

**BREACH OF WARRANTY IN MARINE INSURANCE:
*Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General
Insurance Ltd* [2006] WASC 104 (*Pilbara Pilot*)**

Kate Lewins*

Introduction

This case concerns the vessel *Pilbara Pilot*, which was lost in February 1995 at Dampier during Cyclone Bobby. The vessel was insured by the defendant pursuant to a marine insurance policy at the time of its loss. The plaintiff's action sought indemnity under the policy. The defendant denied indemnity on various grounds. This case note deals with one of those grounds; the issue of the failure to moor the vessel on a cyclone proof mooring in breach of an express warranty. The vessel had been tied to the stern of another vessel during the cyclone and the parting of the mooring lines led to the loss of the vessel. The trial judge Heenan J found there was no breach of the express warranty because the actions of the insured were in an attempt to avert the loss, and as such the proximate cause of the loss was the cyclone itself.¹

This case raises the vexed issue of proximate cause: will an insured's action attempting to avert a loss by a peril insured be part of the peril itself, or a new peril. The twist in the tale is whether the insured's actions in attempting to avert the loss can neutralise a breach of warranty which occurred during that attempt.

The facts

Pilbara Pilot was a 14.6 metre seagoing covered pilot/personnel vessel with a 4.3 m beam and 1.5 draft.² It was under contract to act as a pilot boat, carrying pilots to and from ships entering and leaving the port of Dampier. The vessel's usual mooring was in or near an area of approved anchorage for small craft, in about 1.8 metres of water.³ The judge found that the usual mooring of the vessel was in fact 'cyclone proof' and was approved by the local statutory authority.⁴ The plaintiff also owned another vessel, the *Pilbara Jarrah*, which was moored in the lee of a causeway and in water of about 4 metres. As Cyclone Bobby approached, a number of the plaintiff's captains expressed concern that in the particular weather conditions, the *Pilbara Pilot* might be at risk because of its insufficient water clearance.⁵ The port at this time was on yellow alert, and announcements had been made that the port would move onto red alert about an hour later.⁶ Once it moved onto red alert no shipping movements were permitted:⁷ 'in these circumstances of apprehended imminent peril the decision was made taken to move the vessel.'⁸

As Heenan J noted,⁹ once the decision had been made to move the vessel, the options were rather limited. There were no moorings free at that time. The plaintiff's manager decided to move the vessel to a more sheltered anchorage and in deeper water, albeit tied to the stern of the *Pilbara Jarrah*. The *Pilbara Jarrah*'s mooring was an approved cyclone mooring but, as His Honour accepted, only for the one vessel.

* Senior Lecturer, Murdoch University School of Law. By way of disclosure of interest in the case, it should be noted that the author was employed by the defendant's solicitors and acted for the defendant from 1995 to 1996.

¹ *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* [2006] WASC 104 (Supreme Court of Western Australia Unreported, Heenan J, 8 June 2006) [132].

² *Ibid* [20].

³ *Ibid* [4].

⁴ *Ibid* [101]. The judge rejected the defendant's argument that the vessel's usual mooring was not cyclone proof, in breach of the warranty under the policy. A lengthy part of the judgment deals with this argument.

⁵ *Ibid* [44].

⁶ *Ibid* [45].

⁷ *Ibid* [45].

⁸ *Ibid* [45].

⁹ *Ibid* [48].

During the passage of Cyclone Bobby the mooring lines that had secured it to the *Pilbara Jarrah* had parted, leaving the *Pilbara Pilot* adrift. It was then driven onto rocks, badly battered and eventually sank.

