IN THE SUPREME COURT OF APPEAL
IN SOUTH AFRICA

REPORTABLE

Case no: 477/99

In the matter between:

FEDSURE GENERAL INSURANCE LIMITED Appellant

and

CAREFREE INVESTMENTS (PROPRIETRARY) LIMITED Respondent

CORAM: **HOWIE, SCHUTZ, MPATI JJA, CLOETE AND BRAND AJJA**

Date of Hearing: 27 August 2001

Date Delivered: 11 September 2001

Marine insurance policy - transit clause - whether goods in ordinary course of transit when stolen.

J U D G M E N T

HOWIE JA

[1] The respondent company, a clothing manufacturer of Ladysmith, was an insured and consignee, and the appellant the insurer, in respect of a marine open insurance policy. The policy covered a containerised consignment of fabric ("the goods") against various risks, including theft, while in transit from South Korea to Durban. After discharge of the container at Durban it was stored in the harbour precincts, first in the Portnet container terminal and then in the South African Container Depot warehouse. Prior to customs clearance and collection by the respondent, and while still in storage in the warehouse, the goods were stolen. They were never recovered.

[2] In the High Court at Johannesburg the respondent sued on the policy, claiming payment of the value of the goods. The appellant pleaded, with reference to the terms of the policy, that at the time of the theft the goods were not in the ordinary course of transit and that the insurance had in any event already terminated. The learned trial Judge (Nugent J) gave judgment in favour of the respondent. Now on appeal with the

necessary leave, the appellant relies on those two grounds of defence.

[3] The insurance was subject to what are called in English insurance law (which governs the policy) as the Institute Cargo Clauses. One such clause is known as the "warehouse to warehouse" or "transit" clause. It contains the following:

"DURATION

8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either

8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,

8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either

8.1.2.1 for storage other than in the ordinary course of transit or

8.1.2.2 for allocation or distribution,

or

8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge,

whichever shall first occur.

8.2 ...

8.3 This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, and deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners of charterers under the contract of affreightment."

(For present purposes it is unnecessary to refer to paragraph 9.)

[4] The only evidence before the trial court was given by Mr A H Kazi, the respondent's managing director, and Mr J F Hyde, operations manager at the Portnet container terminal. Before summarising the relevant parts of their testimony it is appropriate to state certain undisputed facts.

[5] The container was discharged on 8 June 1995. Mr Kazi knew of the arrival of the goods within a week of that date. In the period from 10 to 19 June he received the original bill of lading and other documents relative to the shipment of the goods. On 16 or 17 June the goods were removed from the terminal to the warehouse. Mr Kazi first contacted his clearing agent on or after 25 June. On 5 July the clearing agent received

the original documentation required for clearance of the goods. On 8 July, unbeknown to Mr Kazi or anyone else on the respondent's behalf, the theft occurred. On 14 July Mr Kazi commenced steps to obtain finance necessary to pay for clearance of the goods. On 18 July, with those arrangements made, the respondent's clearing agent went to clear the goods and the theft was discovered.

[6] According to Mr Hyde the container would have been removed from the Portnet terminal to the South African Container Depot warehouse because space limitations at the terminal allowed for only a few days' storage and the Container Depot property was one of a number licensed by the Customs Department as a bonded warehouse. Goods would remain there in bond until clearance and collection. Clearance involved production of, amongst other documents, the original bill of lading and payment of customs duty and Value Added Tax. The warehouse, like the Portnet terminal, was a highly secure area and some importers tended to use it as a place of safe storage, despite the expense involved, occcasionally for periods in excess of a month before clearance. Provided

importers were in possession of the requisite original documentation, expedition of the clearance process was really in their hands and could even be achieved while goods were still on the high seas.

[7] Mr Kazi said that the respondent was a regular importer and for this reason it had its own warehouse in Durban to which the goods would have been taken by its agent after customs clearance. From there distribution would have taken place to the trade. In the interim he knew that the goods were in safe storage at the Container Depot warehouse. The cash flow of the respondent's business tended to have its ups and downs and it was his wont to wait for a favourable cash flow position before proceeding to clear imported goods. He knew that the goods in question were due to arrive in the first half of June but the respondent's finances were such that it did not then have the money available to pay for the necessary duty and tax. That was why he did not at that stage arrange for clearance. Because the cash flow situation did not improve he ultimately decided to borrow in order to pay for clearance. He did not claim that this loan source was

unavailable at any relevant prior time. Had the respondent's cash position allowed, he would have had the goods cleared sooner.

