07/04; [2004] VSC 31

SUPREME COURT OF VICTORIA

QBE INSURANCE LTD v PATTERSON FINE JEWELLERY PTY LTD

Kellam J

27 June 2003; 13 February 2004 — (2004) 13 ANZ Insurance Cases ¶61-610

CIVIL PROCEEDINGS – INSURANCE – JEWELLERS INSURANCE POLICY – THEFT OF JEWELLERY FROM TRAVELLER – TRAVELLER LEFT JEWELLERY UNATTENDED IN A SHOP IN A SHOPPING CENTRE – "IN TRANSIT" – MEANING OF – WHETHER JEWELLERY IN TRANSIT AT TIME OF THEFT – WHETHER COVERED BY TERMS OF POLICY OF INSURANCE – FINDING BY MAGISTRATE THAT INSURER REQUIRED TO INDEMNIFY INSURED - WHETHER MAGISTRATE IN ERROR.

P. and QBE entered into an insurance policy to indemnify P. in the event of loss of jewellery. When N., an agent of P. went to a shopping centre in order to display P.'s jewellery, N. left the jewellery unattended in a shop whilst he went to the toilet. When he returned, the jewellery was missing. Subsequently, P. sought to be indemnified by QBE for the value of the stolen jewellery. The insurance policy in force at the time provided that stock was not to be left unattended by the agent in transit. The magistrate found that QBE was required to indemnify P. for the loss. Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside. Claim dismissed.
1. The policy made it clear that it was intended the insured and its agents had an obligation to take care to ensure that stock outside the insured's business premises in transit was not left unattended.

2. The meaning of the words "in transit" in the policy were not to be confined by reference to the use of such words in the context of a carrier's liability policy or a marine insurance policy. The context of the policy was such that the words "in transit" were to be read to include conveyance or transportation of the stock from place to place with such breaks in motion as may be incidental to the conveyance or transportation. It was a condition precedent to the liability of the insurer that the jewellery not be left unattended but be carried by hand and remain under the agent's personal supervision at the time. As the condition precedent was not met by P. through its agent N., QBE was not liable to indemnify P. pursuant to the terms of the policy.

KELLAM J:
1. This proceeding is an appeal by QBE Insurance Limited ("QBE") under s109 of the *Magistrates' Court Act* 1989 against a final order of a Magistrate dated 19 February 2003. The order of the Magistrate was that QBE pay Patterson Fine Jewellery Pty Ltd ("Patterson") the sum of $14,422.15 under an insurance policy held by Patterson with QBE. In addition an order for interest and costs in the total sum of $8,000 were awarded to Patterson by the Magistrate.

Background
2. Patterson and QBE entered into a "Jewellers Block Insurance Policy" on 3 July 2001 for the period 15 June 2001 to 15 June 2002.

3. The policy, subject to its terms, provided insurance cover in relation to jewellery used by Patterson in the conduct of its business as a jeweller and in particular relevance to the current case, insured such jewellery against theft.

4. No transcript of the hearing before the Magistrate was produced before me but the Magistrate produced written reasons for his decision.

5. In relation to the facts he found established the Magistrate said:

> "Mr Alston Norris is an independent traveller/agent for (Patterson). He specialized in certain types of jewellery for three companies of which (Patterson) was one. (Patterson) in the present case had provided him with two display cases of the range of (Patterson)'s jewellery. When Mr Norris originally collected the jewellery from (Patterson) a list was prepared of the jewellery taken with the price of the

> various items also listed. Mr Norris did not actually ever sell any of these display items to customers. He would show the customers the range and they would place orders through him for items selected with (Patterson) that they required."

It should be observed that the affidavit sworn by Mr Arnold of Counsel, who appeared for QBE before the Magistrate stated that Mr Norris gave evidence before the Magistrate that the cases had been delivered by Patterson to him approximately four weeks prior to the date of the theft for the purposes of him showing the jewellery as samples to jewellers. There is no evidence before me as to whether or not there was any evidence before the Magistrate as to when the stock was to be returned to Patterson by Norris.

6. On 1 November 2001 Mr Norris went to the Carlingford Shopping Centre in New South Wales to show the range of jewellery he held on behalf of Patterson to three separate customers who had shops in that shopping centre.

