4. COMMENTARIES AND CASE NOTES

A. COOPER V. PHOENIX PRUDENTIAL AUSTRALIA LIMITED AND OTHERS

Cooper v. Phoenix Prudential Australia Limited and Others, a decision of the Chief Justice of the Supreme Court of Western Australia in Chambers, unreported, 22 June 1983. The case considered the meaning of "sent to sea" and the case note has been contributed by Geoffry E. Underwood.

In this case His Honour, the Chief Justice of Western Australia, Mr Justice Burt had to consider the meaning of "sent to sea" in sub-section (5) of section 45 of the Marine Insurance Act 1909 (Cth).

The facts are as follows. The plaintiff, a professional fisherman, was at all material times the owner and skipper of the fishing boat "Hood", which boat the plaintiff had insured with the defendant under a time policy of marine insurance. Early in May 1982, the plaintiff decided to sail the "Hood", on a fishing venture, from Emu Point, near Albany, to Bremer Bay which is about 150 kilometres to the east of Albany. The plaintiff intended to leave Emu Point on 7 May and, as his regular crew member was unavailable on that day, he engaged another man who was to crew the boat until it reached Bremer Bay. It was arranged that the regular crew member would travel overland to Bremer Bay and that he would there board the boat and relieve the casual hand on 9 May.

The boat reached Bremer Bay on the night of 7 May. It was anchored about 800 metres off-shore that night and the following day was spent in fishing. At about 6 p.m. on that day the boat was again anchored off-shore and the plaintiff and his casual hand remained on board. On the following morning, Sunday 9 May, the casual hand rode ashore and left the boat. The plaintiff's regular crewman had not yet arrived at Bremer Bay to replace him. The plaintiff waited on board at anchor for the remainder of that day and throughout Sunday night. Early on the following morning he decided to return to Albany single-handed and he weighed anchor and left Bremer Bay at about 4 o'clock on that morning. He fished as he went. He anchored at Cape Riche for an hour and then continued on, intending to spend that night at anchor at Cheynes Beach. However, he received an unfavourable weather report and this led him to decide to press on to Albany, his estimated time of arrival there being shortly after 10 o'clock at night. At about 5 p.m. he was approaching the passage between Michaelmas Island and Herald Point. The boat was being steered by its automatic pilot. Apparently the plaintiff fell asleep and the boat grounded on Michaelmas Island and became a total loss.

It was common ground that when lost the boat, "with the privity of the assured", was "in an unseaworthy state" as she was under-

manned. It was also conceded that the loss was attributable to that unseaworthiness.

Section 45(5) of the Marine Insurance Act 1909 (Cth) states that

> [i]n a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

Section 40(5) of the Marine Insurance Act 1907 (W.A.) is in identical terms and, thus, it was not necessary to decide whether the policy the subject of the action is or is not a policy of "State marine insurance" within the meaning of section 6(1) of the Marine Insurance Act 1909 (Cth).

The only question to be decided on the admitted facts was whether when the boat weighed anchor at Bremer Bay to return to Albany, in the terms of that sub-section, it had been "sent to sea".

Counsel told His Honour that they had been unable to find any authority on the phrase "the ship is sent to sea". The plaintiff's submission was that the "ship was sent to sea" when it sailed from Emu Point and that it remained continuously at sea thereafter until it was lost. While "at sea" it could not be "sent to sea". His Honour did not accept the submission as to do so would imply in a time policy the warranty to be implied in a voyage policy by section 45(1) of the Marine Insurance Act 1909 (Cth).

His Honour found that as the plaintiff on this occasion had anchored at Bremer Bay for a short stay-over, when he left the anchorage and the ship was got under way to return to Albany it was, within the meaning of section 45(5) of the Commonwealth Act and section 40(5) of the State Act, if that be the relevant statute, "sent to sea". Consequently the plaintiff's claim was dismissed and he was ordered to pay the defendant's costs of the originating summons to be taxed.