damage, subsequent to that caused by or arising out of mechanical breakdown, caused by a peril, which in the circumstances is not excluded by some other provision in the policy …'

Occasioned by a Peril

[35] The next and most difficult part of the proviso is the requirement that the subsequent damage be 'occasioned by a peril (not otherwise excluded)'. The respondents rely on the rules of syntax to contend that there must be a peril which causes the subsequent damage, and the peril must itself be a consequence of, or be caused by the faulty workmanship (an event or peril referred to in exclusion 4). The respondents therefore argue that the proviso requires two levels of causation. There must be a peril which causes the subsequent damage, and the peril must itself be caused by one of the events i.e. faulty workmanship, specified in the exclusion. There must be, in other words, an antecedent cause and a succeeding cause between the defective workmanship and the subsequent loss.

[36] The structure of the proviso does lend support to the submission. There are, however, difficulties with it. Firstly, the word 'peril', especially in the context of insurance law, does not mean 'cause'. Secondly, it is not likely that the proviso means that its application depends upon the identification of two distinct causes related in such a way that one precedes and brings about the other, so that there must be a cause of a cause producing the subsequent damage. Thirdly, the second cause is likely to remove the applicability of exclusion 4 to the loss in question in any event. I have touched on this already. If the proviso to operate requires the infliction of damage which is separate and independent from the damage occasioned by faulty workmanship, and if the cause of that separate damage is effective to cause it, and is separate and distinct from the damage caused by defective workmanship, which is the initiating cause, then it is hard to see that the loss in

question, the subsequent damage, could come within the operation of exclusion 4. Almost by definition the loss in question would not be damage occasioned by or happening through defective workmanship. The proviso would then be limited in application to circumstances in which the exclusion did not attach. The proviso would thus mean that exclusion 4 did not apply to circumstances in which it did not apply.

[37] The word 'peril' in the context of insurance policies means no more than loss or damage and the means by which, or the manner in which, the loss occurred. In *Acme Galvanising* the Court, in considering a similar policy, thought that 'peril' meant a 'hazard or occurrence' which causes loss or injury. In a better known case *Hamilton Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 Lord Bramwell said (at 526):

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

[38] The remark was made in the context of a policy of marine insurance where the question was whether the loss occurred from a peril of the sea. The qualification is of no relevance here. The description of what is a peril is helpful. It is, I think, clear, that the peril is not just the loss or damage but, as I say, the manner in which the goods were damaged or lost. The manner of the occurrence of the loss is part of the peril. The same car may be insured for damage by collision but not by fire. The 'peril' is damage by impact, not damage by fire. A house and its contents may be insured against storm but not flood. The peril, if the policy is to be liable on the claim, is water damage from the storm, not from the flood.

The Meaning of the Proviso

[39] The meaning of the proviso to exclusion 4 becomes clearer if one reverses the order of its elements. The proviso applies, and the exclusion therefore does not, if an event or peril referred to in the exclusion results in a peril, which is not itself excluded by some other exclusion in the policy, and that peril occasions subsequent loss, destruction or damage to the insured property. The first mentioned event or peril is damage occasioned by faulty workmanship. This must result in a another peril. For present purposes the proviso then becomes:

> 'If damage occasioned by faulty workmanship results in a peril not excluded by another exclusion, and the peril occasions subsequent damage to the insured property, exclusion 4 does not apply.'

[40] What is meant by 'peril' in this context? It is, as I have said, loss or damage to the subject matter of the insurance policy and the circumstance in which the loss or damage occurred. This concept is, I think, what lies behind the phrase 'occasioned by peril (not otherwise excluded).' The peril which results from the faulty workmanship is damage to the insured property occurring in circumstances which would make the insurer liable on the policy, and there is no other basis given by the policy for refusing indemnity. If this damage is 'subsequent' to the damage caused by the faulty workmanship the proviso applies. This part of the proviso means only that the manner in which the subsequent damage occurs is not 'otherwise excluded' under the policy.

I do not think that this part of the proviso can mean that the peril must itself be a cause of the subsequent loss. 'Peril' really means the circumstances of loss or damage. As such it describes how a loss occurred, but a peril is not a cause. The proviso does not, in my opinion, require two separate causes, one (faulty workmanship) antecedent to the other (the peril), which causes the subsequent loss. This element of the proviso signifies that there must be 'an occasion' of the subsequent loss, and that the 'occasion' is the manner in which the subsequent loss occurred. If the proviso is to apply that manner of occurrence must not be excluded by a term of the policy other than exclusion 4. The phrase 'occasioned by a peril not otherwise excluded' is a description of the occasion of the subsequent damage, i.e., the damage and the manner of its occurrence. The phrase expresses one concept not two. The concept is that the circumstances in which the subsequent loss occurs is not excluded by any term of the policy other than exclusion 4. When the proviso speaks of 'subsequent damage occasioned by a peril (not otherwise excluded)' it means subsequent damage which occurs in circumstances not otherwise excluded by the policy.

[41] In analysing the proviso it is easy to be caught up in semantics and ensnared in metaphysics. To define a 'peril' as damage and the means of its occurrence is to say something about the cause of the damage. It is damage caused in a particular manner. Nevertheless the distinction I have tried to make between 'peril' and 'cause' is real. The proviso is concerned to ensure that the manner of occurrence of the subsequent damage is not 'otherwise excluded' by the policy. It is not, in my opinion, concerned to insist that the subsequent damage be the result of two, cumulative, causes.

