

AN UNMERITORIOUS DEFENCE –
THE REQUIREMENT OF
INSURABLE INTEREST IN THE LAW
OF MARINE INSURANCE
AND RELATED MATTERS

BY

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On 4 February, 1881, when she was one day's sailing out of Hamburg, the "City of Dublin" sank. When she went down, 3,900 bags of sugar went with her. Although the vessel and sugar may have been lost, all was not; for from it arose, like some bedraggled phoenix, the Stock v. Inglis litigation - 9 Q.B.D 708 (Field, J.) 12 Q.B.D. 564 (C.A.) and 10 App. Cas. 263 (H.L.). When the litigation was at its intermediate stage, Brett, M.R. began his judgment with the following paragraphs (at 571):

"Nobody can deny that this a case of extreme difficulty and great nicety.

In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly as between assured and insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond proper limits, but we ought, I think, to consider the question with a mind, if the facts and the law will allow it, to find in favour of an insurable interest."

Obviously, the title of this paper hearkens to the words of the Master of the Rolls. But, it seeks to do more. In particular, it refers to requirement of insurable interest in the law of marine insurance. The reason for this is that, as a result of the Report of the Commonwealth Law Reform Commission on Insurance Contracts (A.L.R.C. 20) the general law relating to insurable interest in non-marine indemnity insurance has been significantly altered by ss. 16 and 17 of the Insurance Contracts Act, 1984 (Cth.). It might be noted parenthetically that marine insurance was expressly excluded from the Commission's terms of reference (Report at xv.).

The Commission was of the view that existing legislative requirements relating to insurable interest were, "... the result of a combination of imprecise drafting and historical accident rather than coherent implementation of clear legislative policy. " Accordingly, the Commission recommended the abolition of the requirement of insurable interest in the context of non-marine indemnity insurance. However, in the Commission's opinion, simply to abolish this requirement without addressing other perceived injustices which might flow from an application of the accepted principles of indemnity insurance would not have been sufficient.

To give effect to the Commission's recommendations, s. 16(1) of the 1984 Act provides that a contract of general insurance is not void by reason only that the insured did not have, at the time when the contract was entered into, an interest in the subject-matter of the contract. This is followed by s. 17, which is in the following terms:

17. Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that the property the subject-matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by reason only that, at the time of the loss, the insured did not have an interest at law or in equity in the property.

In New Zealand the Insurance Law Reform Act, 1985 modified the common law of insurance. Section 7 of that Act dealt with insurable interest, and sub-section (1) began, "(1) Except as provided in the Marine Insurance Act, 1908,....." Although the method of dealing with the matter may have been different, in New Zealand as in Australia the law of marine insurance was left untouched.

Although in Australia and New Zealand there may be new regimes in other areas of insurance law, in the field of marine insurance the search for an insurable interest is just as important as it was when Sir Baliol Brett penned his judgment in Stock almost 110 years ago. That this is so is amply demonstrated by the judgment of Carruthers, J. and the New South Wales Court of Appeal (Kirby, P. and Clarke and Handley, JJ. A.) in N.S.W. Leather Co. Pty. Limited v. Vanguard Insurance Company Limited. Although an Application for Special Leave to appeal to the High Court was lodged, it was not proceeded with.

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N.S.W. Leather is worthy of examination for three reasons. First, because the issues raised and the judgments in which they were considered are of intrinsic significance and interest. Secondly, just as in the area of carriage of goods by sea changes in the way business is conducted has sorely tested existing legal rules, N.S.W. Leather shows that changes in the way that the export trade is now conducted may also test the relevance and applicability of existing legal rules relating to the passing of risk under f.o.b. contracts, and the acquisition of an insurable interest under policies of marine insurance. Thirdly, the case suggests that the time may have come for a thoroughgoing modernization (some of its unfortunate connotations cause me to eschew the word "reform") of the law of marine insurance.

At least so far as the defendant insurer in N.S.W. Leather was concerned the critical facts and principal legal issue in the case could be shortly stated. The plaintiff assured claimed in respect of the loss of consignments of leather goods which it had purchased f.o.b. Rio Grande from various Brazilian suppliers. The leather in respect of which the plaintiff claimed was never shipped on board the relevant nominated vessels with the result that all losses occurred before risk and property in the goods passed to the plaintiff, and, therefore, before the plaintiff acquired an insurable interest in them.

Although the critical factual issue upon which the defendant relied, non-shipment of the leather, was conceded at the trial, the various bases upon which the plaintiff put its case make it necessary to

examine the factual background to the case in a little more detail. The relevant players were: R.R. Lagemann Exportacoes de Couros Ltda. (Lagemann); Transpex Comissaria Despachos Ltda. (Transpex), and Sul Porto e Agencia Maritima (Sul Porto).

