reportable

case no: 394/99

In the matter between:

ISANDO FOODS (PTY) LIMITED Appellant

and

FEDGEN INSURANCE COMPANY LIMITED Respondent

Coram: Hefer, ACJ, Howie, JA and Nugent, AJA

Heard: 4 May 2001

Delivered: 23 May 2001

Insurance – fire – property "for which (the insured) are responsible" – limits insurer's liability to loss sustained by insured.

J U D G M E N T

NUGENT, A J A:

[1] On 13 September 1996 a fire occurred on certain premises in Isando from which the appellant was conducting its business extracting and selling seed-oil. The appellant had purchased the premises earlier that year from a company known as Epic Oil Mills (Pty) Ltd (Epic) and was occupying and using it in anticipation of the property being transferred. A seed-oil extraction plant, which had been constructed on the premises by Epic and improved by the appellant at considerable cost, was damaged by the fire.

[2] The fire occurred during the currency of a policy of fire insurance that was issued by the respondent in favour of the appellant. The property insured under the policy was specified in the schedule as "plant, machinery, landlord's fixtures and fittings for which the insured is responsible and all other contents excluding property more specifically insured" situated on the premises. The

event that was insured against (referred to in the policy as the "defined event") was described as follows:

> "Damage to the whole or part of the property described in the schedule, owned by the Insured or for which they are responsible by (fire, lightning or thunderbolt, explosion or such additional perils as are stated in the schedule to be included)."

[3] The appellant sued the respondent in the Transvaal Provincial Division to recover under the policy the cost of reinstating the extraction plant and various further losses alleged to have been sustained as a result of the damage. The respondent resisted the claim on a number of grounds. Amongst other things the respondent denied that the damage to the extraction plant constituted a defined event as contemplated by the policy more particularly because (so the respondent contended) the extraction plant was not property for which the respondent was responsible at the time the fire occurred. At the

commencement of the trial the learned judge directed that the question whether a defined event had occurred should be determined separately from the remaining issues in the action. Ultimately he found for the respondent and he dismissed the appellant's claims but granted the appellant leave to appeal to this court.

[4] The extraction plant was not owned by the appellant at the time the fire occurred and the debate in the court below and in this court centred upon whether it was property "for which the insured (was) responsible". When phrased in those terms the question is misleading because it suggests that the enquiry is whether the extraction plant itself was an item insured under the policy. That is not what the policy means. All the items specified in the schedule (which includes the extraction plant in question) were insured under

the policy. The effect of the phrase "for which they are responsible" is rather to limit the insurance to the insured's interest in the insured items.

[5] As pointed out by the learned judge in the court *a quo* the phrase "for which they are responsible" was introduced into English insurance practice in order to restrict the liability of the insurer to the loss that is suffered by the insured. In *The North British & Mercantile Insurance Company v Moffat & Another* (1871) 7 LR 25 (CP), which concerned a policy that insured "merchandise ... the assured's own, in trust or on commission for which they are responsible," Keating J observed (at 31) that:

> "In *London and North Western Ry. Co. v Glyn* [120 ER 1054] Erle and Hill, JJ., had thrown out that if insurance companies wished in future to limit their responsibility to the responsibility of the assured, they must employ express words to that effect. It seems to us that the present plaintiffs have done so in this policy."

[6] In *Engel v Lancashire & General Assurance Company, Limited* (1925) 21 Lloyds R. 327 (KB) that decision was considered to have held that the words limited the insurance to the insured's interest in the goods. Support for that construction was found in the following *obiter dictum* of the Master of the Rolls in *North British and Mercantile Insurance Company v London, Liverpool, and Globe Insurance Company* 5 Ch 569 at 578:

> "... the insurance company who have insured *Barnettt & Co*. against liability (for they have only insured them for goods held in trust or for which they are responsible, and it is therefore an insurance in terms against liability) ..."