His Honour noted that mooring the vessel behind the *Pilbara Jarrah* was a breach of port regulations (although the Port Authority later accepted that the arrangement was made in the interests of safety and good seamanship).¹⁰ The plaintiff also conceded that the opinion of the plaintiff's manager and captains that it would be best to move the vessel was, with the benefit of hindsight, mistaken and that the vessel may have fared better at its usual mooring.¹¹ Expert evidence was led, and accepted, that whatever problems might have occurred during the passage of Cyclone Bobby, it was unlikely that shallow water in the area of the usual mooring would be one of them.¹²

The arguments

The defendant denied indemnity on the grounds that there was a breach of warranty that the vessel was to be moored on a cyclone proof mooring.¹³ The plaintiff admitted that the vessel was not moored on a cyclone proof mooring when it was lost. However the plaintiff argued that a combination of s84(4) of the *Marine Insurance Act 1909* (Cth) (*MIA*), clause 14 of the Institute Cargo Clauses (Hulls) and the duty to take steps to protect the vessel in the face of the cyclone had meant that shifting the vessel from its own mooring to being tied to the stern of the *Pilbara Jarrah* did not constitute a breach of the warranty. Counsel for the plaintiff pointed to the first instance decision of the Hong Kong Commercial Court in *HK Nylon Enterprises Ltd v QBE Insurance (Hong Kong) Ltd*¹⁴ as authority for the proposition that a warranty provision could be modified by other express terms of a marine insurance policy. Thus, regardless of the express provisions of the policy, there was a duty to preserve the vessel, and so long as those steps were reasonable the loss of the vessel should be attributed to the operation of the peril of the sea. The plaintiff proposed that it would not be in the interests of either the insured or insurer for strict compliance with the warranty to be required, when that is in fact the more dangerous course.¹⁵

The decision

Heenan J noted¹⁶ that there was some conflict amongst text writers about the view to be taken of deliberate acts of an insured attempting to avoid an imminent peril. His Honour said:

One approach is to regard the deliberate action taken by the owner or master to avoid imminent perils of the sea then actually operating... as part of the same peril of the sea which the owner or master had sought, by that action, to avoid. – see *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55...Any approach requires consideration to be given to the observations made by Lord Sumner in *British and Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41 which would confine the operation of s84(4) (s74(4) of the *Marine Insurance Act 1906* of the United Kingdom) to actual suing and labouring after the peril had struck and caused damage.¹⁷

His Honour said the real question in this case was – what are the rights and obligations of an insured when faced with an impending peril? The plaintiff submitted that the real and proximate cause of the loss was the imminent cyclone which caused the plaintiff to shift the vessel from its complying mooring. Heenan J accepted the plaintiff's reliance on the case of *Canada Rice Mills Ltd v Union*

¹⁰ Ibid [52].

¹¹ Ibid [16], [44]. But the plaintiff argued this was not to the point on the plaintiff's case – see [16], [116] – [120].

¹² Ibid [41].

¹³ The defendant also disputed that the usual mooring was in fact cyclone proof or that it was approved by the local statutory authority. On that basis the defendant alleged there had been a material non-disclosure and a breach of warranty prior to the cyclone. See [1]. It was also unsuccessful on those grounds. This case note discusses only one ground of defence, namely the breach of warranty in failing to moor the vessel to any cyclone proof mooring at the time of the loss.

¹⁴ (2002) HCCL 46/1999.

¹⁵ *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* [2006] WASC 104 (Unreported, EM Heenan DCJ, 8 June 2006) [120].

¹⁶ Ibid [116].

¹⁷ Although acknowledging it was not on point for this case, the Judge accepted that a breach of s84(4) or equivalent suing and labouring terms will seldom provide an underwriter with a defence to a claim unless it is established that the proximate cause of the loss of the property insured was not the peril insured against by the failure of the insured to take reasonable steps to protect it: [124].

*Marine and General Insurance Co Ltd.*¹⁸ In that case it was held that overheating damage to rice consequent on closing ventilation hatches, closed to protect the rice from rough weather, was caused by perils of the sea rather than the action of closing the hatches.

Heenan J concluded that the decision to move the vessel should, in his view, be regarded as resulting from the peril of the sea, namely the rapidly approaching cyclone. It was that same peril which accomplished the loss of the vessel at its new position astern of the *Pilbara Jarrah*.