The plaintiff had imported leather goods from Brazilian suppliers for some years, and since 1988 used Lagemann in connexion with this part of its business; indeed, according to the evidence the plaintiff had had a hand in the establishment of Lagemann. About three times per year a director of the plaintiff visited the state of Rio Grande do Sul and, with Mr. Lagemann, visited tanneries inland from Porto Alegre. On such visits agreements for the purchase of leather were concluded, with terms as to quantity, type and quantity being agreed upon. Contract prices were quoted f.o.b. in U.S. dollars. After such visits order forms were prepared by Lagemann, and, in addition to recording the purchase terms, the orders stipulated that commission of 3% of the price was payable to Lagemann by the suppliers. Four copies of the orders were prepared: two were sent to suppliers (with one being returned signed to Lagemann), one was sent to the plaintiff, and Lagemann retained the other.

After receipt of the signed order, Lagemann kept in contact with suppliers to ensure that supply dates would be met. Lagemann also visited suppliers to inspect the leather to make sure that it complied with contractual specification; if it did not, instructions were sought from the plaintiff. When a shipment in accordance with contractual specification was ready, Lagemann would contact Transpex, a forwarding agent, and request that container space be booked on an appropriate vessel. Sul Porto were cargo consolidators in the port of Rio Grande, and it was their responsibility to keep Transpex advised of sailing dates, and of the dates by which the leather had to be delivered for containerization. It was the responsibility of the suppliers to arrange for the transportation of the leather from their warehouses to the Sul Porto depot. There was nothing in the evidence to suggest that the sellers had any further contact with the leather after it was delivered to Sul Porto.

Perhaps without paying due heed to Sir Baliol Brett's comment concerning the assumption of facts, in his well upholstered judgment Carruthers, J., was prepared to infer that the suppliers met all the expenses associated with the carriage and handling of the leather until it was loaded on board the various carrying vessels. It is difficult to know what it was in the evidence which led Carruthers, J. to draw this inference. Nothing was said touching the question, and such evidence as there was suggested that the suppliers had no direct contact with either Transpex or Sul Porto. This inference was significant, for although his Honour held that Lagemann acted as purchasing agent for the plaintiff, he held that throughout Transpex and Sul Porto acted as agents for the suppliers. Again, it is difficult to know what led his Honour to draw this inference. Not only was there no evidence as to the payment of Transpex and Sul Porto, but the evidence was that neither of these organizations had any direct contact with the suppliers. Rather, the evidence was it was Lagemann (who his Honour accepted as the plaintiff's agent) who gave instructions to Transpex, which company, in turn, instructed Sul Porto.

It has already been noted that at the trial it was conceded by the plaintiff that the missing leather had never been loaded on board the various carrying vessels. Carruthers, J. considered when it was that the leather went missing, and concluded that it had been stowed into all four containers and that in respect of three pilferage occurred, probably with the connivance of employees of Sul Porto, while the containers were in transit between the Sul Porto depot and the container terminal some 17 kilometres to the south. His Honour found that the remaining container had been stuffed at the Brascon terminal in the old port area at Rio Grande, and that theft probably occurred before the container left the Brascon terminal.

So far as the policy sued upon is concerned, its relevant features can be shortly noted. It was an open cover which had been issued on 15 January, 1981, and it was partly printed and partly typewritten. It included the Lloyd's SG form (which incorporated the 'lost or not lost' clause), and the old All Risks Clauses, which, of course, included the 'warehouse to warehouse' clause.

The plaintiff put its case upon three, or perhaps four, bases. First, it was said that even though the contractual terms may have been described as f.o.b., at the very least, risk in the leather had passed to the plaintiff by the time of loss as found by Carruthers, J. Secondly, it was contended that the plaintiff had acquired an insurable interest by the time the thefts occurred. Thirdly, it was submitted that the warehouse to warehouse clause operated so as to entitle the plaintiff to recover. Finally, it was contended that the plaintiff was entitled to rely upon the lost or not lost clause to recover under the policy.

Carruthers, J. determined all four points against the plaintiff, dealing with the first two simultaneously. In the Court of Appeal, Handley, J.A. (with whom Clarke, J.A. agreed) agreed with Carruthers, J.'s conclusions, though not necessarily his reasoning, on all points save for the lost or not lost clause. Handley, J.A. held that the plaintiff was entitled to rely upon the lost or not lost clause, with the result that the appeal was upheld. Kirby, P. agreed with Handley, J.A.'s reasoning with respect to the lost or not lost clause, and, stated that this was sufficient to dispose of the appeal. Rather than agree with his brethren on the remaining points, Kirby, P. expressly reserved his position to cases in which it would be necessary to decide them.

The first of the plaintiff's arguments had two strands, one of which is of more significance for the purposes of this discussion than the other. That of lesser significance was that as a result of a course of dealing among the parties, the proper inference to draw was that although the contractual terms were described as f.o.b., that formula of words was used only to determine the calculation of the purchase price, and that there ought to be implied into the contracts a term that it was the intent of the parties that risk would pass prior to loading. So put, it can be seen that this part of the submission was drawing a very long bow indeed.

