[HIGH COURT OF AUSTRALIA.]

THE BOARD OF MANAGEMENT OF THE AGRICULTURAL BANK OF TASMANIA AND OTHERS . . . . . Appellants; Plaintiffs,

AND

BROWN . . . . . Respondent. Defendant,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *May* 23, 24; SYDNEY, *Sept.* 2.

McTiernan, Williams, Webb, Fullagar and Taylor JJ.

Marine Insurance—Policy—Endorsement—Construction—Endorsement giving cover for named period "whilst" vessel "engaged in pile-driving work"—Whether vessel engaged in such work while returning to home port after fulfilment by owners of pile-driving contract—Further provision by endorsement for increase in amount insured "for the above-mentioned period only"—Whether increased amount payable on loss of vessel within period but not while engaged in pile-driving work.

A policy of marine insurance covered a vessel and specified equipment therein against total or constructive total loss as the result of usual and specified risks from 24th March 1950 until 24th March 1951. The sum insured was £4,200. By the conditions of the policy the insurer warranted that the vessel would not "undertake towage or salvage service under a contract previously arranged". On 5th September 1950 an endorsement was issued in the following form: "To attach to and form part of Endorsement No. 5723 LLOYD'S Policy No. TM3507. Dated 5th September, 1950. Insured: BOARD OF MANAGEMENT OF THE AGRICULTURAL BANK AND MESSRS. LANGFORD BROS. In consideration of an additional premium having been paid the within mentioned vessel is covered for the period 5th September 1950 to 5th November 1950 inclusive, whilst engaged in Pile Driving and salvage work. It is further noted and allowed that the sum insured is increased to £8,200 for the above-mentioned period only. Subject, nevertheless, to the terms, conditions and stipulations of the within mentioned Policy."

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Pursuant to a contract, the vessel, which was registered in Hobart, was engaged in pile-driving in Macquarie Harbour, Tasmania for about six weeks prior to 20th October 1950. On that day, the work having been completed, the final payment under the contract was made to the owners. On 22nd October 1950 the vessel was used for other purposes of the owners and on the following day stores were taken on board for the return voyage to Hobart. Adverse weather prevented the vessel commencing the return voyage until 24th October 1950 on which day, two hours after she sailed, she went aground at Hell's Gates, the entrance to Macquarie Harbour. At the trial of an action on the policy *Gibson* J. found on the evidence that the standing of the vessel resulted in a constructive total loss. On appeal—

Held, that the vessel was not engaged in pile-driving work at the time she ran aground.

Held further by *McTiernan*, *Webb*, *Fullagar* and *Taylor* JJ., *Williams* J. dissenting, that on the proper construction of the policy and endorsement, the liability of the insurer was increased generally during the period from 5th September to 5th November, and not merely while the vessel was engaged in pile-driving and salvage work.

Held further by *McTiernan*, *Webb*, *Fullagar* and *Taylor* JJ. (*Williams* J. expressing no opinion on the point) that the finding of the learned trial judge that the stranding resulted in a total loss could not be disturbed.

Decision of the Supreme Court of Tasmania (*Gibson* J.), reversed.

APPEAL from the Supreme Court of Tasmania.

The Board of Management of the Agricultural Bank of Tasmania, as mortgagee of the vessel *Re-Echo*, joined as a co-plaintiff with the owners Henry Hobart Langford, Mervyn Langford, Trevor Tasman Langford and Allan Milford Langford in bringing an action in the Supreme Court of Tasmania against Gerald F. Brown, an underwriter at Lloyd's, upon a certain policy of marine insurance in respect of such vessel to which the defendant was a subscriber. The material terms of the policy which was dated 27th April 1950 and of an endorsement thereon dated 5th September 1950, are sufficiently set forth in the judgments of the Court hereunder.

The statement of claim, as amended was as follows:—1. The plaintiffs other than the first-named plaintiff (all of whom are hereinafter collectively referred to as "the owners") were at all material times the registered owners of an auxiliary fishing vessel *Re-Echo* (hereinafter referred to as "the said vessel"). 2. By a mortgage dated 18th July 1949 and registered under the provisions of the *Merchant Shipping Act* Number 174395 the owners mortgaged the said vessel to the first-named plaintiff for securing to the first-named plaintiff repayment of the principal sum of £4,174 and interest