7. One of those jewellery shops was called the Golden Angel. Upon his attendance at that shop Mr Norris found that the owner to whom he intended to display his wares was absent from the shop. Accordingly Mr Norris formed the intention to go to another shopping centre but before doing so he decided that he should attend a nearby toilet. Mr Norris asked the manageress of the shop if he could leave his two cases containing the jewellery in the office whilst he did so. She agreed and Mr Norris then put the cases in the office of the shop. Mr Norris gave evidence before the Magistrate that when he left the shop the manageress was in the office. Upon his return from the toilet, Mr Norris found the cases of jewellery were missing from the office. The manageress gave evidence before the Magistrate that whilst Mr Norris had been at the toilet, she was in the shop serving customers. The office was not locked whilst she served the customers and the door to the office was left open by her whilst she did so. The Magistrate found that the cases of jewellery were stolen during that period of time by an unknown person.

The question of law

8. The question of law as stated by the Master in his order of 14 March 2003 is as follows:

> "Whether, on the facts as found by the Magistrate, was it open for him to hold that the appellant, was required to indemnify the respondent, pursuant to the relevant policy ..."

9. The only issue pursued by QBE on the appeal before me is whether or not Condition 9(b) of the policy, on its proper construction, precludes Patterson from recovering the loss, being the value of the jewellery stolen, under the policy of insurance. No appeal is now pursued in respect of whether or not Patterson took reasonable precautions to prevent loss or damage, as required by Condition 10 of the policy, or whether or not Patterson has proved the quantum of its claim. In particular, QBE does not dispute that the jewellery stolen was property covered by the policy nor is it in dispute that Mr Norris was an agent of Patterson.

Condition 9 of the Policy of Insurance

10. Condition 9 of the policy states as follows:

> "It is a condition precedent to the Company's liability hereon that Stock must not be left unattended by the Insured, their principals, his traveller or agent, employees or agents:
> (a) In the private dwelling of the individual unless left in the custody of a responsible individual. Should an appropriate safe be fitted, then Stock must be left in said locked safe when the premises are unattended.
> (b) In transit, the Stock must be carried by hand and remain under personal supervision, except when baggage may not be carried as cabin luggage due to the International Air Transport Association Regulations, and travels as accompanied baggage on the same flight.
> (c) Whilst on the premises of Hotels or Motels, unless under the immediate personal supervision, or whilst: (i) kept in personal possession and care of responsible person; (ii) is contained in a locked safe and/or safe deposit vault."

Special Condition 2 of the Insurance Policy

11. Special Condition 2 of the policy provides as follows:

> "2. OUTSIDE LIMIT The Company's liability for Stock is limited to the Sum Insured specified in the Schedule for any one loss elsewhere than at the Insured's Premises specified in the Schedule. a)

> TRAVELLERS Whilst carried by the Insured, its representatives, travellers, agents, messengers, and delivery hands but NOT brokers, including whilst in a private dwelling and a hotel or motel.
>
> b) ENTRUSTMENTS Whilst entrusted to dealers, customers, repairers, cutters and brokers. c) SENDINGS Whilst in transit, from the time the goods are accepted by the carrier until delivered at the premises of the consignee."

It should be noted that the schedule to the policy provided for a limit of $30,000 indemnity for any loss which occurred outside the premises of the insured.

The submission of QBE

12. QBE through its counsel, Mr Stirling submits that Condition 9 is a condition precedent to the liability of QBE to indemnify Patterson in respect of the loss of stock. It submits that the stolen jewellery was "in transit" at the time of the theft and that upon the findings of the Magistrate, it was not under the personal supervision of Mr Norris at the time of the theft, he having left it unattended in order to visit the toilet at the shopping centre premises.

13. Mr Stirling submits that the phrase "in transit" is to be interpreted by reference to the objects of the insurance contract and to the wording of Condition 9(b). Mr Stirling submits that when one looks at the policy broadly it is clear that there is a distinction drawn between loss occurring at the premises of the insured, and loss occurring outside those premises. He points out that Special Condition 1 deals with loss "occurring at the insured's premises" and Special Condition 2 of the policy deals with "loss elsewhere than at the insured's premises". He submits that Condition 9 of the policy deals with the steps an insured must take when stock is "off premises". He submits that the first part of Condition 9 deals with the persons who have the obligation not to leave the stock unattended, and that Conditions (a), (b) and c) deal with three different situations where additional or more specific obligations are imposed. He submits that on any view Condition 9(b) covers the situation where a traveller or agent of the insured is taking the stock from place to place with the aim of selling the jewellery. He submits that at the time of the theft the stock was in transit because it was not at the premises of Patterson, it was not at a private dwelling or at a hotel or motel. It was in the possession of Norris as traveller and agent of Patterson. To the extent that it is necessary, Mr Stirling submits Mr Norris was found by the Magistrate to have concluded his business at the Golden Angel shop at the time of the theft.

