IN THE SUPREME COURT OF QUEENSLAND W. 2007 OF 1985

FULL COURT

BETWEEN:

GOLD COAST BAKERIES (OLD) PTY LIMITED (Plaintiff) Appellant

AND:

HEAT & CONTROL PTY LTD (1st Defendant) 1st Respondent

AND:

INDUSTRIAL ELECTRICS PTY LTD (2nd Defendant) 2nd Respondent

AND:

ZURICH AUSTRALIA INSURANCE LIMITED (1st Third Party)

AND:

PRIOR INDUSTRIES PTY LTD (2nd Third Party)

AND:

MAX WEISHAUPT GMBH (3rd Third Party)

CHIEF JUSTICE

DERRINGTON J

de JERSEY J

Judgment of the Court.

Reasons delivered on 21 November 1990.

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"APPEALS AND CROSS APPEALS DISMISSED.

ORDER 1. APPELLANT PAY THE RESPONDENTS' COSTS OF THE APPEAL TO BE TAXED.

2. THE COURT HAVING ALREADY ORDERED THAT THE FIRST RESPONDENT PAY THE COSTS OF THE APPEAL OF THE SECOND THIRD PARTY AND THIRD THIRD PARTY, THE APPELLANT PAY TO THE FIRST RESPONDENT THE COSTS SO PAID BY IT.

3. THAT THERE BE NO ORDER IN RESPECT OF THE FIRST THIRD PARTY'S COSTS.

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IN THE SUPREME COURT OF QUEENSLAND No. 2007 of 1985

Before the Full Court

The Chief Justice

Mr. Justice Derrington

Mr. Justice de Jersey

BETWEEN:

GOLD COAST BAKERIES (OLD) PTY. LIMITED (Plaintiff) Appellant

AND:

HEAT & CONTROL PTY. LTD. (First Defendant) First Respondent

AND:

INDUSTRIAL ELECTRICS PTY. LTD. (Second Defendant) Second Respondent

AND:

ZURICH AUSTRALIA INSURANCE LIMITED (First Third Party)

AND:

PRIOR INDUSTRIES PTY. LTD. (Second Third Party)

AND:

MAX WEISHAUPT GMBH (Third Third Party)

JUDGMENT - THE CHIEF JUSTICE, DERRINGTON and de JERSEY JJ.

Delivered the 21st day of November, 1990

CATCHWORDS:

Review of trial Judge's findings of fact - whether based on assessment of demeanour of witnesses.- liability to indemnity under insurance contract - applicability of exceptions disposition of costs

Insurance - Liability Insurance - Limit on cover excluding claim arising from condition of goods supplied by insured. Damage caused by condition resulting from negligent act of subcontractor. Condition. Insured to observe regulations. Not to employ person on gas-fitting unless qualified gas-fitter. Whether employee of sub-contractor or incorporated sub-contractor "employed" by insured contractor. Costs. Insurer wrongly repudiating liability to indemnify insured against claim. Insured joined as third party. Failure of claimant's action. Whether claimant, insured or insurer should bear third party costs.

Counsel: G.L. Davies Q.C. and with him S. Sheahan for appellant
P. McMurdo for first respondent
C.E.K. Hampson Q.C. and with him J.H. Dalton for second respondent
P.J. Lyons Q.C. and with him A.I. Philippides for first third party
A.J.H. Morris for second third party
C.G.S.L. Jensen for third third party

Solicitors: Quinlan Miller and Treston for appellant
Feez Ruthning for first respondent
Morris Fletcher and Cross for second respondent
Hill and Taylor for first third party
Power and Power for second third party
Henderson Trout for third third party

Hearing dates: 22nd and 23rd October, 1990

IN THE SUPREME COURT OF QUEENSLAND No. 2007 of 1985

BETWEEN:

GOLD COAST BAKERIES (OLD) PTY. LIMITED (Plaintiff) Appellant

AND:

HEAT & CONTROL PTY. LTD. (First Defendant) First Respondent

AND:

INDUSTRIAL ELECTRICS PTY. LTD. (Second Defendant) Second Respondent

AND:

ZURICH AUSTRALIA INSURANCE LIMITED (First Third Party)

AND:

PRIOR INDUSTRIES PTY. LTD. (Second Third Party)

AND:

MAX WEISHAUPT GMBH (Third Third Party)

JUDGMENT OF THE COURT

Delivered the 21st day of November, 1990

In 1983, the appellant entered into a contract with the first respondent for the supply and installation of a bread-baking oven. The second respondent was the first respondent's sub-contractor for the installation of the oven. There are three third parties: the first is the insurer of the first respondent, the second supplied the first respondent with the burner unit for the oven, and the third manufactured the burner.