thereon as therein mentioned. 3. The said vessel was the subject of a policy of insurance dated 27th April 1950 Number T.M. 3507 underwritten (*inter alios*) by the defendant and issued under authority from the underwriters by Harvey Trinder (Tasmania) Pty. Ltd. as brokers from 24th March 1950 to 24th March 1951 at four o'clock in the afternoon local standard time against the maritime risks therein specified (including perils of the sea and fire) for the sum of £4,200. 4. For the purposes of the said policy the said vessel was valued at £9,200. 5. By an endorsement dated 5th September 1950 which attached to and formed part of the said policy the sum insured was increased to £8,200 for the period from 5th September 1950 to 5th November 1950 inclusive whilst the said vessel was engaged in pile-driving and salvage work. 6. The first-named plaintiff is and was at all material times interested to the amount from time to time due under the said mortgage in the said policy of insurance. 7. While the said vessel was engaged in pile-driving and salvage work namely on 24th October 1950 it ran aground at Hell's Gates in circumstances constituting a peril insured against under the said policy. 8. As a result of the said vessel running aground it was so damaged that it was not reasonably practicable to repair the said vessel and the cost of repairing the damage would have exceeded the value of the said vessel when repaired and the owners accordingly gave notice of abandonment to the defendant's agents Harvey Trinder (Tasmania) Pty. Ltd. and/or C. H. Smith and Co. Pty. Ltd. 9. The defendant by his agents Harvey Trinder (Tasmania) Pty. Ltd. and/or C. H. Smith & Co. Pty. Ltd. accepted notice of abandonment of the said vessel. Such acceptance is to be implied from the conduct of the defendant's said agents. 10. The plaintiffs will refer to the said policy for its full terms and effect. 11. The amount due to the first-named plaintiff under the said mortgage up to 1st March 1954 was the sum of £5,336 5s. 2d. 12. Alternatively whilst the first-named plaintiff was interested as aforesaid under the said policy of insurance the said vessel was destroyed by fire at Strachan in Tasmania on 31st December 1950 and totally lost the said fire being a peril insured against under the said policy. 13. The defendant is liable to pay to the first-named plaintiff his proportion of the said sums of £5,336 5s. 2d. or £4,200 respectively (together with interest accruing thereon) but the defendant has refused or failed to pay the same or any part thereof. 14. The defendant is liable to pay to the owners his proportion of the said sums of £8,200 or £4,200 respectively (together with interest accruing thereon) but the defendant has refused or failed to pay the same or any part thereof.

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The action was heard before *Gibson* J. who, in a written judgment delivered on 7th June 1956, found so far as is material, that the vessel had not been engaged in pile-driving work when she ran aground but that she had become a constructive total loss by reason of running aground, and ordered that there be judgment for the plaintiffs for the sum of £14 12s. 0d., being the defendant's proportion as an underwriter of the sum of £4,200 which, his Honour took the view, was the amount payable to the plaintiffs under the terms of the policy.

From this decision the plaintiffs appealed to the High Court and the defendant gave notice of cross-appeal against the finding that the vessel had become a constructive total loss by reason of running aground.

D. M. Chambers Q.C., Solicitor-General for the State of Tasmania (with him *W. C. Hodgman*, *J. H. Dobson* and *R. S. J. Valentine*), for the appellants. The judgment below was for £14 12s. 0d. The sum at issue is £4,200 spread over a number of underwriters of whom the respondent is one. It has been agreed that the other underwriters concerned will be bound by the decision in this case. If necessary, I seek special leave to appeal. On the proper construction of the endorsement it was irrelevant whether or not the vessel, at the time she became a loss, was engaged in pile-driving or salvage work. Both the original policy and the endorsement were time policies. The endorsement did two things. Firstly, it covered the vessel in respect of perils not insured against in the policy while the vessel was engaged in pile-driving and salvage work. Secondly, it increased the amount of the sum insured under the policy for the period of two months. The words " while engaged in pile-driving and salvage work " are not conditional but purely descriptive. [He referred to *Dimock* v. *New Brunswick Marine Assurance Co.* (1).] If material, it is submitted that the vessel was engaged in pile-driving at the material time. Her leaving Macquarie Harbour was inseparable from the operation of pile-driving. In order to engage in it at all the vessel had to be taken to Strachan and brought back from Strachan. I did not appear at the trial below but I am instructed that the point dealing with the construction of the endorsement was not taken. It is a matter on which evidence could throw no light and it is open to the appellants in this Court.

(1) (1848) 5 New Brunswick Rep. (3 Kerr) 654.

