

JEREMY LUDLOW

BARRISTER

Howard Chambers
19 Howard Street
Perth WA 6000

ALLISON PTY LTD v LUMLEY GENERAL INSURANCE LTD *[2005] WASC 37 (11 MARCH 2005) (MASTER NEWNES).*

Background

The *Pilbara Pilot* was lost in Cyclone Bobby at Dampier on 23 February 1995.

The insurer refused an indemnity to the owner on the ground, among others, that, contrary to an express term, the vessel was not moored at a cyclone proof mooring, and that the mooring was not approved in accordance with the statutory requirements.

The owner said that the mooring *was* cyclone proof, was approved informally, and that the insurer had breached the duty of utmost good faith by relying upon its formal non compliance with the statutory requirements.

In 2003, the owner obtained evidence under the FOI Act of correspondence that had taken place in 1995 between the insurer's assessor and the Port Authority indicating that the Port Authority accepted that the mooring was approved, and that there were no standard application forms.

The insurer asserted that that correspondence was privileged, but, in a letter from its solicitors dated 3 September 2003, agreed to waive privilege, on the basis that these documents were largely irrelevant. (*Quaere*, whether they were still privileged.) By that letter, the insurer also waived privilege over the assessor's fifth report, which enclosed a copy of the correspondence, and made some presently irrelevant comments.

The owner then applied to amend its Reply by adding a contention that the breach of the duty of good faith had included the withholding of these documents until privilege was waived. (*Quaere*, whether a claim of privilege could ever be a breach of that duty.)

The insurer initially opposed this application, and filed an affidavit including the following paragraphs:

"8. After receiving a copy of the fifth report from Manu Marine dated 2 November 1995, Phillips Fox made further enquiries in relation to the approval status of 'PILBARA PILOT's' operational mooring.

9. The additional enquiries did not disclose any evidence to substantiate that formal approval for the 'PILBARA PILOT's' operational mooring was granted by the Dampier Port Authority.

10. Further, additional enquiries were made of Captain Hammond and what he said suggested that no informal approval was granted by the Dampier Port

Authority of the 'PILBARA PILOT's' usual mooring. He did not identify when, how and by whom informal approval was granted.

11. The plaintiff has not produced or referred to any admissible evidence to show that the Dampier Port Authority formally or informally approved the relevant mooring.

12. The plaintiff has not pleaded in its statement of claim that the Dampier Port Authority approved the relevant mooring, or given particulars when, how and by whom approval was given.

13. The plaintiff's solicitor has been told that Phillips Fox's enquiries found no evidence to support the suggestion that the mooring was approved at the time of the accident [there is then reference to correspondence to that effect between the solicitors annexed to the affidavit]."

However, the insurer later indicated that the application would not be opposed.

The owner subsequently applied for inspection of certain other documents in respect of which the insurer claimed privilege. The owner contended that privilege had been implicitly waived by the solicitors' letter dated 3 September 2003 and the affidavit.

The documents sought to be inspected were all documents relating to, first, the enquiries of the Port Authority and its Harbour Master (Captain Hammond), secondly, any reconsideration of the plaintiff's claim after receipt of the fifth report, thirdly, its decision not to serve that report, and fourthly, the preparation of the insurer's affidavit of discovery sworn at around that time.

The Most Important Authorities Considered by Master Newnes

Implied Waiver of Privilege

Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475.

Mann v Carnell (1999) 201 CLR 1.

British American Tobacco Australia Services Ltd v Cowell (2002) 7 VR 524.

Goldberg v Ng (1995) 185 CLR 83.

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1998) 81 FCR 526.

No Property in a Witness

Harmony Shipping Co v Saudi Europe Line [1979] 1 WLR 1380.