The second strand was summarized thus by Handley, J.A.:

"Mr. Caldwell QC submitted that the problems which the appellants had experienced in this case were the result of the 'container revolution' which has brought about the

almost universal use of containers for the shipment of general cargo. The Courts should recognise these realities and adapt commercial law to reflect their existence. Accordingly, in his submission, this Court should hold that goods intended for shipment are ^{shipped} when they are loaded into the container and it is sealed."

As has been said above, in his judgment Carruthers, J. entwined both strands of the plaintiff's first contention. In so doing he noted that after consolidation there was no opportunity for the plaintiff (presumably through its agent Lagemann) to inspect the contents of the containers. He also noted that the containers had been supplied by the carriers, and referred to Mitsui & Co. v. American Export Lines Inc. (1981) A.M.C. 331 and Chellaram & Co. v. China Ocean Shipping Co. [1989] 1 Lloyd's Rep. 317 as authority establishing that the container is functionally part of the ship, so long as its contents and number of packages or units are disclosed. In rejecting the plaintiff's argument on this point, his Honour noted that at all times prior to the containers crossing the ship's rail the goods were, ".....in the care custody and control of the sellers." One may wonder how his Honour may have determined this point if he had not drawn the inference with respect to Transpex and Sul Porto referred to above. As has been noted, the conclusion that Transpex and Sul Porto were agents of the sellers was based upon two inferences drawn from scant or non-existent evidence.

He also observed:

"It is true that the advent of containerisation has created problems in that at the time the container crosses the ship's rail its contents cannot be seen. This is in a context in where pilfering is a worldwide problem. It is a far cry from from the nineteenth century days when the purchaser inspected the goods at the time of loading onto 'his ship'. On the other hand, the packaging of dry cargo in wooden crates and the carriage of liquids in casks and the like, have, I imagine, always created problems, insofar as inspection at the time of loading is concerned."

Although it may be true, as his Honour said, that there have always been problems in inspecting cargoes at the time of loading, it would seem to be equally true that since the advent of containerization such problems have multiplied significantly. If the case of shipper stuffed containers is put to one side, with containerization there are now more individuals involved in the handling process after goods leave their supplier's hands for the last time prior to export, and there are probably greater time gaps between the time when goods leave their supplier's hands and when they pass the ship's rail than was the case when cargo was shipped break bulk. Even allowing that the inference as to the agency of Transpex and Sul Porto referred to above was correctly drawn, at least in some senses, there is an air of unreality in talking about leather in the Sul Porto depot in Rio Grande as being at the risk of suppliers whose tanneries were, in some cases, hundreds of kilometres away in the Brazilian inland.

Handley, J.A., after noting the plaintiff's submission in the terms quoted above summarized its thrust as follows:

"The appellant's agent in Brazil inspected the goods in the inland warehouses of the suppliers before they were despatched to the port of loading. At the port the goods were delivered to the cargo consolidator which packed them into containers which were then sealed and delivered to one or other of the container terminals at the port. The sealing of the containers by the Brazilian Customs prevented any inspection of the contents thereafter until the arrival of the containers in Sydney. The contracts of sale called for the appellant to pay for the goods 'cash against documents' before they arrived in Sydney and could be inspected. Provided the seals were apparently intact at the time of loading the theft of the goods could not be detected and the carrier would be entitled and bound to issue clean bills of lading. The appellant therefore ran the risk of paying for goods which had been stolen from the containers before loading and there was

little or nothing which it could do in practice to protect itself against this risk."

Like Carruthers, J., Handley, J.A. began his analysis of the argument by referring to American authority which had characterized the container as functionally a part of the ship. In addition to referring to the authorities cited by Carruthers, J., his Honour also referred to Leather's Best v. SS Mormaclynx [1971] 2 Lloyd's Rep. 486 and Northeast Marine Terminal Inc. v. Caputo (1977) 432 U.S. 249. It might be noted in passing that from the manner in which he expressed himself, his Honour seems to accept this line of authority as representing the law in New South Wales.

Having referred to these authorities, his Honour cautioned his readers that statements in them, ".....cannot be taken literally or out of context". The Mormaclynx involved a consideration of the per package limitation under the Hague Rules, and Northeast Marine involved the construction of industrial safety legislation designed to protect waterside workers, and, his Honour said, ".....(they) provide no support for the view that containers still on land have been loaded on board ship."

These remarks call to mind the very literalist approach to the use of authority which characterized his Honour's judgment in Carrington Slipways Pty. Ltd v. Patrick Operations Pty Ltd. (1991) 24 N.S.W.L.R. 745; a judgment which had the concurrence of Kirby, P. and Samuels, J.A. To the extent that the point did not arise for determination in them, one could not cavil with the assertion that the two cases referred to by Handley, J.A. do not authoritatively establish that a stuffed and sealed container should be regarded as having been loaded on board a vessel when that container remains on land. But, assuming for the moment that Counsel's submission was that a stuffed and sealed container ought to be regarded as having been loaded on board a vessel when it remained on land, rather than some lesser argument, either that the goods in a stuffed sealed container ought not to be regarded as remaining at the shipper's risk, or that such a container ought to be taken as being loaded when even though in fact it was not, it still seems to put the matter too highly to say that such

authorities, '...provide no support....' for the view that such containers have been loaded on board the ship.