R. C. Wright (with him *E. G. Butler*), for the respondent. The policy covered the vessel for the period of one year for £4,200. Then, in consideration of the payment of an additional premium, further cover is granted for the period during which the vessel is engaged in pile-driving. The additional sum of £4,000 is available subject only to the terms of that indorsement. [He referred to *Absalom* v. *United Insurance Co. Ltd.* (1); *Difiori* v. *Adams* (2).] The two paragraphs of the indorsement are to be read together and, so read, the increased cover is available only when the loss takes place both within the calendar time and the operational time specified. On the evidence, the trial judge was not justified in finding that the vessel was a constructive total loss as a result of the grounding. [He addressed the Court on the evidence.]

D. M. Chambers Q.C., in reply.

Cur. adv. vult.

Sept. 2.

The following written judgments were delivered :—

McTIERNAN, FULLAGAR AND TAYLOR JJ. The first-named appellant was the mortgagee, and the other appellants the owners, of the auxiliary fishing vessel *Re-Echo* which, on 24th October 1950, ran aground at Hell's Gates, the entrance to Macquarie Harbour on the western coast of Tasmania. For a period of about six weeks previously her owners had been engaged in the work of pile-driving in the harbour and the vessel had been employed by them in connexion with this task. The work was, however, completed and final payments made to the owners on Friday 20th October 1950. Thereafter, on the Sunday following, the vessel was used for other purposes of the owners and on Monday stores were taken on board for the return voyage to Hobart which was the vessel's home port. Adverse weather conditions prevented her from commencing the return voyage that day but on the following morning the vessel sailed and about two hours later she went aground on the rocky shores of Hell's Gates. The entrance, so called, is narrow and the passage through it is, in some circumstances, not without hazard.

The respondent is an underwriter at Lloyd's and he was a subscriber to a policy of marine insurance issued to the appellants covering the vessel and specified equipment therein against total or constructive total loss as the result of usual and specified risks. The vessel, including her equipment, was valued for the purposes of the policy at the sum of £9,200 and the sum insured was £4,200

(1) (1932) A.L.R. 378. (2) (1884) 53 L.J.Q.B. 437.

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of which the respondent's proportion amounted to £14 12s. 0d. The cover provided by the policy was expressed to continue for the space of twelve calendar months from 24th March 1950 until 24th March 1951 and by the conditions of the policy the insurer warranted that the vessel would not "undertake towage or salvage service under a contract previously arranged." It was, however, stipulated that the vessel should be held covered in case of any breach of warranty as to, *inter alia*, towage or salvage services "provided notice be given immediately after receipt of advices and any additional premium required be agreed."

After the stranding of the vessel the owners purported to give to the insurers notice of abandonment. Thereafter, disputes arose as to whether such notice had been accepted and, also, as to whether an actual or constructive total loss had then occurred. It is unnecessary to relate the details of these disputes, but it should be mentioned that the vessel was refloated after the stranding and then beached inside the harbour. A few days later she was taken some distance up Macquarie Harbour where she was placed on a temporary slip. There, on 31st December 1950 she was so damaged by fire as to become a total loss if, in fact, a total loss had not previously occurred.

The questions in this appeal are not concerned with the policy of insurance in its original form but with the terms of an endorsement by which, on 5th September 1950, the terms of that policy were varied. The form of the endorsement is important and should be set out in full :—

"To attach to and form part of Endorsement No. 5723
LLOYD'S Policy No. TM3507 Dated 5th September, 1950.
Insured : BOARD OF MANAGEMENT OF THE AGRICULTURAL BANK AND MESSRS. LANGFORD BROS.

In consideration of an additional premium having been paid the within mentioned vessel is covered for the period 5th September, 1950 to the 5th November, 1950 inclusive, whilst engaged in Pile Driving and salvage work.

It is further noted and allowed that the sum insured is increased to £8,200 for the above mentioned period only.

Subject, nevertheless, to the terms, conditions and stipulations of the within mentioned Policy.

(10/- Duty Stamp) HARVEY TRINDER (TASMANIA) PTY. LTD.
Horace Kench, Director.
Return Premium £ : : Extra Premium £ : :
A.P. Cert. No. "

It will be seen that the stranding of the *Re-Echo* occurred during the period specified in this memorandum and the question immediately arises whether the appellants, if they suffered a total loss as the result of the stranding, are entitled to recover from the respondent a proportion of the increased sum therein specified.

