

**CARRIER'S LIABILITY
VS
GOODS IN TRANSIT INSURANCE
A LEGAL PERSPECTIVE**

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HISTORY

- Fundamental principle: insurable interest
- Insurable interest in property (“positive” interest e.g. owner or party bearing risk under a sale contract) – first party insurance
- Insurable interest arising out of a potential liability (“negative” interest e.g. contractual liability, delictual liability) – third party insurance
- Insurable interest – party must stand to suffer an appreciable commercial loss
- Distinguishes insurance from gaming / wagering
- Road carrier not owner of cargo carried, nor party bearing risk in and to such cargo under a contract of sale
- Road carrier has no property insurable interest
- Road carrier has potential liability insurable interest based *inter alia* on the terms of the contract of carriage (common law or specific contract terms – fault?)

1990's INSURANCE POLICY AMENDMENTS

- Two separate and distinct types of insurance policies emerged, namely:
- (1) Carrier's Liability Insurance
- Insurer underwrites the carrier's legal liability to the cargo owner arising out of loss of or damage to goods carried
- (2) Goods in Transit Insurance
- The carrier facilitated insurance over the goods in favour of the cargo owner
- Liability (Third Party) vs Property (First Party) Insurance
- Legal position of the parties?
- Carrier an agent? Of insurer? Of insured? Problems with agency
- What happens if the road carrier is placed into liquidation after being indemnified by the insurer? Must the insurer still indemnify the cargo owner?

1990's POLICY AMENDMENTS (cont.)

- *Stipulatio Alteri* – a contract for the benefit of a third party
- **A** (road carrier) concludes a contract of insurance with **B** (the insurer) for the benefit of **C** (the cargo owner / property risk bearer)
- Cargo owner **C** must accept the benefit of the insurance contract
- This was achieved through completing a carrier's waybill / ticking a box requesting insurance cover – written acceptance of benefit
- Sometimes benefit was accepted by standard trading conditions (stc's) but often it had to be “specifically” accepted (i.e. not a general acceptance)
- Often referred to as a “Facility Policy”
- Market *status quo* remained until 2011 / 2012

FINANCIAL SERVICES BOARD (FSB)

- Enter the Financial Services Board (FSB)
- First “Information Letter” dated 22 July 2011
- Response from market?
- Second “Information Letter” dated 18 May 2012
- Stated purpose of letter: “... to provide guidance on the requirements of the Short-Term Insurance Act No. 53 of 1998 (“the Act”) in respect of insurance offered by persons acting in capacity of a bailee (such as couriers and transporters)”
- Guidance on the legal position ? – Yes, to a point
- Is the full legal picture clear ? – No
- Bailment comes to the fore as a legal concept – but can a bailee without a legal liability to the cargo owner, procure property insurance in it’s own name?

FSB (cont.)

- Paragraph 4.2
 - “A transportation policy is a contract under which a person, in return for a premium, undertakes to provide policy benefits if an event, contemplated in a contract as a risk relating to the possession, use or ownership of a vessel, aircraft or other craft or for the conveyance of persons or goods by air, space, land or water, or to the storage, treatment or handling of goods so conveyed or to be so conveyed, occurs.”
- Paragraph 4.3
 - “A person acting in the capacity of a **bailee** can only insure the goods of its client or intermediate a short-term policy for a client if the person –
 - 4.3.1 is a registered insurer; or
 - 4.3.2 enters into a short-term policy (“policy”) with a registered insurer as a bailee; or
 - 4.3.3 acts as an independent intermediary that facilitates a client entering into a policy with a registered insurer; or

FSB (cont.)

- *4.3.4 acts as a binder holder that performs binder functions in terms of a binder agreement or a holder-covered binder agreement.”*
- Our main focus is on sub – paragraphs (2) and (3) above
- (2) enter into policy of insurance as a bailee; or
- (3) act as an independent intermediary facilitating a client entering into a policy of insurance;
- Then, the salutary warning :
- *Paragraph 4.4:*
 - *“A person acting in the capacity of a bailee that insures the goods of its clients and circumstances other than those referred to in paragraph 4.3 is conducting unregistered insurance business and contravening section 7 of the Act.”*

FSB (cont.)

- 4.5 *“A person acting in the capacity of a bailee that is not a registered insurer may enter into a policy with a registered insurer, which policy insures the goods of its clients, in the capacity of a bailee.”*
- This suggests insurance over the goods (i.e. property insurance)
- 4.6 *“A bailee has an insurable interest (i.e. the liability to the client for loss or damage to the goods) in the goods that the client left with the bailee in terms of the contract of bailment.”*
- Is the insurable interest linked to contractual liability?
- Is it not more correct to say that the insurable interest arises out of the obligation to restore possession of the goods to the bailor (which is a contractual obligation)?
- Are the insurance proceeds then paid over in lieu of the property?

