48/88

SUPREME COURT OF VICTORIA

JOHN NASH TRANSPORT Pty Ltd v INTERNATIONAL SPECIALIST UNDERWRITERS Ltd

Kaye J

14 June 1988 — (1988) 5 ANZ Insurance Cases 75,406

INSURANCE – POLICY OF INDEMNITY – REQUIREMENT THAT INSURED NOTIFY INSURER WITHIN A SPECIFIED PERIOD OF VEHICLE ACQUISITIONS – SUCH NOTIFICATION OMITTED – VEHICLE INVOLVED IN COLLISION – WHETHER INSURED ENTITLED TO BE INDEMNIFIED – MEANING OF "ACQUIRED".

JNT P/L ('Insured') effected a motor policy of Insurance with ISU Ltd ('Insurer'). It was provided that where the insured acquired a vehicle, the policy covered such vehicle provided that the insurer was notified of such acquisition within the relevant quarter or 21 days after its expiration. The insured acquired a vehicle on 31 December; therefore was required to notify the insurer by 24 February or within 21 days after that date. However, no notice of acquisition was given to the insurer within the relevant period. The vehicle was not used by the insured until 17 July, when it was involved in a collision. The insured made out an accident report and claim form the following day but gave no notice of acquisition of the vehicle until 7 August. On the proceedings arising out of the collision on 17 July, the Court attached liability to the insured for the damages, found that the insured had omitted to give the notice of acquisition within the relevant period and held that the insured was not entitled to be indemnified by the insurer. Upon order nisi to review—

HELD: Order nisi discharged.
Upon a construction of the Policy of Insurance, the indemnity and benefits in respect of the motor vehicle were not intended to accrue from the date of its use but from the date of its acquisition. Accordingly, the insured was required to declare the acquisition in the quarter (or 21 days after its expiration) in which it was acquired. As this had not been done, the Magistrate was entitled to conclude that the insurer was not liable to indemnify the insured for the liability incurred.

KAYE J: **[1]** This is the return of an Order Nisi to review an order made in the Magistrates' Court at Benalla on 10th September 1986 whereby third party proceedings by the applicant against the respondent were dismissed with costs. The third party proceedings were consequential of a claim for damages made against the applicant resulting from a collision which occurred on 17th July 1985 between a motor vehicle owned by the complainant and a motor vehicle owned by the applicant and driven by its employee. On the hearing of the complaint the applicant admitted its **[2]** liability to the complainant and the quantum of damage claimed by him. Similarly in the third party proceedings the respondent admitted the claimed quantum of the complainant's damage. The magistrate ordered the applicant to pay the complainant $4,427.12 damages with interest of $535 together with $1,457 costs.

The applicant claimed to be indemnified by the respondent against its liability to the complainant under a Motor Policy of Insurance dated 30th September 1983. By its terms, the policy commenced on 11th August 1983 and continued until 24th August 1984, when it was extended for a further period of 12 months. Although the policy was issued by underwriting members of Lloyd's London, the insurer, for practical purposes, was the respondents. By the policy the insurer agreed:-

> "... as regards any vehicle described in the said Schedule (hereinafter referred to as 'the Motor Vehicle') whilst being used for purposes described in the said Schedule and subject to the terms of exclusions and conditions contained herein or endorsed hereon or attached hereto to provide indemnity against loss, damage, or liability as hereinafter mentioned arising out of accident damage or theft actually occurring during the period of insurance stated in the Schedule or during any subsequent period for which Underwriters may accept payment of premium for the renewal of this Policy."

The schedule records the purposes for which the motor vehicles, the subject of the policy, are used are those in connection with the occupation or business of the insured, and the description

and particulars of the vehicles are set out in an attached schedule. Provision for adding vehicles to those appearing in the said schedule are contained in an endorsement numbered 50 attached to the **[3]** policy which reads as follows:-

> "50. This policy extends to include any vehicle of a type constructed for use similar to that described in the schedule and which may be hired, leased or on loan to or by the Insured during the currency of this policy and not listed in the schedule, provided that:-
> (a) the indemnity be in the terms of the Company's motor vehicle policy normally issued for the particular type of vehicle;
>
> (b) the vehicle is not otherwise insured;
>
> (c) the schedule of vehicles to be checked quarterly and the appropriate premium adjustment made from the date the vehicles were acquired/disposed of;
>
> (d) in the event of the Insured failing to lodge with Underwriters a declaration within twenty-one days of the close of any quarterly period a 'NIL' declaration shall be deemed to have been lodged and any vehicle acquired during that quarter shall not be insured by this policy."