His Honour, and the New South Wales Court of Appeal, appear to have no quibble with the correctness American authority which has accepted that a shipping container ought properly to be regarded as functionally part of the ship onto which it is intended that it will be loaded. If that be so, why, one may ask, should it be that goods which are loaded into a steel box which is functionally part of a ship and then sealed so the the shipper ceases to have access to them cannot, at least in some notional sense, be said to be on the ship? Rather than providing, '...no support...' for the argument, the authorities to which his Honour referred provide the first step in it..

It is true, as Handley, J.A. observed, that prior to shipment goods in a sealed container are subject to significant risks, but those are risks of the conduct of malefactors having nothing to do with the shipper. In this, the relevant point appears to be that after stuffing and sealing the shipper ceases to have access to the contents of the container, and, to that extent, it is not unreasonable to regard then, at least notionally, as being on board the carrying vessel for the purpose of the questions which arose in N.S.W.Leather.

Rather, it is submitted that the approach of Kirby, P. has much to commend it. His Honour said:

" ...I am not presently inclined to agree with the opinion that goods intended for shipment in a sealed container are shipped on board only when the container has been loaded on the vessel. As the United States Supreme Court has pointed out 'the container is a modern substitute for the hold of the vessel'. Northeast Marine Terminal Co Inc v Caputo 432 US 249, 270 (1977). To apply to containers the law developed for individually packaged cargo strikes me as yet another instance of the incapacity of legal principle to adapt and change to reflect new technological and commercial realities."

In so expressing himself, his Honour conceded that in the field of international shipping, any such new principle should, if possible, command widespread international acceptance. It is submitted that there is no reason why a new principle which has international acceptance should not have its genesis in authority rather than legislation or a Convention. If a principle, judicially created, is acceptable and workable, it will be widely embraced; if not the case whence it sprang will be politely but firmly, in those comforting words, 'confined to its facts'.

It has been noted above that Carruthers, J. combined his analysis of the passing of risk and property under an f.o.b. contract, and the acquisition by the plaintiff of an insurable interest in the leather, the subject of the litigation. His approach was rooted in orthodoxy. He accepted the following statement of Templeman on Marine Insurance (6th. Ed. at 74) as generally embodying a correct statement of the applicable law:

"When goods are purchased f.o.b. (free on board), the purchaser has no insurable interest in such goods during their transit from the seller's factory or warehouse to the vessel. Conversely, the seller has an insurable interest in the goods for the transit from his factory or warehouse until they are shipped and.....he also has a contingent insurable interest thereafter."

Having held that the contracts between the plaintiff and its Brazilian suppliers were standard f.o.b. contracts, it followed, in his Honour's reasoning, that the plaintiff had no insurable interest in the leather at the time he found that the pilfering occurred.

Although Handley, J.A. referred to the commencing point of Carruthers, J.'s analysis on this aspect of the case, his Honour did not pursue it, but noted the submission of counsel for the appellant that such thinking failed to take into account s. 11 of the Marine Insurance Act, 1909 (Cth.) (the 1909 Act).

Section 11 of the 1909 Act is in the same terms as s. 5 of the English Act of 1906. Sub-section (1) provides that, subject to the Act, a person who is interested in a marine adventure (which is defined by s. 9 of the 1909 Act) has an insurable interest. Sub-section (2) is in the following terms:

"(2) In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."

For the purposes of the argument, Handley, J.A. was prepared to accept that the f.o.b. contracts were marine adventures and the relevant goods insurable property. With respect, given the definition of that term, it is difficult to conceive of f.o.b. contracts themselves as being marine adventures; rather one would have thought that the voyage by which the goods the subject of such contracts found their way to the port of discharge was the marine adventure. Indeed, if the contracts themselves were the adventures, why did not the appellant, as purchaser under contracts, have an insurable interest? In his judgment in Anderson v. Morice (1875) L.R. 10 C.P. 609, Blackburn, J. (at 615) clearly did not regard the contract for the purchase of the rice as a marine adventure.

His Honour noted the appellant's reliance upon the formulation of Lawrence, J. in Lucena v. Crauford (1806) 127 E.R. 630 at 643 (the relevant passage is set out in Arnould at par. 332) and said that the commercial risk to which the appellant was exposed when it paid for goods which had been stolen before shipment fell within the principle. Rather than deal with the wide terms of the formulation of Lawrence, J., by a different route than that followed by Carruthers, J., Handley, J.A. came to the same result as the trial judge, concluding:

"The policy in the present case was on 'goods and/or merchandise' and was limited to such goods etc 'in which

[the insured] have an insurable interest'. In my opinion, and subject to the lost or not lost clause, this policy on goods did not cover the appellant in respect of these goods before the risk passed to it when they were loaded on board and did not cover it against the financial risks it incurred when it paid cash against documents."

