04/92

SUPREME COURT OF VICTORIA

SYMES PANEL MASTERS PTY LTD v VACC INSURANCE CO LTD

Gobbo J

16 September 1991

INSURANCE – CLAIM FOR INDEMNITY FOR PROPERTY DAMAGE – LIABILITY DENIED BY INSURER – REPAIRS CARRIED OUT – CLAIM FOR COST OF REPAIRS – WHETHER DENIAL OF LIABILITY SIMILAR TO DENIAL OF INDEMNITY – WHETHER POLICY OF INSURANCE BREACHED – WHETHER INSURER'S INTERESTS PREJUDICED.

Clause 2(a) of a policy of insurance provided:

> "The insured shall not, without the consent in writing of the company, make any admission, offer, promise or payment in connection with any occurrence or claim and the company, if it so desires, shall be entitled to take over and conduct in the name of the insured the defence or settlement of any claim."

Whilst a motor vehicle was in S.'s possession for repairs it was stripped and damaged by intruders. S. sought indemnity for the loss from its insurer VACC who advised S. that liability for the claim was denied. S. then repaired the vehicle and lodged a claim which the insurer again denied. When the matter came on for hearing, the Magistrate dismissed the claim on the basis that S. was in breach of Clause 2(a) of the policy in that the repairs carried out amounted to an implied admission of liability thereby causing prejudice to the insurer's interest. Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside. Remitted for further hearing.
The denial of liability by the insurer was a denial of indemnity. Accordingly, as the insurer had denied indemnity before the work had been carried out, there was no breach of Clause 2(a) of the policy, and the repairer was entitled to effect repairs to the vehicle.

GOBBO J: [1] This is an appeal from a decision of the Magistrates' Court at Box Hill dismissing a claim for indemnity brought by the plaintiff, who is the appellant in these proceedings, against the defendant insurer, who is the respondent in these proceedings. The claim made in the court below was founded upon a public liability policy under which the insurer agreed to indemnify the plaintiff against loss or damage caused to motor vehicles.

It was established by the evidence in the court below that the plaintiff had had in his possession in July 1989 a Mazda motor vehicle belonging to one Kochinski for the purpose of having it repaired. It had been kept overnight and had been stored by it not within the plaintiff's premises proper but in the rear yard of those premises. The evidence was that that yard was unlit and, on one boundary at least, had only "a low wire fence." The inescapable inference was that it was easily able to be climbed. It effectively meant that the vehicle was not in any meaningful sense stored in any secure fashion. The vehicle was stripped during the night.

The plaintiff notified the defendant and sought indemnity in respect of the loss constituted by the cost of putting right the stripping and other damage that had occurred to the vehicle. There was in fact an additional policy held by plaintiff issued by the same insurer, namely a burglary policy. The evidence before the learned magistrate indicated that there had been some discussions between an employee of the plaintiff and an adjuster appointed by the insurer. As a result of those discussions the plaintiff was left with the clear **[2]** impression that indemnity would not be provided in respect of the loss.

It has been put that the person handling the matter on behalf of the plaintiff appears to have assumed that the matter was only covered by one insurance policy but, in my view, nothing really turns on that since the insurer's own evidence was quite clear that the assessor had been instructed to deny liability under both policies. I will come back to this denial of liability later. The plaintiff proceeded to carry out the reinstatement of the vehicle and then lodged a claim. That matter, after some time, came to trial but before that there was at least one piece of correspondence,

namely a letter of 14 August 1989 from the insurer's adjusters to the plaintiff, which read as follows:

> "We refer to previous conversations and our visits to your office regarding the theft of accessories and spare parts from the vehicles mentioned above and regret that we now must advise we are not in a position to assist you with these claim items as the losses do not fall as being a valid claim under your respective burglary and liability policies. We have now confirmed this denial with your insurance company and now acting on the directions of our principles, we must formally deny this claim and we now close our file."