The quarterly periods referred to in clause (d) of endorsement 50 ended on 24th November, 24th February, 24th May and 24th August. The affidavit in support of the Order Nisi and the answering affidavit filed on behalf of the respondent do not disclose all findings of fact made by the magistrate. Nevertheless, from the affidavits and exhibits, the following facts appear to have been either found by the magistrate or undisputed by the parties. On 31st December 1984 a 1982 model Volvo prime mover, registered number LIS-264, was acquired by the applicant and on 14th January 1985 it was registered in Sydney as a commercial vehicle. I shall hereinafter refer to the vehicle as "the motor vehicle". It was the motor vehicle which came into collision with the complainant's vehicle.

[4] From the time of its acquisition until the journey during which the accident happened, the motor vehicle was not used for any purpose associated with the applicant's business. At the time of the accident it was being used in connection with the applicant's business although it was not listed under the schedule to the policy. From the time of the renewal of the policy on 24th August 1984 until 7th August 1985, the applicant did not lodge with the respondent a declaration within the terms of clause (d) of endorsement 50. The applicant forwarded to the respondent an accident report and claim form dated 18th July 1985; by letter dated 5th August 1985 the respondent denied liability to the applicant under the policy in respect of the damage suffered as a result of the accident.

B.R.A. Australia Pty Ltd (BRA), by an agreement in writing, was the agent for the applicant as the insurer. In a letter dated 7th August 1985, BRA, on behalf of the applicant, confirmed to the respondent "additional vehicles and vehicles deleted to be effected on the policy as at today's date". The letter included a document entitled "Additional vehicles to be picked up on adjustment 84/85". Among the vehicles set out in the document there appears the motor vehicle, alongside of which there is the notation "Taken over January 1985 in use June 1985". By reply dated 19th August 1985 the respondent informed BRA, "Your request for vehicles to be added to the schedule has been complied with and the endorsement is enclosed". The enclosed endorsement, recites an additional premium of $321.27, stamp duty $22.48 and total payable $343.75, and under a further endorsement, "It is hereby declared and agreed that with **[5]** effect from 9th August 1985 the following items are added to the schedule of the policy" there appears among other vehicles the motor vehicle.

The magistrate found that the motor vehicle was acquired on 31st December 1984, that it was acquired for commercial purposes for which it was registered and that the applicant failed to comply with endorsement 50 by omitting to give notice of its acquisition within 21 days of the expiration of the February quarter. After hearing further submissions and finding that the applicant's failure to give notice of acquisition was not due to accident, mistake or reasonable cause, he held that s27 of the *Instruments Act* 1958 did not apply to the applicant's failure to give the required notice. Mr Wilson of Counsel, who appeared to move the Order Nisi, accepted that on the facts found by the magistrate it was not open to be argued that the magistrate was in error in holding that the statute was not applicable as asserted in ground (e) of the grounds of the Order Nisi. Under ground (a) Mr Wilson submitted that on the facts found by the magistrate

the applicant as the insured was entitled to be indemnified, notwithstanding its omission to give notice of its ownership of the motor vehicle during the February quarter or within 21 days of its expiration.

Mr Wilson first contended that by adding the motor vehicle to the schedule on 19th August 1985, the respondent accepted the vehicle as subject to the policy during the quarter ended 24th August. Counsel acknowledged that information of the acquisition date of the motor vehicle was required by the insurer for the purposes of **[6]** adjusting the premium payable by the insured. Having received information of the date when the motor vehicle was "taken over" and "in use" the respondent was able to make the necessary premium adjustment which was the sum of $343.75 as additional premium noted on the endorsement. Mr Wilson contended that once the motor vehicle had been admitted to the schedule it was subject to the policy for the whole quarter ended 24th August and for all purposes of indemnity and benefits thereunder.

However, whether the admission of the motor vehicle to the schedule in the manner effected by the respondent caused it to be an insured vehicle – that is, "a motor vehicle" within the meaning of the policy – at the time of the collision depends upon the proper construction to be placed upon the policy. At the outset it is necessary to be mindful that by the policy the insurer agreed to indemnify the insured against loss, damage or liability "as regards any vehicle described in the schedule (hereinafter referred to as 'the Motor Vehicle')". In the schedule each motor vehicle is identified so that those were the subject of the policy. Permitted additions as "the motor vehicles" to those described in the schedule is provided for by endorsement 50. It is noted that the language used in endorsement 50 is barely sufficient to express the insurer's intention to extend the indemnity and benefits of the policy to events and circumstances arising out of or in connection with vehicles acquired by the insured subsequent to the date of the commencement of the policy.