In coming to this conclusion, his Honour referred in particular to the judgments in the Common Pleas, Exchequer Chamber and House of Lords in Anderson v. Morice (1874) L.R. 10 C.P. 58, (1875) L.R. 10 C.P. 609 and (1876) 1 App. Cas. 713 and Curacao Trading Co v. Federal Ins Co 50 Fed. Supp. 441 1942 and 137 F. 2d. 911 1943. Ultimately the result reached by Handley, J. A. was as orthodox as the conclusion shortly stated by the trial Judge.

Without doing more than citing it, and noting that it had been relied upon by counsel for the appellant, Handley, J.A. referred to the judgment of Frederick van Pelt Bryan, D.J. in Groban v. American Casualty Company 331 F. Supp. 883 (1971). In mentioning this case Handley, J.A. referred to a passage (appearing at (1972) A.M.C. 460 at 476-77), and said:

"The passage demonstrates the width of the concept under US law which appears, in this respect, to be the same as the law under the Marine Insurance Act 1909 (Cwlth)."

From these remarks, it seems clear that his Honour accepts Groban as correctly stating the law to be applied in New South Wales. From his page citation of the A.M.C report, there can be little doubt that the following is the passage in the judgment of van Pelt Bryan, D.J. to which Handley, J.A. was referring (331 F. Supp. 883 at 894):

"The law on insurable interest is quite clear. In Harrison v. Fortlage, 161 U.S. 57, 65,...it is said that 'any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself.' If an

assured has a contract under which the title of a cargo would accrue to him upon delivery and he would suffer from loss of the goods prior to delivery, an insurable interest exists, *Harrison v. Fortlage*, supra. See also *Hagan v. Scottish Union & National Insurance Co.*, 186 U.S. 423.... This includes goods under an f.o.b. contract, prior to the delivery of the goods to the f.o.b. carrier..."

The analysis of Handley, J.A. here requires comment. He has referred to a passage in a judgment which holds that a purchaser of goods under an f.o.b. contract has an insurable interest in those goods prior to their delivery to the carrier, and he has accepted that passage as containing what is, for Australian purposes, an accurate statement of the law; yet in the case before him, he declined to hold that the appellant had an insurable interest in circumstances where this very question arose.

After stating the proposition which Handley, J.A. was prepared to embrace, van Pelt Bryan, D.J. referred to Curacao Trading Co., seeming to rely upon it as authority for the proposition stated. Without expressly stating that Curacao Trading Co. is not authority for the proposition (a matter that will be returned to in due course) for which van Pelt Bryan, D.J. apparently cited it, Handley, J.A. relied in part upon it to determine the insurable interest point against the appellant.

Not only did van Pelt Bryan, D.J. accept that Curacao Trading Co. was authority for the proposition that a purchaser under an f.o.b. contract would acquire an insurable interest prior to delivery of the goods to the f.o.b. carrier, but Parks in his text The Law and Practice of Marine Insurance and Average (at 28 n. 23) also accepts it as authority for this proposition. Unfortunately neither van Pelt Bryan, D.J. nor Parks, by the use of page numbers, direct their readers to the passages in the judgments of Clancy, D.J. or Chase, Ct.J. upon which they rely.

It is submitted that Curacao Trading Co. is no authority at all for this proposition. From a reading of them, neither of the judgments just referred to make any mention of it. Moreover, the facts of that case and the issues which arose for determination in it would indicate that

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the point would not have arisen for decision in it. In Curacao Trading Co. the plaintiff was the assured under a floating import policy issued by the defendant insuring against physical loss or damage from any external cause, including non-delivery. On 3 April, 1939 the policy was extended to cover 18,480 bags of cocoa beans. The plaintiff had become the pledgee (Garcia Sugar Corporation was the pledgor) of the cocoa beans which it (the plaintiff) believed were stored in a warehouse owned by Harbour Stores Corporation in Long Island, New York. It would appear that in becoming pledgee the plaintiff had relied upon warehouse receipts issued by Harbour Stores.

Shortly after 25 May, 1939 both Harbour Stores and Garcia Sugar were adjudicated bankrupt, and it was discovered that there was an insufficient amount of cocoa to correspond to the many warehouse receipts issued against what cocoa was actually kept in the warehouse. The plaintiff participated in what Chase, Ct.J. referred to as an omnibus proceeding brought to determine which of many claimants was entitled to the cocoa. The plaintiff's claim was rejected upon the ground that it was neither the owner nor entitled to the possession of any of the bags of cocoa in the warehouse.

The plaintiff sued under its policy with the defendant, and the defendant successfully moved for summary judgment. It was held that the plaintiff had no insurable interest in the beans as the true ownership of them had been traced in the omnibus proceedings. Secondly, the cover against non-delivery did not encompass protection against the issue of spurious warehouse receipts.