FSB (cont.)

- 4.7 *“A bailee may therefore insure the goods of its clients in its own name **to the extent of its potential liability to the client for the loss or damage to the goods.** The bailee is the policyholder (the person entitled to be provided with the policy benefits under the policy) and must pay the premium stipulated in the policy.”*
- Is this a reference to insurance over the goods (property insurance) or a reference to liability insurance?
- If liability insurance, is property insurance also recognised by the FSB?
- If property insurance, there is no reference to the obligation on the bailee to make over (i.e. pay over) the insurance indemnity to the cargo owner.
- What if the bailee, in its stc's, limits, but does not entirely exclude, its contractual liability to the bailor in respect of the goods?

BAILMENT

- A “bailee” is “one to whom property is bailed, or delivered in trust.”
- English law concept although used interchangeably in our law with deposit (a Roman Dutch law concept)
- English law – a bailee can insure the goods in his own name, irrespective of whether he stands to be legally liable for loss or damage to the goods;
- **A. Tomlinson (Hauliers) Ltd v Hepburn** - (English case)
 - “a bailee can if he chooses, merely insure to cover his own loss or personal liability to the owner of the goods either at common law or under contract ... But equally he can if he chooses insure up to his full insurable interest – up to the value of the goods entrusted to him. And if he does that he can recover the value of the goods although he has suffered no personal loss at all. But in that case the law will require him to account to the owner of the goods has suffered the loss or, as Lord Campbell says, he will be trustee for the owners.”
- Bailee obliged to “make over” (i.e. pay over) insurance indemnity to bailor -
English Law of Trusts

BAILMENT (cont.)

- ***Malcher & Malcomess v King Williamstown Fire & Marine Insurance & Trust Co*** (1883) – (South African case)
 - *“The assured must have an interest to support the policy, and this must be a subsisting right or interest in the property about to be assured, which will be recognised as such in law. A mere expectancy is not an insurable interest, nor is a right binding only in honour. On the other hand, a trustee having possession, may insure for the benefit of the Trust; so may a bailee of goods in Trust.”*
 - *“In testing by examples the nature of the interest which would give a right to insure, it may be mentioned that it has been held that wharfinger and warehousemen may insure and recover the full value of goods in his custody belonging to his customers, even though his interest was limited to certain charges for cartage and rent. So also a common carrier may insure and recover the full value of goods destroyed, even though he might not himself have been liable, in consequence of non-compliance with the Carrier’s Act, to make good the loss to the owners.”*

BAILMENT (cont.)

- South African law therefore aligned with English law at the turn of the century
- However, the English Law of Trusts does not form part of South African law
- ***Estate Kemp and Others v McDonald's Trustees*** (1915)
- ***Crookes NO and Another v Watson & Others*** (1956)
- Seminal South African judgment – ***Government of the Republic of South Africa (Department of Industries v Fibre Spinners & Weavers (Pty) Ltd*** (1977) – Didcott J
- Facts – Dept. Of Industries concluded a contract with Fibre Spinners to manufacture Jute grainbags, to release them as and when required and pending such release to store them at their premises

BAILMENT (cont.)

- Letter from Dept. Of Industries said :
 - “2. *In consideration of Messrs. Fibre Spinners & Weavers arranging, and keeping in force, insurances detailed in para. 3 hereunder, you are hereby absolved from all responsibility for loss of or damage howsoever arising in respect of this Department’s stocks of ... finished jute ... products whilst in the care of your company ...*
 - 3. *It shall be your company’s responsibility to maintain, with my Department’s interest properly noted in the policies, insurance in the following forms:*
 - (i) *grainbags*
 - (ii) *cover as reflected in all risks policy BAR0512280 (or any policy issued in replacement).”*
- Warehouseman was contracted to provide all risks (i.e. property) insurance over the goods in storage

BAILMENT (cont.)

- Didcott J on bailment:
 - *“The bailee (or depositary) is prima facie liable to compensate the bailor (or depositor) for the loss of or damage to the property left with him by the bailor. This is so because the duty which the contract imposed on him was to keep the property under his control, to preserve it and in due course to restore intact to the bailor. He is not, on the other hand, the insurer of the property. He can therefore avoid liability, but only if he proves that he took all reasonable care of the property which the circumstances demanded, yet it was lost or damaged in spite of his diligence.”*
- Didcott J on insurable interest :
- *“A bailee has an insurable interest in the goods deposited with him. He may insure them for their full value, and he may recover it from the insurer if they are lost. He must then account to the bailor for what he has received.”*

BAILMENT (cont.)