In the action which was commenced against the respondent in the Supreme Court of Tasmania the appellants alleged by their statement of claim that "By indorsement dated 5th September 1950 which attached to and formed part of the said policy the sum insured was increased to £8,200 for the period from 5th September 1950 to 5th November 1950 inclusive whilst the said vessel was engaged in pile driving and salvage work." Thereafter, it was alleged that whilst the said vessel was engaged in pile-driving and salvage work on 24th October 1950 she ran aground at Hell's Gates in circumstances constituting a peril insured against under the said policy.

For the purpose of determining the issues which were raised by the pleadings it appears to have been assumed that the statement of claim truly alleged the effect of the arrangement evidenced by the endorsement and, therefore, that the appellants were not entitled to the benefit of the increased cover unless the vessel had become a total loss whilst engaged in pile-driving or salvage work. But upon the hearing of this appeal the contention was advanced, apparently for the first time, that this was not the effect of the endorsement; it was contended that upon its true construction the effect of the endorsement was to extend the cover provided by the policy in respect of the risks therein specified over a wider field of operations and, also, to increase the sum insured in respect of all such risks. Whether or not it was contemplated that the work at Macquarie Harbour would or might involve the vessel in the performance of salvage services or include the performance, in some manner, of towage services is by no means clear but it is not unreasonable to suppose that the parties must have had some reason for thinking so when entering into the arrangement of 5th September.

Upon the issues as presented to him the learned trial judge found that at the time of the stranding the vessel was not engaged in pile-driving and salvage work. But in favour of the appellants he found that the vessel became a total loss as a result of the stranding. It should be mentioned also that his Honour found that the notice of abandonment given by the owners was not accepted. In those circumstances the order which he made entitled the appellants to recover from the respondent his due proportion of £4,200, that is to say, £14 12s. 0d. The appeal of the appellants is brought

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from so much of the order of the learned trial judge as depends upon the construction which he is said to have given to the endorsement, and upon his conclusion that the vessel was not engaged in pile-driving at the relevant time. The respondent, on the other hand, whilst conceding that the subsequent fire, which occurred after the expiration of the period specified in the endorsement, resulted in a total loss, cross-appeals from his Honour's finding that the stranding resulted in such a loss.

There is, in our view, nothing to be said for the proposition that at the time of the casualty the vessel was engaged in " pile-driving " or in " pile-driving work ". As already appears that work had been completed more than three days before the casualty, thereafter the vessel had been used for other purposes of the owners and, ultimately, she commenced her return voyage to Hobart. It is quite clear that unless it is possible to say, as was contended by the appellants, that her journeys to and from Macquarie Harbour, where the actual work of pile-driving was carried out, constituted part of that work the appellants must fail on this point. The endorsement, however, contemplates the use of the vessel in physical operations which, it was possible to suppose, might involve her in some form of towage or salvage work the performance of which could result in discharging the insurers from liability under the policy. The variation of the policy dealt with this possibility by the use of the words, " whilst engaged in pile-driving and salvage work ". Those words are, however, quite inappropriate to embrace the voyage made by the vessel to and from Macquarie Harbour. Quite clearly those voyages could in no way be said to be a breach of the warranty contained in the policy against undertaking towage or salvage services, and the obvious considerations which lead to this view leave no room for the conclusion that the vessel was, whilst on those voyages, engaged in pile-driving or salvage work within the meaning of the endorsement.

But, in our view, the finding on this issue was quite beside the point, for the effect of the variation evidenced by the endorsement was to increase the extent of the liability of the insurers generally during the specified period. This conclusion may be rested upon the plain words of the endorsement. In the first place the endorsement does not, as was suggested, stipulate for insurance against risks of a character different from those specified in the policy in its original form ; the endorsement forms part of the policy and witnesses that in consideration of an additional premium the vessel is held covered for a brief specified period whilst engaged in pile-driving and salvage work. " Covered " means covered by the

policy in respect of the marine risks specified therein ; without the variation so evidenced the vessel would not, in general, have been so covered whilst engaged in salvage work or, possibly, in undertaking some of the tasks directly associated with pile-driving. With these considerations in mind it may be said that the form of the endorsement is consistent only with an intention on the part of the contracting parties to extend the operation of the subsisting policy and not to make a new and independent contract of insurance capable of operation only when the vessel should be engaged in operations of the character specified. Finally, it is impossible to treat the second paragraph of the endorsement merely as a provision applicable to some new and independent, though subsidiary, arrangement. In no way do the terms of this paragraph appear as the specification of the sum insured under some subsidiary contract of insurance ; on the contrary they provide in express terms for the increase of the sum insured to £8,200 and the " sum insured " means the sum appearing as such in the policy. The fact that the increase was to be for the same period as that specified in the first paragraph is quite insufficient to support the contrary conclusion.