Although Curacao Trading Co. may not be authority for the proposition for which it has been cited by van Pelt Bryan, D.J. and Parks, its facts and the questions which fell for determination in it would suggest that its relevance to questions which fell for determination in N.S.W. Leather was perhaps more peripheral than the judgment of Handley, J.A. would suggest. By the time the plaintiff in that case brought its proceedings against underwriters, it had been determined in another set of proceedings that the plaintiff had neither title nor a right to possession of any of the cocoa which was in the warehouse. Moreover, as Handley, J.A. noted, the warehouse receipts had been fraudulently

issued and the cocoa to which they purported to refer was non-existent. All this is a far cry from leather which the appellant had contracted to buy, and which was found to have existed.

Given Handley, J.A.'s remarks as to the applicability of American law to Australia, it is worthwhile to note the following comments of Parks which appear in his text immediately before the portion referred to above. After referring to the nature and incidents of f.o.b., f.a.s. and c. & f. contracts, he says (at 27):

".....(A)n actual ownership interest is not necessary in order to qualify as an 'insurable interest.' The assured need not have title or legally enforceable in rem rights in the property insured to have an insurable interest. If any economic advantage from the continued existence or pecuniary loss from the destruction of the insured property will result to the assured, he has an insurable interest. Stated in another fashion, any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself."

In so stating the law, Parks relied upon Groban, Harrison v. Fortlage 161 U.S. 57 (1896) and Hagan v. Scottish Union & National Insurance Co 186 U.S. 423 (1902).

Having noted the essence of the dispute in Curacao Trading Co. and the manner in which it was decided, it is appropriate to examine the use made of it by Handley, J.A. in his determination of this aspect of N.S.W.Leather. At the core of the reasoning was that in both cases the plaintiff assured was seeking to assert that the policy sued upon insured something which it did not. In Curacao Trading Co. both Clancy, D.J. and Chase, Ct.J. held that the plaintiff was seeking to have a policy on goods cover the fidelity of a warehouseman. Ultimately, Handley, J.A. said:

"Undoubtedly the appellant suffered a loss in each case, but the losses are consequential on the sellers' breaches on contract to ship the full quantity of leather. The appellant had an insurable interest in its contracts, but to adopt the language of the Court of Appeals in the Curacao case (above) the policy it required to cover its losses was not a policy on goods but one in the nature of a guarantee of the sellers' obligations to deliver."

The word ultimately has been used, for although at the end of his analysis Handley, J.A. characterized the attempt of the plaintiff as one to have the sellers' performance of their contracts guaranteed, at earlier points in it he took the view that the risk to which the appellant was exposed was something other than that the sellers might not comply with their contractual obligations. At one point he says that the appellant was not at risk, except as to anticipated profits. At another, the risk is described as a risk the the appellant would be deceived into paying for stolen goods although it was not liable to do so. Earlier in his judgment Handley, J.A. noted that the appellant's attempt to have a term implied into the contracts of sale that risk or property was to pass prior to shipment was fatally flawed by the range of alternate times at which it was submitted that it was intended that risk or property may have passed.

Problems associated with his Honour's reasoning on this aspect of the case do not end here. Immediately before the paragraph quoted above appears the following:

"Accordingly if the existence of the thefts had been discovered in time the appellant could have rejected the shipping documents and declined to pay the price. Having accepted and paid for the shipping documents the appellant still had the right to reject the goods and recover the price when it inspected the containers on arrival and learned the true position. Understandably perhaps the appellant elected not to reject the goods....."

At the risk of not giving due weight to recondite legal argument, of course it was perfectly understandable that the appellant elected not to reject the goods; they were not there to reject.

The above discussion has sought to draw attention to what are seen as unsatisfying aspects of the reasoning on Handley, J.A. on the question of insurable interest in N.S.W. Leather. But there seems to be a more fundamental objection to that reasoning. His Honour accepts that Lawrence, J. correctly stated the principle in Lucena v. Crauford, and that the remarks of van Pelt Bryan in Groban accurately represent the law as it exists in Australia. The relevant portion from the judgment in the latter case has been quoted above. Although they are well known, it is worth re-stating the words of Lawrence, J:

"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; and whom it importeth that its condition as to safety or other quality should continue.....To be interested in a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction....."

Although separated by almost 170 years, there is a thread common to the analyses of Lawrence, J. and van Pelt Bryan, D.J. which is absent from the analysis of Handley, J.A. (and, for that matter, Carruthers, J.). For Lawrence, J. and van Pelt Bryan, D.J. the existence or otherwise of an insurable interest in the "thing", "property" or "goods", the subject matter of insurance, is to be determined by examining the position of the assured qua those "things", "property" or "goods", and in particular how the assured may be circumstanced by their continued existence or destruction. For Handley, J.A., what was of overriding importance was not the position of N.S.W. Leather qua the leather, but the niceties and intricacies of the law of contract as it affected relationships between N.S.W. Leather and its Brazilian suppliers.