On a literal reading, the endorsement extends only to a vehicle hired or leased by the insured or a vehicle on **[7]** loan to the insured. Yet from the extension provision read in conjunction with both the first agreement clause of the policy and conditions contained in clauses (c) and (d) of endorsement 50, it is clear that the extension is intended to include a vehicle of which the insured has become the owner after the commencement of the period of insurance and during the currency of the policy. In addition it is clear that to acquire the benefit of extension under the policy, an insured is required to lodge a declaration of having acquired a vehicle within the specified period. The insured's right to have a vehicle so acquired during the currency of the policy admitted to a schedule is subject to the four conditions set out in clauses (a), (b), (c) and (d). Non-compliance with any one of the conditions set out in the clauses would disentitle the insured to the right to have an after-required vehicle – whether by hire, lease, loan or purchase – added to the list of motor vehicles to those described in the schedule.

The witness Lockhart, a director of a subsidiary company of the respondent, verified that the reason for requiring compliance with the provisions of endorsement 50 is to enable the insurer to make an adjustment of the premium brought about by the addition or deletion of a vehicle or vehicles to the schedule. Moreover it would seem obvious that the amount of premium payable by an insured depends upon the number of vehicles the subject of the indemnity, and the type and year model of each vehicle in respect of which cover under the policy is sought.

The applicant, having omitted to provide a Declaration of Acquisition of the vehicle to the respondent **[8]** within the quarter of February, failed to comply with the condition precedent to the right of indemnity and benefits by way of extension of the policy. The addition of the motor vehicle made by way of adjustment by the respondent was not made under the conditions of endorsement 50, but it was made at the request of BRA, acting as agent for the applicant. This is clear from BRA's letter of 7th August 1985 together with the notation alongside the entry concerning the motor vehicle in the list of additional vehicles, and more particularly by the endorsement containing the declaration and the agreement that the additions of the vehicles to the schedule of the policy are made "with effect from 9th August 1985". In effect the respondent agreed to include the motor vehicles for indemnity and benefit arising in the future limited to the remainder of the term of the policy. Had it been intended that the additions were made under endorsement 50 so that the policy covered those vehicles throughout the quarter ended 24th August, it would not have been appropriate or necessary to have declared the date of effectiveness of the additions.

Mr Wilson further submitted that the word "acquired" in clauses (c) and (d) of endorsement 50 ought not to be given any legal connotation but rather the meaning of being "put into use". Support for his contention was said by counsel to be found in the schedule to the policy where the expression in connection with the motor vehicles is "purpose for which the motor vehicle is used" after which is added "in connection with the occupation of or business of the insured". This might be **[9]** said to indicate that the insurer's concern was the use to which the vehicle is intended to be put. It followed, the submission continued, that the acquisition of the motor vehicle within the meaning of endorsement 50 took place during the quarter ended 24th August and that BRA's notification to the respondent by letter of 7th August 1985 was in compliance with clauses (c) and (d) of the endorsement. Alternatively, it was said, the time for lodging the declaration in respect of it had not yet expired when liability to the applicant arose out of the accident.

In my opinion, from the terms of the main agreement clause and clauses (c) and (d) of endorsement 50, the indemnity and benefits in respect of a motor vehicle are not intended to accrue from the date of its use or while it is in use. It is clear that vehicles described in the schedule to the policy were at once subject to the benefits and indemnity when the period of insurance commenced. Thus if theft of a vehicle described in the schedule to the policy took place while not in use and during the period of the policy the insured would be entitled to an indemnity for its loss. However, the right to indemnity under the extension of the policy provided for under endorsement 50 operates from the date of acquisition of the vehicle. The vehicle having been acquired, by compliance within the time specified of the requirements of endorsement 50 and by lodging of the required declaration, the rights of the insured under the policy in respect of that vehicle commence. The rights will attract to the insured before the declaration has been made, provided the declaration is **[10]** subsequently lodged within the quarter period or 21 days after its expiration.

Moreover, in my view there is nothing in the terms of the policy which would justify attributing to the word "acquired" appearing in clauses (c) and (d) of endorsement 50 a meaning of "put into use" as contended on behalf of the applicant. To do so would give to the word a strained and artificial meaning. In my opinion the meaning to be given to the word "acquired" in its context of endorsement 50 is its plain and ordinary dictionary meaning of "to receive or to come into possession of": *Shorter Oxford Dictionary* 3rd Edition, Vol.l, p85; cf. *Congreve v Inland Revenue Commissioners* [1947] 1 All ER 168 at 182-183. Consequently, the motor vehicle having been acquired by the applicant on 31st December 1984 and not being the subject to a declaration lodged in the February quarter, the respondent was not liable to indemnify the applicant for liability incurred by the applicant arising out of its use at the time of the accident on 17th July 1985. It follows that for the foregoing reasons the Order Nisi will be discharged with costs.