The submission of Patterson

14. Mr Klempfner of counsel who appears for Patterson submits that Condition 9 of the policy does not apply to the facts as found by the Magistrate as, in both law and fact, it cannot be said that the jewellery was in transit, within the meaning of the policy at the time of the theft.

15. It should be noted that the Magistrate reached the conclusion that whether the jewellery was in transit or not, was an irrelevant issue. It is not entirely clear from his written reasons why he considered this to be so. Mr Klempfner does not contend that the issue of whether the jewellery was in transit was as stated by the Magistrate, irrelevant. Indeed, he submits that the question of whether or not the goods were in transit was the substance of the submissions made to the Magistrate and was "entirely relevant" in his submission. Mr Klempfner however, submits that Patterson is entitled, as the respondent to the appeal, to support the order of the Magistrates' Court upon any ground which was open to it in that court, irrespective of the reasoning process adopted by the Magistrate. This submission appears to me to be clearly correct, particularly in circumstances where it seems clear that the submissions made on behalf of Patterson before me do not depart in any significant manner from those which were advanced before the Magistrate.

16. Mr Klempfner submits that the insurance policy has been drafted, although poorly he submits, in such a way that makes it apparent that the insurer has a clear understanding of the manner in which the jewellery trade operates. He submits that Condition 9 of the policy so far as it can be understood by reason of its lack of clarity and syntax, cannot be considered in isolation, and that its context within the framework of the policy, and its interrelationship with the other provisions of the policy must be examined. He submits that notwithstanding the use of the term "in transit" in Condition 9(b), the term is not defined in any way in the policy. However, he points out that the word "transit" is used in the policy in addition to Condition 9(b), in two "Endorsements" to the policy.

17. In Endorsement 3 the word is used in relation to "overseas transit". The endorsement provides that notwithstanding anything to the contrary contained in the policy as to territorial limits, the policy extends to indemnify the insured in respect of loss or damage to goods from whatever cause "whilst in transit" to or at any port or places in the world.

18. In Endorsement 4 of the policy dealing with "Exhibitions of Jewellery" it is stated that the policy extends to cover the property insured against loss "whilst in transit or at rest" for the purposes of display at any exhibition.

19. Thus Mr Klempfner contends that it is evident from a reading of the whole of the policy that the phrase "in transit" has a specific meaning within the context of the policy and accords with commercial usage, namely the carriage of goods (in this case jewellery) from one place to another for the purposes of transportation. The term means the carriage of goods from a place of despatch to a place of destination, Mr Klempfner submits. He submits that in the circumstances of this case, the act of the agent in taking the jewellery from shop to shop within a shopping centre does not create a situation whereby the jewellery was in transit within the meaning of the policy, as the jewellery was not being moved from shop to shop for the purpose of transportation. Rather he submits, the jewellery was being moved from shop to shop as a necessary incident of the agent of Patterson attempting to sell items of jewellery to potential customers.

20. Mr Klempfner submits that I should adopt the meaning of "in transit" as being a single movement from origin to destination. In this regard he relied upon a decision of the Supreme Court of British Colombia, *Bailey v Anderson*[1] where Andrew J in considering factual circumstances where an insured left a case of jewels in the boot of his car which was stolen whilst he stopped to play nine holes of golf, said:

> "Surprisingly, counsel relied almost exclusively on American cases in argument on what constitutes 'in transit'. I do not intend this remark to be taken as in any way derogatory of what I consider some of the most lucid judgments I have read. Having read those authorities and references to English and Canadian cases I am satisfied that my view accords with that expressed in *Mayflower Dairy Products Inc v Fidelity-Phoenix Fire Ins. Co. of New York* (1938) 9 NYS 2d 892, a judgment of the Supreme Court, Appellate Term, First Department. The *per curiam* judgment reads as follows:
>
> 'Transportation or in transit as applied to a seller making its own deliveries to customers means the movement of the loaded conveyance carrying the goods from the starting point or seller's premises to the point of destination or place of delivery to the buyer or customer. While there may be some reasonable deviation such as temporary stops incidental to the process of delivery or necessary for those engaged in same, or even the return of undelivered goods, transportation or in transit implies the continuous action of moving the goods from the one point and putting them down in another. In our opinion in transit cannot include a period commencing on the evening of one day when for its own convenience the seller in its own premises loads the goods on its truck, and extending then on through the night during which the loaded truck is stored in such premises on to that time in the morning of the next day when the truck is manned and proceeds on its way to the point of destination. Such a situation implies storage.' See further the dicta of Rand J in *J W Windsor Co Ltd v Charlottetown* [1948] 2 DLR 625 at p628: 'I think it impossible to treat the goods as 'in transit'. What that expression as used here contemplates is a single movement from origin to destination in which the goods are in the control of the carrier.' In my opinion, stopping at a golf course for at least two hours, and possibly up to four or five, cannot be construed as a reasonable deviation from the act of transporting the jewels, nor was such a deviation reasonably to be expected to be in the contemplation of the parties. Nor does such transportation constitute a single movement from origin to destination under the control of a carrier."

21. On this basis Mr Klempfner submits that the essential elements of goods being "in transit" involve a single movement from place of origin to place of destination in which the goods are in control of a carrier.

What is the meaning of "in transit"?

22. It is apparent from a reading of the many authorities which have considered the phrase "in transit" that there is no universal meaning ascribed to the expression. Indeed the term is used in a variety of different types of policies including marine policies, carrier's insurance policies or policies insuring the goods themselves. As Newton and Norris JJ said in *Peter Jackson v Consolidated Insurance of Australia Ltd*[2], the expression is not a "term of art". It is a matter of construing the words used in the particular contract and applying them to the facts which have been established.

That said however, assistance is to be obtained from a consideration of the approach of various courts to the construction of insurance contracts using the words "in transit" in particular fact circumstances.

23. In *NEC Australia Proprietary Limited v Gamif Proprietary Limited & Anor*[3] Lockhart J gave consideration to the meaning of the words "in transit" in relation to a "carrier's liability policy". The insured, a transporter of goods claimed against its insurer for loss resulting from the theft of certain goods from one of the insured's warehouses. In issue between the parties was whether or not the goods were "in transit" at the time of the theft within the ordinary meaning of that term in the policy of insurance. Lockhart J said[4]:

> "In my opinion the policy covers machines of NEC whilst being transported from one place to another. It does not mean that the machines must be in motion at all times. But it does mean that the overall object of the insurance contract is to facilitate the transportation of the machines of NEC from one place to another. The "transit" may be interrupted to permit efficient and economical loading, transhipment, unloading and storage to await another vehicle to carry the goods from the point of original shipment to the point of destination; but the interruption cannot be merely for the commercial convenience of one of the parties. The ordinary meaning of "transit" essentially connotes that goods are in motion between two points, but the period of transit may continue during intervals or periods when they may be loaded or unloaded and temporarily housed provided that this is reasonably referrable to the furtherance of the carriage of goods to the final destination. The notion of "in transit" accepts that the movement of the goods may be interrupted by circumstances associated with the requirements of their transportation".

24. In *Hepburn v A Tomlinson (Hauliers) Ltd*[5] the House of Lords gave consideration to the meaning of "in transit" in relation to a policy taken out by carriers on goods, the property of a third party. In the circumstances of that case the carriers made claim against the insurer on an insurance policy taken out by them on "tobacco manufactured goods" the property of a third party. The goods, a quantity of cigarettes, were carried by the carrier in lorries hired to the third party and were taken to the third party's warehouse in London where they arrived after working hours and consequently were not unloaded immediately. On arrival the lorries and their contents were taken into the charge of the third party's night watchman. They were to be unloaded the following morning. In the meantime, they were stolen. It was held that the goods were still "in transit" when they were stolen because the policy also included loading and unloading. Lord Reid said[6]:

> "Counsel attempted to argue that there were two separate periods of risk, the period of transit and the period of loading or unloading and that in this case the period of transit had come to an end and the period of unloading had not commenced when the theft took place. But in my opinion that is quite inconsistent with the wording of the policy which must mean that the period of transit during which the goods are on risk is extended so as to include unloading and only comes to an end when the unloading is completed."