Of course the contracts the appellant made with its Brazilian suppliers have relevance; had they not existed the appellant would not have had any interest (not using that word as a term of art) in the leather.

But neither Carruthers, J. nor Handley, J.A. explain in terms why it was, given the broad formulations of Lawrence, J and van Pelt Bryan, D.J., particularly when viewed in the context of the observations of Brett, M.R., that the appellant had no insurable interest in the leather at the time it was found to have been stolen.

Against the comments just made it should be recalled, as has been noted above, that the conclusions of both Carruthers, J. and Handley, J.A. represent current orthodoxy. In works of varying repute may be found statements to the effect that a purchaser under an f.o.b. contract only acquires an insurable interest after shipment of those goods. The question remains: if they are correct, and if the words of Lawrence, J. and van Pelt Bryan, D.J. mean what they say, must orthodoxy be correct?

Again, on the question of insurable interest, Kirby, P. preferred to reserve his position:

"I would also reserve my opinion on whether the conventional law on insurable interest in marine insurance survives the operation of s 11(1) of the Marine Insurance Act 1909 (Cth) or whether, as that section is properly understood, the appellant had an insurable interest in the goods once they were placed in the sealed containers (and not just in the profits expected from the safe arrival of the goods in Sydney). That interesting and important point can also be kept to a case where decision is necessary upon it."

So far as the first of the questions upon which the President chose of reserve his position the following may be said. To the extent that the English Act of 1906 was understood to be a codification of the law of marine insurance as it then stood, one would have thought that, at the very least, the "conventional law" on insurable interest ought to be regarded as having been embodied in the legislation. As to the second point, and assuming that his Honour meant to say that the goods

would then be placed in containers and then sealed rather than be placed in sealed containers, it remains to be seen whether, some day a judicial bold spirit (and the President is surely one) will take the law beyond the point where it has been left by Handley, J.A.

It has been noted above that, so far as the resolution of the case was concerned, what was critical was the difference of opinion between Carruthers, J. and the Court of Appeal as to the operation of the lost or not lost clause. It is now appropriate to consider this difference of opinion.

The judgment of Carruthers, J. on this point is replete with references to both text and authority from which we learn a little of the position under French and German law, and that, so far as English law is concerned, the clause has been in use since the time of James I. In the opening part of his consideration of this point, his Honour sets out section 12 of the 1909 Act(s 6 of the English Act):

"12. (1) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured 'lost or not lost,' the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not."

However, the real starting point of Carruthers, J.'s consideration of the clause's operation is where, after referring to where standard (and not so standard) works consider the clause, it is pointed out in their analyses of the clause, Arnould (par. 339), Parks (at 185) and Halsbury (4th. Ed. Vol. 25 par. 196) all stipulate that before an assured may take advantage of the clause, 'the loss in question must fall on' him. For their statement of the law Arnould and Parks rely upon Sutherland v. Pratt (1843) 11 M. & W. 296 and Reinhart & Co. v. Joshua Hoyle & Sons Ltd. [1960] 1 Lloyd's Rep. 483 (Pearson, J. (as he then was)) and [1961] 1 Lloyd's Rep. 347 (Sellers & Willmer, L. JJ., Donovan, L.J. (as he then was) dissenting). In addition to these

authorities, Halsbury relies upon Marine Insurance Co. Ltd. v. Grimmer (1944) 77 Ll. L. Rep. 224 (Atkinson, J.) and 461 (Scott, L.J. and du Parcq and Morton, L.J.J. (as they then were).

His Honour set out a passage from the judgment of Parke, B. in Sutherland v. Pratt (at 311-12), and noted that the differences of opinion in Reinhart "made it difficult to obtain assistance from this case" in resolving the matter before him. To the extent that the latter case was of assistance, his Honour preferred Willmer, L.J.'s interpretation of Sutherland v. Pratt, notwithstanding that it appeared to conflict with that of Pearson, J. and Sellers, L.J.

After further brief references to Arnould (par. 31 nn. 88 and 89) and Hastie v. Coutourier (1853) 9 Exch. 102 (concerning acquisition of an insurable interest where goods have been totally lost before the contract of purchase was made), his Honour affirmed his acceptance of the proposition that the clause could be of no use to an assured unless the loss in question fell upon him, and noted that this was consistent with the principle that the contract of insurance was one of indemnity. He expressed his conclusion thus:

" The question then is whether the plaintiff has satisfied that requirement in the present case. Has the loss in question fallen on the plaintiff? In my view it has not. There is no issue that the leather was stolen from the containers before they passed over the ship's (sic) rail at Rio Grande. The plaintiff was therefore clearly entitled to recover the purchase price from the sellers. It is not difficult to discern why that course was not followed in this case bearing in mind the difficulties of its conducting litigation in Brazil and doubts as to the financial viability of the sellers. However, that is a misfortune which the plaintiff must bear."