By early 1985, installation of the oven and burner was substantially complete. On the evening of 20th March, 1985, the oven exploded. As a result, the appellant suffered loss amounting to $300,000. It unsuccessfully sued to recover that loss.

The explosion was caused because of a malfunction in the burner unit. This unit operated to mix air with gas, and ignite the mixture, providing a flame to heat the oven. A damper system controlled the flow of air into the ignition chamber. The damper, a metal plate, was fixed to an arm which controlled its setting. While vertical, the damper closed off most of the air flow; if horizontal, it facilitated maximum air flow. Were the control arm disconnected, the damper would hang vertically, stopping the flow of air through the burner to the ignition chamber. This would lead to the production of carbon monoxide and eventually, an explosion.

The learned trial Judge found that this explosion was caused in that way, by disconnection of the damper control arm. He held that had occurred “as a result of human intervention at some time shortly before the explosion, and probably on the day of the explosion”; and saw this as “consistent with interference by some servant or agent of the first (respondent), some servant or agent of the second (respondent) or some other unidentified person”. The appellant does not challenge any of those findings.

The Judge then considered the involvement of those representatives of the respondents who were or may have been present at the site on 20th March, 1985. The first

respondent's employee Speires was there, he said, and Leach may have been there, but neither of them interfered with the control arm, as His Honour found. The second respondent's employees B.R. and K.N. Harley were present, and His Honour accepted their denials of having interfered in any way with the control arm. The appellant's principal ground of appeal involved a challenge to that acceptance by His Honour of the evidence of the Harleys.

Mr B. Harley was an apprentice electrician employed by the second respondent on a full-time basis. Mr. K. Harley was his father, employed part-time. Each clearly denied having interfered with the control arm.

Mr. B. Harley said that he had no reason to interfere with it. Mr. Davies Q.C., who appeared for the appellant, submitted by way of criticism that Mr. B. Harley's recollection was “based entirely on work sheet records”. A fair reading of his evidence shows, however, that he relied on those work sheets to refresh his memory, and that his recollection was not confined to the limited details set out on those sheets. Further, on the day after the explosion he had discussed with a superior the modification which he had made on the previous day. Although he agreed that he did not descend to total detail, there is a strong inference that the discussion was sufficient to reveal whether the work which he had done would have taken him into that part of the equipment which may have been relevant. In these circumstances his reliance on the job cards was reasonable and effective, particularly as all work, if not all detail, was entered on them.

Mr. K. Harley likewise gave apparently clear evidence that he did not interfere with the control arm, or have any reason to do so.

The Judge said that he found “nothing inherently improbable” in the evidence of the Harleys, and then observed that “to some extent, it was supported by the work sheets”. Those sheets refer to work which, it was conceded, should not have involved interference with the control arm.

Mr. Davies submitted that in taking that approach, His Honour ignored the evidence that the Harleys were doing work "beyond that required of them". His Honour was however alive to that point, saying that it was "possible that not every job performed on that day was recorded on the sheets". In any case, His Honour did not regard the sheets as determinative of the matter. All he said was that the sheets gave the evidence of the Harleys "some" support, and that view was open.

The appellant's challenge to the Judge's acceptance of the evidence of the Harleys focused on his rejection of the contrary evidence of another witness, Mr. Pratt, a plumber working at the site. Mr. Pratt gave evidence to the effect that the Harleys were on top of the oven (where the control arm is located) for most of the day, and that they had the "top cover off", referring to the burner. The Harleys denied having had the cover off, and denied the extent to which Mr. Pratt claimed they were on top of the oven: Mr. K. Harley said he was there only occasionally, and Mr. B. Harley from time to time. His Honour considered that he could not accept both the evidence of Mr. Pratt and that of the Harleys. He accepted the evidence of the Harleys in preference to that of Mr. Pratt.

