IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 509/04

In the matter between

BARLOWORLD CAPITAL (PTY)LTD trading as BARLOWORLD EQUIPMENT FINANCE **Appellant**

and

RS NAPIER NO **Respondent**

CORAM: **HOWIE P, ZULMAN, CAMERON, NAVSA et JAFTA JJA**

Date Heard: 17 February 2006

Delivered: 30 March 2006

Summary: **Insurer informed of third party interest in insured property before paying proceeds of policy – whether on facts bound by contract or trade usage to pay third party before paying insured.**

Neutral citation: Barloworld Capital Pty Ltd v Napier NO [2006] SCA 48 (RSA)

J U D G M E N T

HOWIE P

HOWIE P

[1] This appeal concerns the short term insurance industry and the implications of the practice of noting an owner's interest in property insured at the instance of an instalment sale purchaser. The specific issue is whether a request by the seller of such property to the insurer to note its interest imposed on the insurer in the circumstances discussed below, an obligation, on pain of damages, to pay the seller the amount still owing to it by the insured before paying any balance to the latter.

[2] The appellant finance house (the seller) sold a mechanical excavator on instalments (the sale), with reservation of ownership until final payment. It was an express term of the sale that the buyer would insure the equipment and have the interest of the seller noted on the relevant policy. The buyer effected the insurance but failed to procure the noting of the seller's interest on the policy. The insurance contract was concluded between the buyer (the insured) and certain underwriters at Lloyds (Lloyds). Before final payment by the insured under the sale the equipment was irreparably damaged in circumstances obliging Lloyds to agree to pay out the insurance proceeds. Prior to payment Lloyds was informed of the seller's interest. The insured then owed the seller R839 925 but the proceeds of the policy were paid to the insured.

[3] In a trial before the High Court at Johannesburg the seller sued Lloyds (in the person of its South African representative as nominal defendant) for contractual damages in the sum of the insurance proceeds which it asserted should have been paid to it. The claim was based on an alleged contract between the seller and Lloyds and, in the alternative, on an alleged trade usage, in breach of either of which Lloyds paid the proceeds to the insured rather than to the seller. The learned trial Judge (Goldblatt J) found against

the seller, holding that neither the alleged contract nor the trade usage relied on had been proved. With his leave the seller appeals.

[4] The alleged contract is pleaded in terms which I would summarise thus. In November or December 2000 the seller (represented by either Mr Franklin, its General Manager, or Mr Knight, its Managing Director) asked Lloyds or one or other of its authorised representatives (Equity Loss Adjusters or Leppard and Associates (Pty) Ltd or Chesterfield Insurance Brokers Ltd) to note its interest on the policy, which Lloyds or its representatives duly did. In the circumstances an agreement was concluded between the seller and Lloyds, a material term of which was that Lloyds would pay the seller the outstanding amount due on the sale before it paid anything to the insured.

[5] The alternative claim asserts that Lloyds' obligation first to pay the insured's creditor arose from a trade usage which was 'universally and uniformly observed ... long established, notorious, reasonable and certain'. The obligation is triggered 'in the event, **inter alia,** of the owner of the insured property requesting the insurer to note its interest in such property'. (My underlining.) Lloyds became so obliged, it is further alleged, because it, or its representatives referred to, were asked to note the seller's interest or, alternatively, were 'made aware' of it. (One presumes that the insurer's becoming so aware was an event within the ambit of the words **'inter alia'** in the earlier cited part of the pleading, in other words that the alleged obligation arises, for present purposes, if there is either a request to note the interest or merely an awareness of the interest.)

[6] Extensive expert evidence was led concerning the alleged trade usage. Before discussing such evidence it is necessary to determine the facts. Due to overlapping they pertain to both the main and alternative claims.

[7] In advance of the trial the seller furnished certain particulars. They may be summarised as follows. A written request to note the seller's interest was made to Equity Loss Adjusters (Equity) who 'accepted and/or noted' it as Lloyds' authorised representative. The request was also 'accepted and/or noted' by Leppard and Associates (Pty) Ltd and Chesterfield Insurance Brokers Ltd on behalf of Lloyds. The pleader goes on to say that in any event 'it is not necessary for the request to be "accepted"'. As to the agreement, the subject of the main claim, the seller alleged that it was concluded 'on the noting of the (seller's) interest'. (Leppard and Associates is Lloyds' authorised broker in South Africa and Chesterfield Insurance Brokers is a United Kingdom firm through which Leppard and Associates obtains access to the underwriters at Lloyds.)