As it is acknowledged that it was an honest and reasonable decision to move the *Pilbara Pilot* in those circumstances, I consider that both the movement of the vessel and its subsequent loss were caused by this peril of the sea and it is not to the point that, at the new temporary position of the *Pilbara Pilot* astern of the *Pilbara Jarrah* she was not moored at a cyclone proof mooring... It is not possible, in my view, to regard the move of the vessel from its original mooring as in any way interrupting or avoiding the causative effect of the cyclone... The transfer of the *Pilbara Pilot* to a new temporary mooring was a precaution, unfortunately unsuccessful, taken with a view to preserve the vessel from the developing threat and one which was supported by all the competent marine expertise available at the time.¹⁹

Comment

There is nothing unusual about a claim where actions of the insured in attempting to avoid a loss actually lead to some loss, but the proximate cause being found to be the initial peril. It was accepted by the trial judge that had the vessel remained on the mooring, it would have had a better chance of surviving the cyclone. What does appear novel about this decision is that the insured's actions were in breach of an express warranty, and the judge found that the express warranty was modified by the requirement to take steps to preserve the insured property. The judgment, somewhat unconvincingly, relies upon a first instance decision in Hong Kong in disposing of one of the fundamental tenets of marine insurance – that a warranty must be exactly complied with.²⁰ The other case cited, *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd*²¹, was not decided in the context of an allegation of breach of warranty. Unfortunately the defendant decided not to appeal the decision, so review of the case will have to wait for another occasion.

This case raises vexed issues – what is an insured to do if it feels that compliance with a warranty will increase the chance of a loss? Would insurers wish an insured to comply with express warranties in every circumstance, even if the insured felt it was not in the best interests of the insured property and may leave the vessel more exposed to a peril rather than less?²² Heenan J accepts that the insured's decision, even with the best of intentions, may well have been wrong. Should the insurer be liable in either case; whether the vessel is wrecked in compliance with the warranty, as well as where the vessel is wrecked after the insured embarks on a well intentioned but ultimately misguided attempt to save it, in breach of the warranty?

Reform?

Whilst the topic of reform of marine insurance has gone off the boil of late, it is interesting to note what might transpire if such a case fell under the *Insurance Contracts Act 1984* (Cth) (ICA) or alternatively if the proposed *MIA* reforms were enacted. Under the ICA there is no concept of warranties. Section 54 applies to a breach of an express term requiring the insured to act in some way after the contract has been entered. It seems to have been accepted by the judge that the decision to move the vessel and moor it behind the *Pilbara Jarrah* in breach of the policy was in fact was capable of causing or contributing to the loss in question. Section 54(2) gives the insurer the right to refuse the claim in that case. However under s54(5) if the act was necessary to preserve property then the insurer may not refuse to pay the claim by reason only of the act. On the facts, this would have led to a similar issue: to whether moving the *Pilbara Pilot* was indeed 'necessary to preserve property', particularly when, in this case, it did not have that outcome and probably increased the risk of harm.

¹⁸ [1941] AC 55.

¹⁹ *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* [2006] WASC 104 (Unreported, EM Heenan DCJ, 8 June 2006) [132].

²⁰ Section 39(1) *Marine Insurance Act 1909* (Cth).

²¹ Above n 18.

²² Above n 19 [120].

Under the reforms to the *MIA* proposed by the Australian Law Reform Commission (ALRC),²³ warranties would be abolished. A breach of an express term of the contract would be prima facie grounds for denial of the claim, subject to the insured's right to prove that the loss for which it seeks to be indemnified was not proximately caused by or attributable to (as the case may be) the breach. The obligation to act to preserve property set out in s84(4), and on which so much of this case hinged, would be retained under the reforms. As in the *Pilbara Pilot* case, it would be open to an insured to argue that the proximate cause was not the failure to moor the vessel on the cyclone proof mooring but the cyclone itself. It would seem that the same argument that succeeded in this case could be argued under the new reforms – namely, that if an insured acted to preserve property in accordance with s84(4) then that will negate the effect of a breach of an express term. The abolition of warranties, and the requirement for exact compliance, would mean that the issue would become purely one of proximate cause. Under the reforms, the result of the *Pilbara Pilot* would be the same and would be uncontroversial.

This case reflects, perhaps, a continuing judicial discomfort at upholding of breaches of warranty at all costs. Without legislative reform to the law relating to warranties in marine insurance contracts, this type of decision may become more frequent. Ironically, reform along the lines postulated by the ALRC might have the same effect.

²³ Australian Law Reform Commission, *Review of the Marine Insurance Act 1909* Report No 91, (2001).