[8] The onus is on the respondent to prove that the insurance attached at the time of the theft. Taking into account the evidence recounted above, the respondent failed to show that loan finance was not available when the necessary original documentation came into Mr Kazi's possession. It took only four days to procure such finance and to proceed to clearance. Given the time span established by the undisputed facts, the goods could with ease have been cleared and collected before the theft occurred had the loan source been tapped timeously. The conclusion is therefore inescapable that Mr Kazi let the goods remain in bond for reasons of commercial convenience and it was for those reasons that they were effectively in storage when stolen.

[9] Accepting that the ordinary course of transit in this case would, without more, have terminated on delivery to the respondent's warehouse in Durban, the two questions raised by the appellant's plea involve the enquiry whether, at the time of the theft, that ordinary

course had not, been interrupted or whether in terms of paragraph 8.1.2 of the transit clause, the insurance had not already been terminated.

[10] It is apparent from the record and the judgment of the trial Court that the focus of counsel and the learned Judge was confined to the meaning and effect of paragraph 8.1.2 and that the issue of interruption of the ordinary course of transit did not enjoy attention until raised by the appellant's counsel in this court.

[11] In the view I take of the case it is unnecessary to decide whether the insurance terminated in terms of paragraph 8.1.2 of the transit clause. I should add, however, that it seems very much open to question whether, before the election referred to in that paragraph can be made, the insured must, as the learned Judge held, have paid the clearance dues and so have obtained control of the goods. There would appear to be no logical reason, when all one is doing in order to store goods is to leave them where they are, for the law to require that one first has to have control before one can use such venue for storage. There would also seem to be scant reason why the necessary election

cannot precede the end of such storage and indeed precede the delivery into such storage.

On the facts of this case there may well have been termination of the insurance under paragraph 8.1.2. but I express no final opinion on that issue.

[12] Reverting to the matter of interruption of the ordinary course of transit, a delay or interruption which, objectively viewed, is not part of the usual and ordinary means of effecting transit, and which is occasioned by some collateral purpose, will disturb the ordinary course of transit. Accordingly, loss occurring within the period of such delay or interruption will not be covered by the policy. In these respects see *Pearson v The Directors of the Commercial Union Assurance Company* [1876] 1 AC 498 (H.L. (E.)) at 502-3 and *Tension Overhead Electric (Pty) Ltd v National Employers General Insurance Co Ltd* 1990 (4) SA 190 (W) at 196 A-B. The reason is not that the insurance has come to an end (for it remains in existence), nor that the transit has come to an end (for the journey is not yet finally over) but simply that the insurance pertains to the ordinary course of transit and what is outside the ambit of that course cannot,

logically, be within the cover. It is consistent with that construction that where the interruption is within the control of the insured the clear implication of paragraph 8.3 of the transit clause is that the insurance is not in force during the delay.

[13] Counsel for the respondent sought to rely, in respect of the present point, on certain passages in the case of *John Martin of London Ltd v Russell* [1960] 1 Lloyds LR 554 (QB) at 565 (second column). The insurer's contention there was that the insurance cover under a transit clause had ceased on discharge of the goods if the consignee did not intend to send them to a final warehouse. The court rejected that argument, firstly, because changes in ownership of the goods during transit could create uncertainty as to whose intention was to prevail and, secondly, because intentions could fluctuate resulting in a "shifting cover", sometimes in force, sometimes not.

[14] In the present case the enquiry is not whether the insurance had terminated. For that, one must respectfully agree, subjective intention would not suffice. Indeed, where paragraph 8.1.2 of the transit clause imports a subjective element into the required

election-making which is necessary for that instance of termination, it also requires the objective determination whether the storage is otherwise than in the ordinary course of transit. And as to the metaphor of a "shifting cover" dependent solely on intention, there, too, one has no such problem when the question is whether something occurred within the ordinary course of transit. Plainly, subjectivity will be involved in the formation and implementation of a collateral purpose but the impression of a changing cover must disappear on application of the objective test as to whether a delay or interruption is or is not part of the usual and ordinary means of effecting transit.

[15] The evidence in this matter shows that the theft occurred during a period beyond that which was necessary or even reasonable for customs clearance in the ordinary course of transit. In addition, the fact that the goods were in storage at the Container Depot was because Mr Kazi, on behalf of the respondent, had a collateral commercial purpose for leaving them there. It follows that the goods were not stolen "during the ordinary course of transit" within the meaning of paragraph 8.1 of the transit clause.

[16] The appeal must therefore succeed.

[17] The following order is made:

1. The appeal succeeds, with costs.

2. The order of the Court *a quo* is set aside and substituted by the following:

   "The plaintiff's claim is dismissed, with costs."

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C.T. HOWIE
JUDGE OF APPEAL

CONCURRED:

SCHUTZ JA
MPATI JA
CLOETE AJA
BRAND AJA