As I say, the matter proceeded then to a court proceeding in which the plaintiff sought recovery of indemnity being, according to the particulars, a demand for cost of repairs in the sum of $4,423.23 but it appears clear that that total figure was amended to $6,660.50. The substance of the way in which the matter was argued was that the plaintiff contended that the insurer had refused to indemnify it for any and all of its loss. The defendant's response was essentially based upon an exclusion **[3]** clause in the policy of insurance, more particularly clause 2(a) which reads as follows:

> "The insured shall not, without the content in writing of the company, make any admission, offer, promise or payment in connection with any occurrence or claim and the company, if it so desires, shall be entitled to take over and conduct in the name of the insured the defence or settlement of any claim."

Whatever may have been the basis of the discussions at the earlier point of time, in the hearing before the learned magistrate the matter essentially proceeded upon the basis that the conduct of the plaintiff in proceeding to carry out the reinstatement and rehabilitation work on the vehicle was a breach of clause 2(a) and that it was not to the point that, as the letter of 14 August 1989 demonstrated, the insurers had denied liability under both policies. Nonetheless, it was said the insured had breached clause 2(a) before the letter of 14 August 1989. It appears that the learned magistrate upheld that argument.

In my view that finding was not open on the evidence before the learned magistrate. It was clear on the material, and in this case I am not confining myself but indeed I rely upon the material emanating from the respondent insurer – that its adjuster had instructions to deny liability on both policies and said that he had communicated this in the oral discussions when a claim was made, after the damage but before 14 August 1989 and before the work had been carried out.

It was submitted to me by counsel for the insurer that is not a material matter because there was some evidence that the plaintiff's representative was proceeding upon the basis that there was only one material policy, namely the **[4]** burglary policy. But that is of no consequence for the insurer had an obligation to meet a claim for indemnity. The misunderstanding, if there was one, on the part of the plaintiff did not mean that in the face of a general request for indemnity the insurer is then able to say 'Well, I, in effect, know that I have two policies, one of which at least may be entirely applicable but because you may not know of the policy I will simply deny you indemnity.' In my view that course was not properly open to the insurer and its action in denying liability generally must be taken to be a breach of its policy, the relevant policy here being the public liability policy.

It was argued with some ingenuity before me that a denial of liability was not really a denial of indemnity but was simply a statement by the insurer to the insured saying that the third party would not be able to recover because it would not be able to show a breach of the bailment. The particular matter referred to was that the bailor would not be able to show negligence.

I am prepared to assume that there was no other relevant basis of claim, although there may well have been. Limiting the matter for the moment to negligence, there are two things to be said. The first is that a denial of liability when an insured seeks indemnity must be taken to mean a denial of indemnity. It is not suggested that it was put in any different way and, indeed, an insured is entitled to ask of its insurer that it indicate whether it is prepared to take up a claim or to reject it or whether it wants further material. The insured cannot be told, in the ordinary course, "We will have nothing more to do with this **[5]** matter because the person who may sue you will not be able to recover".

There is a further matter that needs to be adverted to, namely this question of negligence. It was also argued that it was open to the magistrate to treat the denial of liability as able to be sustained on the basis that the plaintiff was never under any obligation to pay for the cost of reinstating the pillaged vehicle because there was no negligence. Or, to put it another way, because it would not be possible for such a third party to show negligence.

The difficulty about this argument is that it does not appear to have been argued and certainly the learned magistrate made no findings that support that. On the contrary, such evidence as there is points overwhelmingly the other way. As I have already indicated, the evidence was that the vehicle was stored in a yard that was, effectively, easily open to intruders by reason of the bare wire fence, what has been described as a low wire fence, and without lighting and inferentially without any other form of protection such as regular patrols or supervision or anything of that nature. In these circumstances, I am unable to see how, if a finding had been made by the magistrate – and I am unable to detect a specific finding to that effect – it could have been a finding that any reasonable magistrate could have arrived at, namely that there was no negligence on the part of the bailee of the vehicle.