The proviso does not have three separate elements namely (i) subsequent damage (ii) occasioned by a peril etc. (iii) resulting from a peril identified in exclusion 4(a) to (e). It expresses one composite notion. The words that follow 'subsequent loss, damage or destruction' are descriptive of what constitutes this subsequent damage. It is clear that the subsequent damage must have a causal connection with the peril or event specified in exclusion 4(a) to (e). Those perils or events are themselves damage occasioned by or happening through faulty workmanship, to take the peril relevant in this case. The damage occasioned by faulty workmanship must be followed by other damage which is different to the first mentioned damage. The subsequent damage must be a peril (i.e. loss or damage) which occurs in circumstances that are not excluded by reason of some exclusion other than number 4.

[42] In my opinion 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, i.e. 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.

[43] There is an alternative way of expressing the meaning. Peril ordinarily means danger. A danger is a contingency that some loss or damage will eventuate. If peril is understood in this way then the proviso will operate if: (i) faulty workmanship results in a danger which, if it eventuates, will further damage the insured property, (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; (iii) the damage which follows from the eventuation of the danger, the realisation of the contingency, is subsequent damage.

[44] I find *Acme* unhelpful and unpersuasive. It appears to me inconsistent with the approach taken by the Court of Appeal *L'Union des Assurances* where damage to the circulating oil and ammonia, and the compressor, was treated as subsequent damage even though they were part of the one refrigeration system. The compressor was a different machine from the booster which broke, and of course, the ammonia passed through the booster but was not part of it. The Californian Court held that damage to the insured's factory other than the kettle was not an 'ensuing loss'. The second point is that if there be a peril separate and independent from the original excluded peril (the faulty workmanship) it is difficult to see how, as a matter of logic, it can result from it. Moreover if there be a separate and independent cause of the 'ensuing loss' then whatever the cause of the cause, the exclusion would have no application because the cause of the loss would be the new independent and separate event. Thirdly the court did not appear to ground its decision in the words of the exclusion but superimposed a meaning. This is not my understanding of the role of the judicial construction of contracts.

Application of the Proviso

[45] It is not easy to apply the proviso to the facts of the case. The construction I have given to the proviso means, of course, that the facts of a particular claim must reveal two types of damage: damage caused by the faulty workmanship and subsequent damage. The facts must make it possible to observe the distinction. It should be noted that in *L'Union des Assurances* and in *Chalmers Leask* (where the distinction was between 'the part immediately affected' by the defective workmanship and other parts of the insured property), the application of the proviso was made with respect to parts of the property insured, not to different consequences in the chain of causation. So in the *L'Union* case the proviso limited the exclusion so that the policy covered damage to the compressor and refrigeration plant but not to the broken rotary booster itself. In *Chalmers* the proviso limited to the defectively built dam the property covered by the exclusion, and not to the damage downstream of the dam resulting from its failure. This does not mean that in other cases the distinction may not be found in different consequences in the sequence of events.

[46] The cautionary tale reminds us that for want of a nail the shoe was lost and that there followed, ineluctably and perhaps rapidly, the loss of horse, rider, message, battle and kingdom. One is inclined to think that the loss of the kingdom was subsequent to the farrier's faulty workmanship, but there is no obvious answer to where along the sequence of consequence the loss became subsequent.

[47] The distinction suggested by the applicant at least allows for a principled application of the proviso. The distinction is that between the product of the faulty workmanship, and damage which then results because of the defective work. It was the weld that was done in a faulty manner. It was the product of the faulty workmanship. The faulty workmanship led to or occasioned the defective weld and the separation of the diaphragm and flange. The buckling of the leg structure and the collapse of the Reclaimer were all subsequent in time and effect to the failure of the defective weld.

[48] The question of construction thus comes down to the question whether a distinction is to be seen in the damage done to the Reclaimer following on the failure of the weld. There can, I think, be such a distinction that has its basis in consequences rather than the identification of individual items or parts of the insured property. If one looks for a distinction in terms of consequence one can find it between the weld failure and separation of flange and diaphragm, and in the consequences that followed for the structure of the Reclaimer. It is also possible to discern a distinction between parts of the Reclaimer. They, of course, formed a complete structure with one function, but it was a machine of many parts. One part was damaged, being the join between one of the legs and the circular base. That damage led to the collapse of the leg, the overloading and collapse of the other legs and the damage to the rest of the structure caused by its impact with the conveyor belts and the ground.

[49] This is the conclusion to which I have come. One part of the Reclaimer was damaged because of faulty workmanship. The other parts were subsequently damaged resulting from that faulty workmanship. The faulty workmanship was the occasion by which the Reclaimer was damaged. The damage that followed the failure of the weld is subsequent damage. It is not excluded by some other term of the policy. The proviso applies to prevent recovery under the policy for that part of the leg structure, the flange and diaphragm, which were joined by the weld.

[50] If one adopts the second mode of construction of the proviso, that which substitutes ‘danger’ for ‘peril’, the result is the same. On this approach there was damage to the Reclaimer occasioned by, or which happened through, faulty workmanship. The damage was the separation of the flange plate and diaphragm because of the weld failure. The damage resulted in the danger (‘Peril’) that the loss of structural integrity to which the separation gave rise would eventuate in a failure of the structure of which the weld was part. The danger did eventuate, the leg collapsed bringing down the Reclaimer. This is subsequent damage which occurred in a manner, in circumstances, not otherwise excluded by the policy.

[51] I think the position is even clearer with respect to the damage to the conveyors. They were not part of the Reclaimer but were damaged when the Reclaimer collapsed onto them. The damage to them is subsequent to the faulty workmanship, it resulted from it and was occasioned by a peril, the collapse of the Reclaimer, and loss occasioned in that manner is not excluded by some other provision of the policy. It follows that, in my opinion, the applicant is entitled to indemnity under the policy.