25. In *Pennsylvania Company for Insurances on Lives and Granting Annuities v Mumford*[7] the Court of Appeal held that the words "whilst in transit between any houses or places" did not cover the loss which took place intra-murally between the vaults of a firm which held securities, in circumstances where the loss was caused by the dishonesty of an employee of the firm with whom such securities were deposited.

26. In *Crows Transport v Phoenix Assurance Co*[8] and in relation to a claim on a policy endorsed to cover goods "temporarily housed during the course of transit" it was held that goods collected together at the insured's premises ready to be loaded on his vehicles were covered as being in transit.

27. In *Verna Trading Pty Ltd v New India Assurance Pty Ltd*[9] the Full Court of the Supreme Court of Victoria gave consideration to the meaning of the word "transit" in relation to a policy of marine insurance which provided that:

> "The insurance attaches from the time the goods leave the warehouse ... for the commencement of the transit, continues during the ordinary course of transit and terminates ... on delivery to any other warehouse or place of storage ... which the assured elect to use ... for storage other than in the ordinary course of transit."

28. In his judgment Kaye J said[10]:

> "While the expression "in transit" is not a term of art, its intended meaning may become apparent from the context in which it is used ... In the present case the meaning of the phrase "during the ordinary course of transit" is indicated by the purpose of the warehouse to warehouse clauses forming part of the marine policy."

29. At page 168 Ormiston J said:

> "It would therefore appear that the 'ordinary course of transit' would end if an act or acts took place which would, reasonably considered, indicate that the transit had terminated or that the transit had been so interrupted that it could not be seen as likely that the transit would re-commence without there being a positive decision to that effect by the assured or consignee."

30. At page 169 to 170 Ormiston J quoted the following observation which appears in Templeman on *Marine Insurance* 6th Ed at p102-5:

> "Obviously, it is not necessary for goods to be continuously in motion to constitute being in transit. During the ordinary course of transit the goods might frequently come to rest or be temporarily stored at some intermediate place, such as in a transit shed at the docks whilst waiting to be loaded at the port of shipment, or at a port of transhipment, and again later at the port of discharge while being cleared through Customs and then whilst awaiting the arrival of a vehicle to convey the goods to the final warehouse."

It should be noted however that Ormiston J expressed a warning about applying all observations appearing in authorities to particular facts. He said[11]:

> "It is neither appropriate nor desirable that I should attempt to particularise all the matters which might take an adventure out of the ordinary course of transit. One should be cautious about some of the other observations in the authorities to which I have referred, not because they were wrong in principle, but because they applied to policies in different terms or related to circumstances very different from the present."

31. In *SCA (Freight) Ltd v Gibson*[12] Ackner J considered a claim brought by the plaintiffs claiming an indemnity under a "goods in transit" insurance policy. The plaintiffs were hauliers who had agreed to transport a consignment of books from Rome to Manchester by road on vehicles operated by and belonging to the plaintiff. The driver of a vehicle loaded with the books decided to take a trip (described by the trial judge as a "joyride") in the vehicle to the centre of Rome, during which an accident occurred and substantial damage was caused to the books. Ackner J held that the goods were not at the material time covered by the transit policy. He said[13]:

> "Goods cease to be in transit when they are on a journey which is not in reasonable furtherance of their carriage to their ultimate destination. Obviously a detour which is reasonably necessary to enable a driver to obtain food or rest would be in furtherance of the safe and expeditious carriage of the goods to their ultimate destination. It would be an ordinary incident in the transit of goods by the plaintiff's vehicle. It is a question of degree as to what is or is not in reasonable furtherance of the carriage of the goods. A deviation which is wholly unrelated to the usual and ordinary method of pursuing the adventure would prevent the goods being 'in transit' within the meaning of the policy".