Upon this construction of the endorsement it becomes necessary to consider the issue of fact raised by the respondent's cross-appeal for, upon this construction, the right of the appellant to recover an amount in excess of that already awarded depends upon whether the stranding of the vessel resulted in a total loss. The learned trial judge was of the opinion that it did and there can be no doubt that there was sufficient evidence to support such a finding. Indeed, it may be said, there was sufficient evidence to support either that or the contrary conclusion for there was a sharp conflict on this issue. The conflict which arose upon the evidence was of such a character as to present the learned trial judge with a problem of unusual difficulty and, in the circumstances, to make the issue in dispute appear as one particularly unsuitable to be disposed of merely upon consideration of the written transcript. Nevertheless, upon the appeal, cogent arguments against the finding of the trial judge were advanced, but after a careful reading of the transcript we are satisfied that it should stand. It is, we think, possible to say that in the end the finding resulted from his Honour's declared preference for the evidence and conclusions of Captain McKay, a witness called for the appellants, as against the evidence given by Mr. Tucker who was called as a witness by the respondent. It seems from his Honour's reasons that, apart from the evidence of the former witness, he would not have been prepared to find that the stranding resulted in a total loss. Whether or not it did appears

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to depend upon the degree of damage done to the timbers of the vessel in the vicinity of the keel and the stern. Mr. Tucker, who saw and examined the vessel shortly after the casualty was firmly of the opinion that no irreparable damage had occurred but when he saw the vessel its keel was still in the water and his examination was conducted in circumstances in which it was possible that the starting of the vessel's timbers could have escaped detection. Moreover, the vessel was ballasted with some forty tons of concrete and an internal inspection in the vicinity of the keel was quite impossible. On the other hand, Captain McKay did not see the vessel, or, rather, its remains, until some four years later and at this stage little remained of the hull above the concrete ballast. Yet he was prepared to say that the damage which he then observed indicated that the stranding, and the consequent pounding which the vessel had received, had caused her timbers to start from the keel structure and had so damaged her stern timbers as to make it impossible for her to be made seaworthy again. It was, of course, urged with considerable force that it would be unsafe to rely upon this view formed, as it was, upon an examination made at such a remote stage and after a disastrous fire had occurred and the remains of the vessel had for so long been exposed to the elements. But the criticism inherent in this observation is deprived of much of its force if the character of the damage then apparent could point only to one conclusion. This was the view formed by Captain McKay and nothing appears in his cross-examination which would entitle us to say that he reached it upon considerations that are seriously open to question. Moreover, it should be observed, the learned trial judge inspected the remains of the vessel and was, therefore, in a much more advantageous position than this Court in seeking to evaluate the criticism that Captain McKay's opinion was formed upon unsatisfactory material and in deciding between the views expressed by that witness and Mr. Tucker. In these circumstances, his Honour's finding on this point is not open to question and accordingly the appeal of the appellants should be allowed and the cross-appeal dismissed. Judgment should be directed for the appellants for the respondent's due proportion of the sum of £8,200 but since this result follows because of the appellants' success on a point not taken below there should be no order as to the costs of either the appeal or the cross-appeal.

WILLIAMS J. The appellants sued the respondent in the Supreme Court of Tasmania for his proportion of the insurance moneys alleged to be due to them under a Lloyd's policy of marine insurance

dated 27th April 1950 and an endorsement of that policy dated 5th September 1950. The appellants are the owners and mortgagee of the *Re-Echo* a licensed fishing vessel registered at the port of Hobart which was insured by Lloyd's under the policy for £4,200 against a total or a constructive total loss for twelve months commencing on 24th March 1950 and ending on 24th March 1951, whilst cruising in Tasmanian coastal waters.

The text of the endorsement which is "to attach to and form part of" the policy is as follows: "In consideration of an additional premium having been paid the within mentioned vessel is covered for the period 5th September, 1950 to the 5th November, 1950 inclusive, whilst engaged in Pile Driving and salvage work. It is further noted and allowed that the sum insured is increased to £8,200 for the above mentioned period only. Subject, nevertheless, to the terms, conditions and stipulations of the within mentioned policy."