- Didcott J on the effect of the letter from the Dept. Of Industries and the contract:
 - *“...whichever the case, it was contemplated that, in the event of loss or damage resulting from the development of any such risk, the Defendant would have recourse to the insurer. No doubt, it was also envisaged that, if it was successful in that direction, the Defendant would account in turn to the Plaintiff, not for the loss or damage, but for what it had got from the insurer in respect of the loss or damage.”*
- Didcott J therefore accepted in principle that a bailee could insure property of a third party cargo owner in its own name (i.e. property insurance) on the basis that the bailee would have to account to the cargo owner in respect of the insurance proceeds
- FSB’s information letter – liability insurance – does it recognise property insurance by the bailee and the obligation to make over proceeds?

PROBLEM AREAS

- Sub-Contractors
- If carrier **A** sub-contracts the carriage to carrier **B** and goods are damaged whilst in the latter's possession, is carrier **A** a bailee? Physical control of the cargo or ultimate control of the destination?
- Is a transport broker a bailee?
- Is a freight forwarder / clearing and forwarding agent a bailee?
- Does double insurance arise – same type of insurance (?), same insured but a different insurer?
- Facility policy? Bailee policy? Liability policy (fault based)? ICC(A) clauses
- Theft – insured under ICC(A) – not under liability policy
- Compliance with the Regulatory environment by the insurer, the insurance manager / agent, the carrier, the freight forwarder, the clearing and forwarding agent and the insured

PROBLEM AREAS (cont.)

- Subrogation in property insurance scenario – how does subrogation operate?
- It is prudent to obtain a cession / assignment from cargo owner to give the insurer the right to claim for loss or damage to goods
- Subrogation and cession different – insurer must sue in its own name in the case of a cession
- What if carrier retains insurance proceeds?
- If freight / cartage unpaid, carriers will be tempted to retain insurance proceeds and set these off against outstanding freight / cartage – can this be done?
- Contingency policies?
- Hybrid policies?
- All this potentially means fertile grounds for confusion and litigation (with a bit of luck!)

REGULATORY FRAMEWORK

- Short-term Insurance Act
 - *“Independent Intermediary”*
 - *“Services as an intermediary”* is defined as follows:
 - *“means any act performed by a person –*
 - (a) *the result of which is that another person will or does or offers to enter into, vary or renew a short-term policy; or*
 - (b) *with a view to –*
 - (i) *maintaining, servicing or otherwise dealing with;*
 - (ii) *collecting or accounting for premiums payable under; or*
 - (iii) *receiving, submitting or processing claims under a short-term policy”*
- Potentially very wide ambit
- Predominantly concerned with the flow of money / the collection of premium and the payment of commission

FAIS ACT

- *“Financial Services Provider”* :
- means any person, other than a representative, who has a regular feature of the business on such person –
 - (a) furnishes advice; or
 - (b) furnishes advice and renders an intermediary service; or
 - (c) renders an intermediary service”
- *“Intermediary Service”*
- Means, “... any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supply –
 - (a) the result of which is that the client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or

FAIS ACT (cont.)

- (b) *with a view to –*
- (i) *buying, selling or otherwise dealing in ... managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by the client from the product supplier or in which the client has invested;*
- (ii) *collecting or accounting for premiums or other monies payable by the client to a product supplier in respect of a financial product”*
- Section 36 of the FAIS Act read with section 7(1) of the FAIS Act – person who breaches is guilty of an offence and is on conviction liable to a fine not exceeding R 1 million or to imprisonment for a period not exceeding ten years or to both such fine and imprisonment!
- Severe punishment – intent vs negligence

THE WAY FORWARD

- Insurers have been reviewing policies
- Commercial / confidential issues – insurers are in competition and looking for an advantage in the market
- Facility policies are problematic unless the carrier is FAIS compliant
- Property policy with the carrier as insured is possible but the insured is obliged to make over any indemnity to the cargo owner
- Liability policy with the carrier as insured is possible but the extent of the cover for liabilities must be set out
- Potential gap between the law and the FSB's guidance per letter?
- Industry in the form of AMUSA and SAIA needs to address the FSB on the gap - it is possible to approach the court for a declaratory order
- Given the severe criminal ramifications, these matters need to be clarified in the interests of all industry players

Thank You