32. In *Kelly v National Insurance Co of New Zealand Limited*[14] the New Zealand Court of Appeal gave consideration to the words "in transit" in relation to a property insurance policy which excluded loss or damage to property which was in transit. In a joint judgment the Court said[15]:

> "The judge relied on *Sadler Brothers Co v Meredith*[16] and *Crows Transport Ltd v Phoenix Assurance Co Limited*[17] as authority for the proposition that goods are in transit from when they leave the customer's premises until they reach their destination. Those cases make it clear that the meaning of 'transit' may depend on its context and on the wording of the particular policy. They show that the word 'transit' can include matters incidental to transit, such as the period between receipt of the goods by the haulier and the commencement of the journey, or some temporary interruption of the journey. The present case concerns the different question whether the grinder was still in transit after it had arrived at its destination and had then been unloaded, although not yet finally positioned."

After considering a number of the authorities including some of those referred to above, the Court said[18]:

> "All of these cases show that there is no universal answer to the question of what is meant by transit. It is a matter of construing the words used in the particular contract, and applying them to the facts. In the present case, there was no cartage contract. The contract was for the hire of men and machinery ... The policy in s1(b) expressly covers the property of the insured at the premises and there can be no doubt that the grinder was at the premises ... at the time it suffered damage. It had been in transit from the old premises to the new, but it had not only arrived inside the new premises, but it had been unloaded from the forklift and deposited on planks of timber on the floor of the premises. The subsequent re-positioning does not seem to fall readily within the ordinary meaning of 'transit'."

33. Insofar as the ordinary meaning of the word "transit" is concerned the *Oxford Concise Australian Dictionary* states that it means "The act or process of going, conveying, or being conveyed, especially over a distance".

34. Accordingly it appears to me that there is some weight in the submission made by Mr Klempfner that the authorities, although they do normally concern issues related to marine insurance or transport insurance establish that the expression "in transit" relates to the movement of goods for the purposes of transport. Mr Klempfner submits that this is a crucial consideration in the determination of this appeal. In this regard he relies upon *Legal and General Insurance Australia Limited v Eather*[19] where Kirby P (as he then was) summarised three general rules that are taken to guide courts in the construction of insurance polices:

> "The first is that, wherever possible established constructions, laid down by courts of high authority, should be followed to ensure the uniform interpretation of terms of insurance policies, which are commonly repeated. This rule is founded on the obvious good sense of providing, in a worldwide market of common contracts, an objectively ascertainable and commonly known or knowable dictionary by which the respective rights and obligations of insurers and insured can readily be found. Secondly, where there is doubt as to the meaning of a policy, particularly in respect of terms contained in standard printed forms proffered by the insurer to the insured, courts, if not otherwise able to resolve the ambiguity, will construe the policy *contra proferentem*. This principle is grounded in the substantially superior position enjoyed by the insurer to specify, and where necessary amend, the standard terms on which it offers indemnity to its insured. Thirdly, insurance policies will be construed in their commercial and social setting and having regard to their purposes. If one construction strikes fundamentally at the purpose of the policy, which is to spread the risk insured against, whilst another construction that is reasonably available would effect that purpose, the latter will be preferred."

35. Mr Klempfner submits that the words "in transit" have a specific commercial meaning, namely the carriage of goods from one place to another for the purposes of transportation. Thus he submits that there is manifest ambiguity in relation to the expression "in transit" upon a proper analysis of the policy. He submits that in the factual circumstances of the loss of the jewellery by Patterson the goods cannot be said to be in transit within the usual meaning of those words as applied by the Courts. In such circumstances the use of the word "transit" in Condition 9(b) is, he submits, ambiguous and should be read against QBE.

Conclusion

36. It is true as submitted by Mr Klempfner that the usual commercial use of the words "in transit" in marine and carriers insurance and other similar policies relates to a movement of goods from origin to destination, often under the control of a carrier. It is true as submitted by Mr Klempfner that the circumstances of this case are such that the loss would be unlikely to be regarded as having occurred "in transit" if the insurance policy was a carriage of goods or a carrier's liability policy. However, as is also clear from the authorities, the question of the meaning of the term must be considered in the light of the particular policy which has been issued by the insurer and by reference to the object of the contract of insurance and the particular clause used. One has to construe the words in the particular contract and apply them (if possible) to the facts of the particular case. The cardinal rule of construction is that the intention of the parties must prevail.[20]

37. It is apparent that the policy was written specifically to cover loss, destruction or damage to stock of the type usually in the possession and use of a wholesale jeweller. The definition of "stock" in section 1 of the policy is a wide definition which includes "the valuables defined as diamonds and precious stones in any form, tools, sample cases, cases, packaging, watches, metals of all kinds, pearls, jewellery and the like, bonds, securities and other documents of value, cash,

coins and notes and all other stocks, the property of the Insured and/or for which the Insured is responsible...".