At the time the sum insured was increased in this way the owners of the vessel were about to take her by sea from Hobart to Macquarie Harbour on the west coast of Tasmania to engage in pile-driving there. They did this and were engaged in this work until 20th October 1950. The next three days were spent on fishing expeditions and preparing the vessel to return to Hobart. On 24th October 1950 the vessel, whilst proceeding from the harbour through the entrance known as Hell's Gates on her way to Hobart ran ashore on some rocks. The appellants claim that she was so damaged as to become a constructive total loss. This is disputed by the respondent. An agent of Lloyd's caused the vessel to be refloated and towed to a sand-bank near the rocks, where partial repairs were effected. She was then towed to Strachan in the upper reaches of the harbour and placed on a slip with her hull partly submerged but mostly above the water pending a decision whether she could be repaired or not. Whilst still on the slip the whole of her hull above water was destroyed by fire on 31st December 1950 and this caused her to become admittedly a constructive total loss.

Gibson J. who tried the action held that the vessel became a constructive total loss on 24th October 1950 but he also held that the loss was not covered by the endorsement on the policy because the vessel was not then engaged in pile-driving or salvage work and that the appellants were entitled to recover £4,200 and not £8,200. The proportion of the former liability underwritten by the respondent was £14 12s. 0d. and his Honour gave judgment against him for this amount. From this judgment the owners and mortgagee

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have appealed to this Court as of right, the affidavit in support stating that an agreement had been entered into before the trial of the action by which all the underwriters agreed to be bound by the judgment of the Court in the action against the respondent. This agreement is in fact included in the policy. The other underwriters are not, however, parties to the action and I have a doubt whether this agreement is sufficient to give the appellants an appeal as of right although such an appeal lies from a final judgment which involved indirectly any claim respecting any property of the value of £1,500 and it is submitted that £4,000, the difference between £4,200 and £8,200, is so involved. But it is unnecessary to decide the point because it is clear that this sum is in fact if not in strict law in dispute and I am of opinion that special leave to appeal should be granted.

This leaves two questions to be argued on the merits. Firstly, whether the learned trial judge was wrong in holding that the loss was not covered by the endorsement and secondly, if this is answered in favour of the appellants, whether he was right in holding that the vessel became a constructive total loss on 24th October 1950. If she did not become a constructive total loss until 31st December 1950, the loss would have occurred beyond the period of the endorsement. The second question naturally is raised not by the appellants but by the respondent. It involves an issue of fact, and it is unnecessary to deal with it if the first question is resolved adversely to the appellants. In my opinion the first question should be so resolved. The answer depends upon the true meaning of the endorsement read with the policy of which it forms part. The perils against which the vessel is insured by the policy include, subject to certain exceptions, the perils of the sea and certain specific perils of which fire is one. The cruising limits are Tasmanian coastal waters. One of the warranties is that the vessel, whilst it has leave to assist and tow vessels or craft in distress, will not undertake towage or salvage services under a contract previously arranged by the owners and or managers and or charterers. The vessel is however held covered in case of any breach of warranty as to, *inter alia*, salvage services provided notice be given immediately after receipt of advices and any additional premium required be agreed. It is common ground that at the date the endorsement was entered into the vessel was about to proceed to Macquarie Harbour on the west coast of Tasmania to engage in pile-driving there and that the seas off that coast can be very rough and the entrance to the harbour which is known as Hell's Gates dangerous to navigate. The endorsement states that in consideration of an additional premium having

been paid the vessel is covered for the period 5th September 1950 to 5th November 1950 inclusive whilst engaged in pile-driving and salvage work. It does not appear to have been contemplated that the vessel would engage in salvage work in this period and it is difficult to understand why salvage work was included as well as pile-driving. Pile-driving was presumably work which the parties thought might expose the vessel to more danger of becoming a total or constructive total loss that she would be exposed to in the course of her normal cruising. It may have been expressly mentioned because it was thought that the vessel could be lost in the course of doing this work from a peril not covered by the policy, although the policy covers the risk of explosions on shipboard or elsewhere. The specific mention of pile-driving indicates an intention to extend the cover so as to include any total or constructive total loss of the vessel from any cause whatsoever whilst engaged in pile-driving. The specific mention of salvage similarly indicates an intention to extend the cover so as to include any such loss whilst engaged in salvage work although the salvage was of such a nature that it would not have fallen within the somewhat limited cover contained in the policy.