[8] It will be apparent that in contradistinction to the insured's obligation to the seller to have had the seller's interest noted on the policy, the trade usage alleged by the seller which obliged the insurer first to pay the seller, arose from no more than the latter's request to take note of its interest and/or the insurer's knowledge of the interest.

[9] Also in advance of the trial certain facts were agreed. They were as follows. Leppard and Associates was Lloyds' agent in concluding the insurance agreement. Leppard and Associates also had authority to appoint loss adjuster, Equity, to investigate and assess the insured's claim on the policy. However, because the claim was above R500 000, Leppard and Associates had to process the claim but could not settle it – that was for Lloyds alone. The loss in respect of the excavator occurred in June 2000. Lloyds accepted liability in August 2000 and instructed Equity, pursuant to its investigations, to make recommendations to Lloyds as to an appropriate settlement amount. In September 2000 the policy was cancelled. By that

time the insured had lodged claims in respect of other machines as well and Lloyds considered the insured too bad a risk to continue insuring. On 17 November 2000 the insured's attorney, Mr O'Brien, threatened litigation against Lloyds if the insured's claim was not paid in seven days. On 20 November Equity reported to Leppard and Associates that the seller's interest had not been disclosed to Lloyds and that Mr Knight was unaware that it had not been noted on the policy. He ended by saying that Knight would provide Equity with settlement amounts (ie amounts still owing to the seller on the damaged equipment.). On 23 November Mr Franklin, having learnt that the insured had claims pending in respect of equipment sold to it by the seller, and that the insured was negotiating with Equity, directed a letter to Equity furnishing settlement amounts and asking it to ensure that the insurer 'notes our interest (in the excavator)'.

[10] On 28 November Mr O'Brien wrote to Equity pointing out that it had known all along of the insured's relationship with the various finance houses that had financed the acquisition of the machines in respect of which the insured was claiming. He went on to say that there was no legal basis 'as between insurers and our client' to note the interest of any finance house. He concluded: 'Please note that any payment to third parties will not absolve your client [referring to Lloyds] from their obligations to our client'.

[11] On 11 December Equity wrote to Leppard explaining that O'Brien did not only want to avoid payment being made by Lloyds to a finance house such as the seller but in fact wanted payment to the insured to be made to him directly. 'The impression gained' said Equity, 'was that he appeared wary of the fact that his client may not have funds to pay him.' Equity went on to report that O'Brien had advised that summons had been issued but that

he wanted to settle out of court and 'We informed Mr O'Brien that ... this would be a matter between himself and Insurers attorneys.'

[12] On 15 December Equity wrote to Leppard and Associates in connection with the insured's claim in respect of another excavator and furnished the seller's banking details. At that stage Lloyds was contemplating paying the seller in respect of the excavator with which this case is concerned but was uncertain whether to do so in view of O'Brien's demand for payment and his insistence that no third party be paid. On 2 January 2001 O'Brien wrote to Equity repeating his demand and setting out his view that if Lloyds paid a finance house it risked having to pay the insured as well. The upshot was that legal advice was sought on Lloyds' behalf from attorneys Deneys Reitz as to who the recipient of payment should be.

[13] On 11 January Deneys Reitz advised that payment be made to O'Brien on the insured's behalf. On 22 January that advice was implemented. On 24 January 2001 Equity wrote to the seller advising that Lloyds were given legal advice to pay the insured direct 'as your interests had not been noted on their policy prior to the events from which the claims arose'.

[14] Oral evidence for the seller was given by Knight and three witnesses, Messrs Van der Meer, Gallimore and Rothman, who were called to give expert evidence as to the alleged trade usage. For Lloyds evidence was given by Mr Leppard, managing director and chief underwriter of Leppard and Associates, and Mr Parmenter, a member of the Lloyds consortium that insured the excavator.

[15] In so far as the main claim is concerned the vital evidence is really that of Leppard and Parmenter. This is because the seller, apart from reliance

on the correspondence and in particular the request by Knight that its interest be noted, was not in a position to know how that request was dealt with. Indeed, the argument advanced by the seller's counsel on appeal was that the agreement alleged as the basis of the main claim was admittedly not established by direct evidence but had rather to be inferred from passages in the correspondence read with excerpts of Parmenter's evidence.