38. The policy provided cover of $1,000,000 for stock kept at the premises of the insured but provided by special condition 2 (see paragraph 11 above) a limit of $30,000 for any one loss elsewhere than on the premises including whilst carried by the insured, its representatives, travellers, agents, and including whilst "in a private dwelling and a hotel or motel".

39. However, by Condition 9 the policy provides that it is a condition precedent to liability that stock was not to be left unattended by the insured, their principals, travellers, agents, or employees. The condition then sets out three circumstances. By condition 9(a) it is provided that if the stock is in the private dwelling of an individual it must be left "in the custody of a responsible individual" but may be left in a "locked safe when the premises are unattended". By Condition 9(b) stock "in transit" must be carried by hand and "remain under personal supervision" except when by reason of IATA regulations such stock may not be carried as cabin baggage and travels as accompanied baggage on the same flight. Condition 9(c) provides for stock, upon the premises of hotels or motels to be kept under "immediate personal supervision" or "in personal possession and care" of a responsible person or in a locked safe and/or safe deposit vault.

40. Whilst it is true, as submitted by Mr Klempfner that condition 9 lacks syntax and is at least worded inelegantly, it is nevertheless drafted in such a way that to my mind it is clear that it was intended the insured, and its travellers and agents have an obligation to take care to ensure that stock outside the business premises of the insured and in a home, in transit, or in a hotel or motel is not left unattended, otherwise than when it is in a locked safe or is travelling as unaccompanied baggage on an air flight in certain circumstances.

41. In that context it falls for the words "in transit" to be construed. It is clear that the policy provides indemnity for the stock of the insured when it is not upon the premises of the insured in certain circumstances. Conditions 9(a) and (b) provide what is required of the insured, its travellers and agents to be indemnified in the event of the stock being situated in the home of a principal, or employee, traveller or agent of the insured or upon the premises of a motel. Condition 9(b) purports to cover the circumstances of transit, including carriage of the stock by air, in the possession of an authorised individual.

42. In my view, the meaning of the words "in transit" in this particular policy cannot be confined by reference to the use of such words in the context of a carrier's liability policy or a marine insurance policy. I accept that in those policies the usual and commercial meaning of "in transit" is the carriage of goods from one place to another for the purpose of transportation, usually by a carrier. However, as Roskill J said in *Sadler Brothers Company v Meredith*[21]:

> "Obviously an exhaustive definition of transit is impossible, and equally obviously it is undesirable, and certainly I do not propose to attempt one. I am merely trying to apply the facts of this case as I find them to this particular policy."

43. The policy under consideration here is a Jewellers' Policy the object of which is to provide cover for all facets of a wholesale jeweller's business. The policy provides limited cover for stock when it is off the premises of the insured. Clearly the policy contemplates cover for stock whilst in the possession of "Travellers" as referred to in Special Condition 2. In that context, the words "in transit" as they appear in Condition 9(b) appear to me to apply to such times as when the jewellery stock is being conveyed by such agent or traveller from place to place for the purposes of the business of the insured. Condition 9 contemplates that such persons will from time to time spend time in their own homes, in aircraft or in hotels or motels. This is recognition of the fact that during the course of transit (or conveyance) the stock may come to rest temporarily in the home of, or hotel or motel used by such agent and traveller. The whole context of the condition is such as to make it clear that the expression "in transit" cannot mean a single movement from origin to destination as submitted by Mr Klempfner. Looking at the object of the policy, it is apparent in my view, that the interpretation of the words "in transit" urged upon me by Mr Klempfner would defeat the object and purpose of the clause. The object and the purpose of Condition 9 is to ensure that the indemnity provided for "off premises" stock is subject to the requirement that such stock be not left unattended, (otherwise than when in a safe), when in a private home, in transit, or in a hotel or motel.