[7] It was submitted by Mr van der Linde SC for the appellant that the phrase "for which the assured are responsible" merely describes the insured's insurable interest in the subject matter of the insurance which was the

appellant's potential liability for loss while the property was under its control. I do not think the phrase was intended to be merely descriptive of the insurable interest in the property for then it would serve no functional purpose. Nor, I might add , do I think the phrase purported to identify which property was insured with reference to whether the insured was potentially liable for its loss. That construction (which was the construction that was rejected in *Engel's* case) would seem to me to introduce such vagueness as to the identity of the property insured that it could not have been intended by the parties.

[8] I agree with the learned judge in the court *a quo* that the words in the present policy have been used with the same intention and effect as they have been used in English practice which is to limit the *extent* to which the goods are insured rather than to describe the insurable interest or to define the goods that were insured. What was insured was the specified property but only to the

extent of the insured's responsibility for damage or loss (i.e. to the exclusion of the interest of the owner). I can see no other meaningful construction to place on the phrase in the context in which it occurs.

[9] The question then is whether the appellant can be said to be "responsible" for the damage that occurred in the present case. More often than not a person who has been entrusted with the property of another will be responsible to the owner for damage to the property in the sense of being "answerable (or) accountable" (Oxford English Dictionary) to the owner for the damage. For example when property is held under a contract of lease, or pledge, or bailment, or loan, the custodian is answerable or accountable to the owner for damage unless it was not caused by his fault (*Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 962) which means, in effect, that he is responsible to the owner for damage caused by his negligence or the negligence

of those for whose conduct he is responsible. I can see no reason, however, why the word should be restricted to pecuniary loss that falls upon the shoulders of the insured indirectly as in those cases. Bearing in mind particularly the context within which the phrase occurs it seems to me that it does not stretch language unduly to say that the insured is "responsible" for loss that falls directly on himself. I do not think that accountability to a third person is necessarily required. All that is required is that the loss should fall ultimately on the insured.

[10] The learned judge in the court *a quo* appears to have held that the loss in the present case did not fall on the appellant but rather on the owner of the property and for that reason he dismissed the appellant's claims. To consider that aspect of the matter it is necessary to set out in more detail the

circumstances in which the appellant came to be in occupation of the premises at the time the fire occurred.

[11] The premises (including the extraction plant) were sold by Epic to a certain Mr Muller or his nominee on 4 January 1996. The agreement of sale provided for a deposit to be paid by the purchaser upon conclusion of the agreement, and for the balance of the purchase price to be paid upon registration of transfer of the property. A guarantee for the payment of that sum was required to be furnished by the purchaser within thirty days of the agreement being concluded. The agreement, which was in standard form with modifications in manuscript, contained the following clause 3:

> "On registration of transfer, possession and the risks of ownership shall pass to the purchaser, from which date the purchaser shall receive all benefits from and be responsible for all rates and taxes levied upon the

> property and the purchaser shall refund to the seller any rates and taxes paid in advance of that date."

(The latter part of the clause was modified by a further manuscript clause which cast the responsibility for payment of rates and taxes upon the purchaser with effect from 1 January 1996 but that is not important). The agreement also provided that:

> " ... occupation of the property, shall be given to the purchaser on 1 January 1996 by which date the seller or other occupier shall be obliged to vacate the property."

[12] The deposit was paid and Mr Muller took occupation of the property on the day that the agreement was concluded. Presently a guarantee securing payment of the balance of the purchase price was furnished and in the normal course the property would have been transferred to the purchaser within weeks. Before that occurred, however, Epic became aware that Mr Muller intended

nominating a business competitor as the purchaser of the property and Epic attempted to resile from the agreement. Meanwhile Mr Muller nominated the appellant (which was indeed a business competitor) as the purchaser and the appellant took occupation of the premises as it was entitled to do. Protracted litigation followed with Epic alleging that the agreement was invalid and the appellant resolutely asserting its validity. While this continued Epic naturally refused to transfer the property and the appellant remained in occupation. The dispute was ultimately resolved but that was only after the fire had occurred. The nature and course of the dispute between Epic and the appellant are not now relevant and it is sufficient to say that on the evidence before us the agreement of sale was at all times valid and binding notwithstanding Epic's assertion to the contrary.