[16] It will be recalled that the essential allegation made by the seller in this regard was that Lloyds noted the seller's interest on the policy. In the plea this was denied. The denial was affirmed by clear evidence by Leppard and Parmenter. The latter said he had taken note of the request but that the policy had been cancelled before the request was made. (He accepted that cancellation did not bar a claim by the insured.) Asked if noting could occur in the case of a cancelled policy, he said he did not know. Although he could not see a difficulty, he said he would take legal opinion on the issue. That his 'taking note' was not the same 'noting' that was requested, or at least was not implementation of what he understood the request to mean, was explained in Parmenter's later evidence. He said that had there been noting on the policy it would have been done by Leppard and Associates. What usually happened was that a request for noting came from an insured's broker and, if assented to, resulted either in an endorsement on the policy or some written confirmation of the noting of the interest. The request could, however, come from a finance house, with the same consequence. Neither Leppard's nor Parmenter's credibility was in issue either at the trial or on appeal. They said they did not intend any contractual nexus between Lloyds and the seller.

[17] In an endeavour to overcome the hurdle constituted by their evidence counsel for the seller contended as follows. Parmenter took cognisance of

the seller's request; there was no response by Lloyds or on its behalf indicating a refusal to note the seller's interest; the seller's bank details were obtained; payment to the seller was at least in contemplation at some point; and Equity's letter of 24 January 2001 to the seller, in saying that its interest had not been noted before the events from which the claim arose, implied that it had been noted subsequently. The most probable inference to be drawn, said counsel, was that noting on the policy had in fact occurred.

[18] Even cumulatively those factors do not warrant the inference sought to be drawn. Firstly, whatever weight one could have afforded them had Parmenter not testified, his denial that there was noting on the policy, or even an acceptance of the request, stands as a credible, uncontradicted answer. Secondly, it is important to point out that by the time the request was received in late November 2000 Lloyds faced a number of claims by the insured, as well as O'Brien's threat to sue Lloyds if payment was not made to the insured. Even if Lloyds did contemplate paying the seller rather than the insured, O'Brien's strenuous insistence created uncertainty as to what Lloyds should do, so much so that legal advice was eventually sought. Added to that, the seller's bank details were under consideration not in relation to this claim but another. Then, as regards Equity's letter of 24 January 2001, Equity was never Lloyd's authorised representative in respect of any action taken that is material to this case. And whatever construction its phraseology permits *in vacuo*, when read in factual context it cannot support the conclusion desired by the seller. It is simply not feasible that Parmenter or any representative of Lloyds would, from 23 November 2000 onwards, have agreed to pay the seller when faced with the insured's demand for payment as voiced by O'Brien and in the state of uncertainty which led in the end to resort to legal advice.

[19] Reverting to the terminology of the main claim, there was no request made to note the seller's interest on the policy and no such notation took place. However much it might be thought that Lloyds ought to have responded to the request, even if simply to decline it, non-reaction to the request cannot on the facts of this case amount to acceptance.

[20] The seller set much store by the decision in *Marine and Trade Insurance Company Ltd v J Gerber Finance Pty Ltd.*[1] There, the owner of a mechanical loader leased to a construction company and newly insured by the appellant at the lessee's instance, wrote to the insurer requesting that its interest be noted on the policy and that acknowledgment of the endorsement be furnished to it. This was at a stage when insurance on the loader which had been taken out by the owner with the same insurer was about to be cancelled in view of the new insurance. The owner emphasised the need for endorsement before such cancellation took place. The request was acceded to and a copy of the relevant portion of the policy containing a detailed notation was furnished to the owner. In due course the loader was damaged beyond repair. The insurer paid the insured the proceeds of the policy. The lessee was still indebted to the owner but was liquidated. The owner could recover no dividend and so sued the insurer for damages, alleging that a binding agreement had come into existence by reason of the notation at the owner's request. Apart from the facts outlined above it was proved that it was the practice in the appellant's office to note a third party's interest on its policies and by virtue of such notation to pay such third parties the amount due to them by the insured when the latter claimed on the policies.[2] This court considered this practice an important part of the facts known to the

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[1] 1981 (4) SA 958 (A)
[2] At 966F.

owner and insured and an indication of their common purpose.[3] It was held that they intended to contract with one another and had reached 'full consensus'.[4]

[21] This brief recital of the salient features of the *Marine and Trade* case reveals the extent to which the present facts fall short of proving what was established in that matter. Whilst it may indeed be accepted that Knight's request was aimed at securing payment to the seller of what the insured still owed, there was, as I have said, no request (as pleaded) for notation on the policy and no consent by Lloyds to effect such notation. In addition, Parmenter's lack of knowledge or experience of noting on a cancelled policy disentitles one from drawing the inference that he must have effected such notation.