44. In my view, the context of the policy is such that the words "in transit" may be read to include conveyance or transportation of the stock from the premises of the insured to the home of the traveller, and then from his or her home to the premises of a retail jeweller and then again from the premises of such retail jeweller to another retail jeweller and then to a motel and then back to the premises of the insured and so on. It does not require a single trip to be in transit but in my view does require the concept of conveyance or transportation from place to place with such breaks in motion as may be incidental to the conveyance or transportation. This interpretation of the meaning of the words "in transit" appearing in Condition 9(b) is not inconsistent with the use of the same words in Endorsements 3 and 4 of the policy and indeed may be said to be perfectly consistent with Endorsement 4 of the policy which extends cover to stock, subject to conditions, "whilst in transit ..." for the purpose of display at any exhibition anywhere in Australia. It is apparent that Endorsement 3 refers to "in transit" in the context of the jewellery trade in that overseas "sendings" are capable of being indemnified. Likewise Condition 4 which in certain circumstances extends cover to the property insured "in transit or at rest for the purpose of display at any exhibition anywhere in Australia" clearly does not contemplate transport to a consignee, or a single movement from origin to destination, but rather the conveyance of jewellery to or from displays at exhibitions anywhere in Australia. Thus, transit in that context may involve several conveyances of jewellery stock between the premises of the insured to places of display and then ultimately return to such premises.

45. The reasons for decision of the Magistrate make it clear that Mr Norris called upon Golden Angel without appointment, ascertained that the owner was not there, and then asked if he could leave his cases of stock in the office whilst he went to the shopping centre toilet. He did not open his cases or display his stock or take any orders. In such circumstances, the cases were then left unattended by Mr Norris. Furthermore, they were left unattended by him, whilst they were in transit within the meaning of the policy. The cases of jewellery were outside the premises of the insured for the purposes of being transported or conveyed by Mr Norris from such premises, or from his home or hotel or motel, to the premises of potential customers of the insured, not for the purpose of sale or delivery, but for the purposes of display to attract sales orders.

46. In my view, the factual circumstance of that conveyance within the structure and terms of the Jewellers Block Policy, is such that at the time of the theft of the jewellery, it was "in transit" within the meaning of Condition 9(b) of the policy and thus it was a condition precedent to the liability of the appellant that the jewellery cases be not left unattended by Mr Norris, but be carried by hand and remain under his personal supervision at the time. The condition precedent was not met by the insured, by its traveller Mr Norris, and thus the appellant is not liable to indemnify the respondent.

47. It follows in my opinion that the Magistrate made an error of law in concluding that Condition 9 of the policy did not apply to the factual circumstances established before him.

48. It appears to me that the appropriate orders are that the appeal should be allowed with costs, and that there should be a certificate granted to the respondent in respect of the costs of the appeal. The order of the Magistrate should be set aside and in lieu thereof an order made that the claim should be dismissed with the costs of QBE in the Magistrates' Court to be taxed on the appropriate scale and paid by Patterson. However, I will grant liberty to Counsel to make submissions as to the appropriate form of the orders.

---

[1] (1975) 63 DLR (3d) 139 at 146-7.
[2] [1975] VicRp 77; [1975] VR 781 at 799.
[3] (1993) 42 FCR 410; (1993) 7 ANZ Insurance Cases 61-178.
[4] At pages 417-418.
[5] [1966] AC 451; [1966] 1 All ER 418.
[6] At p466.
[7] [1920] 2 KB 537.
[8] [1965] 1 All ER 596; [1965] 1 WLR 383.
[9] [1991] VicRp 12; [1991] 1 VR 129; 6 ANZ Insurance Cases 76,243.
[10] At p147.
[11] At p168.
[12] [1974] 2 Lloyds Rep 533.
[13] At p535.
[14] [1995] 1 NZLR 641; (1995) 8 ANZ Insurance Cases 61-239.

[15] At p645.
[16] [1963] 2 Lloyds Report 298.
[17] [1965] 1 Lloyds Report 139; [1965] 1 All ER 596; [1965] 1 WLR 383.
[18] At p646.
[19] (1986) 6 NSWLR 390 at 394; (1986) 4 ANZ Insurance Cases 60-749.
[20] *Lombard Australia Ltd v NRMA Insurance Ltd* [1969] 1 Lloyds Rep 575.
[21] [1963] 2 Ll. L. Rep 293 at 307-308.

APPEARANCES: For the plaintiff QBE Insurance: Mr M Stirling, counsel. Norris Coates, solicitors. For the respondent Patterson Fine Jewellery: Mr D Klempfner, counsel. Cavoli and Co, solicitors.