[13] Generally, when property is sold the risk that the property might be damaged passes to the purchaser once the sale is perfected even though delivery has not yet taken place but that does not mean that all risk passes to the purchaser irrespective of how it is caused. The risk that passes upon sale is the risk of damage through no fault of the seller. In other words it is only the risk of damage by *vis major* or *casus fortuitus* or damage caused by third parties through no fault of the seller that passes to the purchaser (Pothier *Sale* 53, 54, 56, 57; Voet 18.6.2; *Frumer v Maitland* 1954 (3) SA 840 (A) 845 C-D; Wille's Principles of South African Law 8th ed by Hutchison 533; Lee and Honoré: The South African Law of Obligations 2nd ed par 240).

[14] In the present case clause 3 of the agreement of sale provided that "on registration of transfer ... the risks of ownership shall pass to the purchaser". That clause did no more than prevent those risks from passing that would otherwise have passed upon perfection of the sale. It did not purport to confer

greater risk upon the seller than it already had. Nor, by the same token, did it purport to absolve the appellant of any risk that it might assume. Upon taking occupation of the property in anticipation of becoming the owner it must follow, in my view, that the appellant assumed the risk of damage to the property caused by its own fault (or that of third persons for whose conduct it was responsible) for that was not a risk that the seller took upon itself. If delivery of the property had been tendered to the appellant after it had been damaged by the appellant's fault the appellant could hardly have been heard to say that the seller was obliged to make good the damage. The loss would of necessity have fallen upon the appellant for no reason but that the risk of it occurring was not assumed by the seller. In my view that would indeed be a loss for which the appellant would be "responsible" for purposes of the policy. I do not think the loss is any different in principle from the loss which is sustained by a lessee,

or a pledgee, or any other custodian of property of another if the property is damaged by fault on his part.

[15] Mr Burger SC for the respondent submitted that the policy could not have been intended to insure against the risk of loss of that nature because that would be in conflict with General Condition 3 which provides that "the insured shall take all reasonable steps and precautions to prevent accidents or losses."

The effect of construing the insuring clauses to include loss caused by negligence, it was submitted, would at the same time negate the insurance because it would conflict with that condition. That seems to me to beg the question what is meant by the insuring clause. If, properly construed, it insures against negligence (and in my view it does for I can see no other meaning) then the condition must necessarily be construed in another way for otherwise, as

pointed out by Lord Goddard in *Woolfall & Rimmer, Ltd v Moyle* [1941] 3 AER 304 (CA) at 311:

> "...it would follow that the underwriters were saying, 'I will insure you against your liability for negligence on condition that you are not negligent,' ..."

He went on to say of such a clause that:

> "It is a condition which is put in for the protection of the underwriter, or perhaps one might say to limit the field of the underwriter's liability to the extent that he is saying: 'I will insure you against the consequences of your negligence, but understand that I am insuring you on the footing that you are not to regard yourself, because you are insured, as free to carry on your business in a reckless manner. You are to take those reasonable precautions to prevent accidents which ordinary business people take. That is to say, you are to run your business in the ordinary way, and not in a way which invites accidents.'"

(See *Bates & Lloyd Aviation (Pty) Ltd & Another v Aviation Insurance Co* 1985 (3) SA 916 (A) 937 A-B)

[16] All that remains, then, is to determine whether it has been shown that the damage now in issue fell within the terms of the insurance as I have construed it. It was for the appellant to bring its claim within the four corners of the policy. That required it to establish that it was responsible for the damage in the sense that the loss fell upon itself and not upon the owner. That it could do only by establishing that the fire was not due to fortuitous causes or the acts of third parties for which the owner bore the risk. The evidence goes no way at all to establishing the cause of the fire let alone that the loss fell upon the appellant. In those circumstances, in my view, the appellant's claims were bound to fail and they were correctly dismissed.

The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

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R W Nugent
Acting Judge of Appeal

Hefer ACJ)
Howie JA) concur