[22] It follows that the main claim could not succeed.

[23] Turning to the alternative claim based on what I have called trade usage, the seller's expert witnesses said that it was a long-standing practice in the industry, when an owner of insured property asked the insurer to note its interest, to pay the owner out of the proceeds of the policy any outstanding amount due to it by the insured in respect of the property, prior to paying the insured. The practice was universally observed and well-known. It served to give protection to the finance house without prejudicing the insured and involved the former being able to expect with certainty that it would be paid first. Broadly, Leppard and Parmenter were in agreement with that evidence.

[24] For present purposes there is no need to observe what distinctions there are said to be in law between custom, usage or practice.[5] If the

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[3] At 967A.
[4] At 967E.

evidence established that an insurer's mere receipt of a request to note or its mere knowledge of a third party owner's interest imposed on it, without contract, an enforceable obligation, on pain of damages, first to pay the owner, then the alternative claim will have succeeded.

[25] It must be emphasised that the alternative claim does not rest on a term of the insurance agreement (express or tacit) or on a tacit contract between the insurer and the seller. No such contractual foundation was pleaded or sufficiently investigated at the trial to enable one to deal with the matter as if either had been pleaded.

[26] In so far as the seller sought assistance from the *Marine and Trade* case also in regard to the alternative claim, I fail to see how such assistance can be derived from it. That case concerned the established practice of a particular insurer. It was not pleaded on the basis of a universal trade usage. And, as indicated already, a contract was found to have been proved, at the commencement of the insurance, for express notation on the policy with proof of notation being furnished to the owner.

[27] The learned trial Judge found against the seller on this issue because, so he held, the trade usage proved was clear enough as far as it went but that none of the witnesses had encountered the problem raised by the present facts which was whether an insurer who knew of a seller's interest was obliged to pay it in the absence of prior noting and in the face of express opposition by the insured.

[28] In attacking that finding counsel for the seller argued that if the problem had never arisen it was because the proven usage provided clarity as to how insurance proceeds were to be paid out, even in a situation such as the instant one.

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[5] See generally, Christie, *The Law of Contract*, 4th, 184 ff.

[29] It seems to me that the stark implications of the seller's contention go a long way to demonstrating its untenableness. The contention is this: although the insured has a contractual obligation to pay the insured, which is untrammelled by any rival contractual obligation to the seller such as existed in *Marine and Trade*, the insured nevertheless incurs an enforceable obligation to the seller to pay the latter by reason of mere acquisition of knowledge of the seller's interest.

[30] In my view the evidence goes no further than showing that the usage provides an effective arrangement, (whether one calls it a convention or practice is immaterial,) as long as there is in effect tripartite consensus, express or implied, that the insurer, even though not contractually bound to the seller, will pay the latter first. If it is the insured who discloses the seller's interest this would imply his consent that the debt to the seller be discharged first. If it is the seller who gives the insurer the requisite information, as here, the opportunity for the insurer to ascertain the insured's attitude will usually arise. Parmenter indicated clearly enough that if there appeared to be a dispute, actual or potential, between insured and seller he would urge that it be sorted out before paying either. In other words the insured's objection to first paying the seller would be a stumbling block to unquestioning implementation of the usual practice.

[31] I find nothing in the evidence which warrants the conclusion that as a matter of trade usage an insurer, by mere acquisition of knowledge of the seller's interest, becomes bound, as if by contract, to pay the latter ahead of the insured.

[32] Counsel for the seller sought support in Van der Meer's evidence for the contention that the insurer's knowledge of the seller's interest imposes a legal obligation on the latter. I fail to find such support. In one passage the

witness said no more than that he could not say whether what burdened the insurer was a moral obligation but it was a practice. In another passage he relied on an instance where the policy itself saddled the insurer with the obligation where it knew of the third party's interest.

[33] In the result I think that the trial Court was correct in its conclusion. It does not seem to me that this outcome impedes efficiency and clarity in the industry. A third party such as the seller can always take self-evident steps to ensure that the buyer or lessor complies with its obligation to have the former's interest noted on the policy. Secondly, it can take cession of the policy. Thirdly, it can bring the situation within the ambit of the *Marine and Trade* decision. Finally it can stipulate that the buyer/lessor procures in the insurance contract an obligation on the insurer first to pay the third party.

[34] The appeal is dismissed with costs, such costs to include the costs of two counsel.

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CT HOWIE
PRESIDENT SCA

CONCUR:

Zulman JA
Cameron JA
Navsa JA
Jafta JA