That then leaves the original situation that there had been a denial of indemnity by the insurer and it was a denial which had occurred before any conduct of a **[6]** disadvantageous nature, such as an implied admission of liability, had occurred. It follows that, in my view, the claim in the plaintiff's case that there had been a breach of the policy through a denial of indemnity is made out. There is no suggestion that any other ingredients or material matters had not been proved and the plaintiff had to succeed in the light of the considerations I have set out above.

I will deal briefly however with the second matter, which was open to the plaintiff to rely upon, namely the terms of s54, since that was canvassed before the learned magistrate and was the subject of a finding by him. I rely for this purpose on the material of the respondent since that is the party which is, as it were, seeking to sustain the decision of the court below. Section 54(1) of the *Insurance Contracts Act* (1984) provides as follows:

> "Subject to this section where the effect of a contract of insurance would but for this section be that the insurer may refuse to pay a claim either in whole or in part by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which sub-section (2) applies, the insurer may not refuse to pay the claim by reason only of that act but his liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act."

Sub-section (2) provides:

> "Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract the insurer may refuse to pay the claim."

Turning back then to s54(1), the act which is relied upon here as disentitling the plaintiff was the implied **[7]** admission of liability by carrying out the work and otherwise the breach of condition 2(a) of the policy. That is, of course, an act that occurred after the contract was entered into. The question is was it an act in respect of which subsection (2) applied.

Turning back then to sub-section (2), "where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim." Here again the act must be the same act, namely of making some implied admission of liability. I am unable to see how it could be said in this case that an act of admission of liability in the circumstances is one that contributed to the loss in respect of which the insurance cover is provided. These kinds of provisions are more likely to have an operation where they are causal to loss in respect of which the insurance cover is provided. I an unable to see here, and indeed the argument did not really advance the matter, that sub-section (2) applied.

Given that sub-section (2) did not apply here, then s54(1) commanded that the insurer may not refuse to pay the claim by reason only of that act. Then there is a provision for some form of reduction that represents the degree of prejudice but it is not suggested in this case that

there could be some form of apportionment that reduced the amount of the loss by reason of prejudice. There might be some circumstances where an admission might lead to that but that was not the way in which the matter was dealt with in the hearing before the learned magistrate. The learned magistrate's phraseology as reported in the **[8]** affidavit was that in relation to s54 of the *Insurance Contracts Act* it was such a breach that placed the insured in a position of meeting the third party's claim without any resort.

In my view the breach, being a breach postulated on the breach of condition 2(a) of the policy, could not be said to have placed the insured in a position of meeting the third party's claim without any resort because, for a start, the payment or the carrying out of the repairs removed any claim. The verbiage seems to be quite inappropriate. There may in fact be a typing error, and it may be intended to speak of a breach which placed the insurer in a position, through indemnity, of having to meet the third party's claim without any resort. This amounts to some argument of diminution, but here again it is difficult to see how diminution would operate in these circumstances.

I only indicate, therefore, that it appears to me that s54 does not apply but my views on that section are, in a sense, *obiter* since I have come to the conclusion that there being a denial of indemnity by the insurer for no cause then the plaintiff was entitled to do the best he could in those circumstances. It then must follow that it was reasonable for it to proceed to limit the amount of any cost and expense and to proceed to carry out the work as expeditiously as possible. It did so and it simply seeks to recover the bare costs of doing that work. For those reasons, the appeal must succeed. The order of the learned magistrate should be set aside. The matter should be remitted to the learned magistrate to be dealt with according to law in accordance with these reasons. I order **[9]** that the respondent pay the appellant's costs of this appeal, including any reserved costs, and I direct that the respondent have a certificate under the *Appeal Costs Fund Act*.

APPEARANCES: For the applicant Symes: Mr M Randall, counsel. Battley & Co, solicitors. For the respondent VACC: Mr D Myers, counsel. Sholl Nicholson, solicitors.