The argument before us proceeded to a considerable extent upon the basis that the true scope of the endorsement depended entirely upon whether the words " whilst engaged in Pile Driving and salvage work " were words of condition or were merely descriptive of the work upon which the vessel was about to engage. I am unable to read those words as other than words of condition. They cover the vessel whilst engaged upon one or other of these works. The loss of the vessel whilst not so engaged would not be covered by the endorsement and she would be uninsured unless covered by something in the policy. But this still leaves open the question whether the second sentence in the endorsement " it is further noted and allowed that the sum insured is increased to £8,200 for the above-mentioned period only " refers only to the particular coverage whilst the vessel is engaged in pile-driving and salvage work provided for in the endorsement. The sentence is open to the construction that the sum insured by the policy, that is £4,200, is increased to and replaced by the sum of £8,200 for the period 5th September 1950 to 5th November 1950, so that the latter sum would be payable if the vessel became a total or constructive total loss in this period from any peril covered by the policy or the endorsement. It was urged for the appellants that the parties must have contemplated that the vessel would be exposed to greater perils

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of the sea whilst voyaging off the west coast of Tasmania or navigating Hell's Gates than she would encounter on her normal cruising. But the evidence is that the vessel was in the habit of going ten miles out to sea on these cruises. There does not appear to be any reason why the parties should have contemplated that the perils of the sea off the west coast of Tasmania or in passing through Hell's Gates should have been such that the higher insurance was required whilst the vessel was simply navigating these waters. But it may have been contemplated that if the vessel was engaged in salvage work the risks from the perils of the sea particularly if she were towing another vessel in such seas or through the entrance would be appreciably increased and this may explain the particular provisions of the policy relating to this work. The endorsement must be read as a whole and, when this is done, it seems to me that it is dealing with one subject matter and one subject matter only, that is, the provision of a particular coverage for a limited period and that the second sentence should be construed as referring and referring only to this particular subject matter. In other words, the effect of the endorsement is to insure the vessel against a total or constructive total loss for £8,200 provided the loss occur between the dates in question and whilst the vessel is engaged in pile-driving or salvage work.

It is some satisfaction to know that this is what the appellants must have thought the endorsement meant at the time of the amended statement of claim because par. 5 alleges that: "By an endorsement dated 5th September 1950 which attached to and formed part of the said policy the sum insured was increased to £8,200 for the period from 5th September 1950 to 5th November 1950 inclusive whilst the said vessel was engaged in pile driving and salvage work," and par. 7 that "While the said vessel was engaged in pile driving and salvage work namely on 24th October 1950 it ran aground at Hell's Gates in circumstances constituting a peril insured against under the said policy". We were referred to certain cases and to the well-known classification of marine insurance policies into voyage policies, time policies and mixed policies. But neither the cases cited nor this classification assists in the solution of the present problem. That problem is to ascertain the true intention of the parties from the language they have used. In *Robertson and Thomson* v. *French* (1) Lord *Ellenborough* said: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a

(1) (1803) 4 East. 130 [102 E.R. 779].

policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words " (1).

In my opinion special leave to appeal should be granted but the appeal should fail and be dismissed with costs.

WEBB J. This is an appeal from a judgment for the respondent's proportion of £4,200 given by the Supreme Court of Tasmania (*Gibson* J.) in favour of the appellants who were the mortgagee and the owners of an auxiliary fishing vessel engaged in pile-driving among other activities. The action was brought by the appellants to recover moneys under a Lloyd's policy of marine insurance of the vessel covering stated risks from 24th March 1950 to 24th March 1951.

The vessel ran on the rocks in Macquarie Harbour when returning to its home port, Hobart, on 24th October 1950, four days after the completion of pile-driving operations on which it had been engaged for some weeks in Macquarie Harbour. The policy was originally for £4,200 for a total or constructive total loss; but for an additional premium this amount was by endorsement on the policy increased to £8,200 during a period of two months from 5th September to 5th November 1950, " whilst engaged in pile-driving and salvage work ".

The endorsement on the policy reads, so far as material:—" In consideration of an additional premium having been paid the . . . vessel is covered for the period 5th September 1950 to 5th November 1950 inclusive, whilst engaged in Pile-Driving and salvage work. It is further noted and allowed that the sum insured is increased to £8,200 for the above-mentioned period only."

The appellants claimed the respondent's proportion of £8,200 as for a total loss of the vessel on 24th October 1950, *whilst engaged in pile-driving*. *Gibson* J. found that there had been a total loss of the vessel on 24th October 1950, but that it was not then engaged in

(1) (1803) 4 East., at pp. 135, 136 [102 E.R., at p. 779].

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pile-driving or salvage work and gave judgment for the respondent's proportion of £4,200. Against this judgment the appellants appeal to this Court, special leave being sought if required. There is a cross-appeal by the respondent insurer against the finding of a total loss.

It is convenient to deal first with the cross-appeal.