Put shortly, his Honour's view was that before it was entitled to the benefit of the clause, the plaintiff had to show that a loss had fallen upon it. Given the finding as to when it was that the leather had been stolen (and the plaintiff's concession that the leather had never

an insurable interest in the stolen leather. This conclusion, Handley, J.A. was able to reach by an application of accepted sale of goods law principle.

As no evidence of Brazilian law had been led, in accordance with the usual rule, the matter was to be determined according to New South Wales law. Under s 22(1) of the Sale of Goods Act, 1923 (NSW), property in the leather would have passed to the appellant at a time when the parties intended that it should pass. The contracts were ordinary f.o.b. contracts, and his Honour's view was that property in the leather, which, unbeknownst to the parties had been stolen, was to pass to the plaintiff in accordance with the normal incidents of an f.o.b. contract. Here, it might be interpolated that, given the contracts as found, the presumed intention of the parties would have been that property would have passed when the relevant containers passed the ships' rails. With the passing of property would have come, conformably with authority accepted by Handley, J.A., an insurable interest in the plaintiff.

The question then became whether the antecedent theft of the leather could have frustrated the parties' presumed contractual intention. In his Honour's view, it did not. In part Handley, J.A. relied upon authority: Crespin v. Puncheon (1881) 7 V.L.R. (L) 203; City Motors v. Southern Aerial Super (1961) 106 C.L.R. 477 at 486 (Kitto, J.); Tome v. Dubois (1868) 73 U.S. 548 at 553-54; Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286 at 1295-6 (Pearson, J. (as he then was)); Patten v. Thomas Motors (1965) 66 S.R. (N.S.W.) 458 (Collins, J.(as he then was), Herron, C.J and McClemens, J. (as he then was) agreeing); Calkins v. Lockwood (1845) 17 Conn. 154, and Webber v. Davis (1857) 44 Maine 147.

As well, his Honour reasoned by analogy:

"During argument members of the Court put to counsel for the respondent a hypothetical example relating to a vintage car sold on FOB terms stolen from its container prior to shipment with the theft not being discovered until arrival. If the stolen car was later recovered could the

seller refund the price and retain the car against the buyer, perhaps after it had risen in value? Counsel for the respondent submitted that the seller was entitled to do so. In my judgment the question answers itself. The property in the stolen car would have passed under the contract, at the latest on payment of the price, and provided the contract remained on foot the property would be with the buyer. We were referred to the famous case of *Coutourier v. Hastie* (1852) Ex 40 (155 ER 1250) but in my opinion no relevant analogy exists between a contract for the sale of goods which are later stolen and a contract for the sale of goods which have already been destroyed."

The result of this reasoning was that, at the time the plaintiff paid the purchase price, if not before, property in the leather which had been stolen passed, and the plaintiff acquired an insurable interest in it. As such an interest had been acquired without knowledge on the thefts on the part of the appellant, it was entitled to rely upon the lost or not lost clause and recover under the policy.

Again, the process of his Honour's reasoning is complex. But, what the appellant may have lost on the swings of the analysis of insurable interest, it gained on the roundabouts of the analysis of the lost or not lost clause.

This paper began with some highly unflattering remarks by a highly respected late nineteenth century English judge on the practice of underwriters, after having accepted premiums from an assured, denying claims upon the basis that the assured lacked an insurable interest in the subject matter of the insurance at the time of its loss or destruction. It has then examined in detail a recent case in which an insurer prayed in aid the defence to defeat claims arising out of the theft of large quantities of leather. The injunction of Brett, M.R. that it is the duty of courts to lean in favour of an insurable interest does not seem to have informed the judgments of Carruthers, J. or Handley, J.A.

Even for a lawyer, the reasoning in the judgments is complex, and, in places, tortuous. One can only guess what a layman would make of

discussion as to the rights of a buyer to reject goods that were not there to reject, or as to the passing of property in goods long since stolen, or the application of rules of law which were developed when a ship's rail had an almost metaphysical quality to the days of containerized shipping and cargo consolidators.

Almost as an entr'acte between the remarks of Sir Baliol Brett and the discussion of N.S.W. Leather appeared a reference to measures adopted by the legislatures of Australia and New Zealand to do away with the criticized common law requirements of insurable interest in the area of non marine insurance. Will there ever be such far reaching changes to the law of marine insurance? A thoroughgoing overhaul of the law of general insurance is one thing; undertaking the same exercise in respect of marine insurance is something else. The international dimension of the law of marine insurance and its interplay with trans-national contracts for the purchase and sale of goods as demonstrated in N.S.W. Leather show that agreement on such matters at an international level would be difficult. It probably also explains why the matter may be resting in the 'too hard baskets' of politicians and law reform agencies.

Although on one view of it it is understandable that a judge at first instance or of an intermediate appellate court may not wish to go further than may be necessary to determine a particular case, it is still perhaps a pity that in N.S.W. Leather the opportunity was not taken to submit received orthodoxy on insurable interest to a more critical analysis. Hopefully so far as the law of marine insurance is concerned the case will not mark the passing of that fecundity for which the common law has been rightly revered; for such could only be a matter for lamentation.