The question whether the vessel became a total loss on 24th October 1950, as found by *Gibson* J., was one of fact depending for its correct determination upon the credibility of expert witnesses who gave conflicting testimony. In determining the question his Honour had the advantage not only of seeing the witnesses testify but also of making an inspection of the vessel. We were not invited to make an inspection, although it was open to us to do so if the vessel had been available for the purpose. This Full Court has made inspections on at least two occasions in collision cases in recent years, in Adelaide and in Brisbane. It is true that appeals to this Court from the Supreme Courts of the States are not by way of re-hearing, and that this Court is confined to a consideration of the evidence taken in the Supreme Court. Still an inspection by members of this Court may properly be made, as the inspection is for the purpose of enabling the Court to understand the questions raised, to follow the evidence and apply it, but not to put the result of the inspection in place of evidence. See *Scott* v. *Numurkah Corporation* (1).

In view of the advantage that *Gibson* J. possessed I think we cannot safely differ from him on the question whether the vessel became a total loss on 24th October 1950.

The cross-appeal should be dismissed.

Then as to the appeal: The words "whilst engaged in pile-driving and salvage work" in the first paragraph of the endorsement are words of extension of the risks covered by the policy: for the period of two months from 5th September to 5th November 1950, the cover is extended to risks attending pile-driving and salvage work. If nothing more appeared in the endorsement these words would also have amounted to words of limitation of the period during which the additional risks were to be covered. But were they words of limitation for the purposes of the second paragraph of the endorsement which increased the sum insured and said nothing about the risks covered, whether original or additional, and merely limited the liability to pay the additional sum to the period referred to in the first paragraph? I think this question should be answered in the negative. In the absence of any compelling reason to adopt

(1) (1954) 91 C.L.R. 300, at p. 313.

the contrary view, I think that "the abovementioned period" in the second paragraph has the same meaning as in the first paragraph, i.e. "the period 5th September 1950 to 5th November 1950 inclusive" and does not refer to the period that pile-driving was in operation. I think there would be a departure from the natural meaning of the words and indeed the substitution of a strained meaning if we held that "the above-mentioned period" in the second paragraph meant the period during which pile-driving and salvage work was being done and not a period of two months from 5th September 1950 to 5th November 1950.

It may be asked: why should the extra amount be limited to the period of two months if not because of the added risks attending pile-driving and salvage during that period? But why should a total loss during pile-driving or salvage give a right to a larger sum than a total loss from any other cause?

I have endeavoured to ascertain the intention of the parties solely from the language of the endorsement on the policy. But if the circumstances under which the additional cover was secured were considered it would be found that the pile-driving work in Macquarie Harbour required the vessel to be navigated in the very dangerous waters between that harbour and Hobart. It would not be surprising then if in proceeding to and from the pile-driving work the owners of the vessel thought it would be exposed to greater risks from the perils of the sea, apart altogether from the actual operations of pile-driving, than if the vessel were engaged in, say, fishing operations. Moreover, the proportion of the amount insured to the value of the thing insured frequently is increased with the added risks.

Gibson J. found that when the vessel ran on the rocks and became a total loss it was not engaged in pile-driving. I respectfully agree. Yet it was on the ground that the vessel was then so engaged and on that ground alone that the appellants sought to recover the increased amount of £8,200. However, as already indicated, it is my opinion that they should still succeed in recovering £8,200 on the fresh ground raised in this Court that during the period of two months from 5th September to 5th November 1950, this higher sum was recoverable for a total loss for any of the risks specified in the policy as insured against.

I would allow the appeal and vary the judgment by increasing the amount thereof to the respondent's due proportion of £8,200, subject to special leave which I think is required and should be granted on the terms that the appellants should pay the respondent's costs of the appeal.

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The point on which the appellants succeed though covered by the notice of appeal was not taken before *Gibson* J. If it had been taken it could not have been met by evidence; and so it is open here. But if it had been taken it might well have rendered the appeal unnecessary.

Appeal allowed. Cross-appeal dismissed. Order of the Supreme Court of Tasmania set aside. Action remitted to the Supreme Court of Tasmania to enter judgment for the plaintiffs for the appropriate amount in accordance with the decision of this Court.

Solicitor for the appellant, the Board of Management of the Agricultural Bank of Tasmania, *J. R. M. Driscoll*, Crown Solicitor for the State of Tasmania.

Solicitors for the other appellants, *Hodgman & Valentine.*

Solicitors for the respondent, *Crisp & Wright.*

R. D. B.