The Judge referred to "a possibility that Mr. Pratt (had) confused incidents which occurred on different days". He referred to the evidence that Mr. Pratt had been at the site on other occasions and had see the Harleys there, and said it was "quite possible that he (had) unconsciously combined incidents witnessed on one day with incidents witnessed on the day in question". He did not say that <u>was</u> what happened: he merely offered it as a possible explanation as to why Mr. Pratt would claim to recall incidents which, on the evidence of the Harleys which His Honour accepted, did not occur on 20th March. There is sometimes a tendency to assume that the evidence of an apparently independent witness must be accepted. That of course is not so. Furthermore, if such evidence is rejected although the witness is found to be truthful, the trial

Judge often offers possible explanations as to how this may have come about. His findings do not depend upon the explanation and it is offered to show how the situation as found could reasonably exist. This is a justifiable and even desirable exercise. An appellant is sometimes tempted to seize upon this and argue that the trial Judge has been wrongly speculating in his findings or has been acting upon unproven facts. Such a line of argument should not succeed.

Mr. Davies criticised the Judge's rejection of the evidence of Mr. Pratt on the ground "that it had not been suggested to Pratt in cross-examination that his recollection of seeing B. Harley working on the burner with its cover removed on 20th March, 1985 was in any way inaccurate, or that he may have been confusing that occasion with another". While it is true that Counsel for the second respondent at the trial did not specifically put to Mr. Pratt that he was mistaken or confused, he did cross-examination Mr. Pratt in detail, indeed to the point where His Honour observed that there was too great a concentration on the "minutiae" of the matter. The tone of the cross-examination was that of a challenge to the accuracy of Mr. Pratt's recollection.

The nature of the cross-examination should have alerted the appellant to the fact that the second respondent was challenging the reliability of Mr. Pratt's recollection. It is rather fanciful to suggest that the appellant would not have appreciated that, unless the further question: "Are you not mistaken about this?" had been specifically put.

In addition, the appellant had been put on notice, by means of the defence of the first respondent, that the first respondent denied having interfered with the damper arm on 20th March, and job sheets which had been discovered by the first respondent and the first respondent's answers to interrogatories as to what work had been done that day, made no reference to work on this particular part of the machinery. This was a case where the nature of the cross-

examination, together with the appellant's knowledge of the first respondent's case gained in advance by those means, meant that the absence of the specific question referred to above placed the appellant at no disadvantage. The cross-examination which was made sufficiently met the requirements of Browne v. Dunn (1894) 6 R. 67 (H.L.).

The present case is very different from Payless Superbarn (N.S.W.) Pty. Ltd. v. O'Gara (New South Wales Court of Appeal, unreported judgment given 28th May, 1990, no. 612 of 1988). The respondent (plaintiff) there claimed to have slipped on grapes on a supermarket floor. The extent of the relevant cross-examination was enquiry as to how many grapes there were, presumably to mount an argument that she should have seen them. The trial Judge excluded subsequent evidence from the appellant (defendant) that the floor was clean, and that exclusion was upheld on appeal, by reference to the principle of Browne v. Dunn. As already noted, the tone and extent of the cross-examination in this case involved a challenge to Mr. Pratt's claims, and for that and other reasons mentioned earlier, the appellant could not reasonably have considered that the second respondent accepted those claims.

Furthermore, when the Harleys later gave evidence denying interference with the arm, of having been only occasionally on top of the oven, and denying removal of the cover, Counsel for the appellant did not object on the ground that their position had not adequately been put to Mr. Pratt in cross-examination. Neither was leave subsequently sought by the appellant to call further evidence to bolster Mr. Pratt's claims. These features suggest that the evidence of the Harleys on these points did not surprise the appellant, and that the evidence it wished to call on these points was confined to that of Mr. Pratt.

There is no basis for concluding, as was submitted, that the appellant did not have a fair trial. It is in that regard important to observe that Counsel for the appellant

did not complain about this matter during the trial; Counsel did not ask the trial Judge to redress the position, such as by the methods discussed in Payless v. O'Gara (by recalling the witness for further cross-examination, allowing the disadvantaged party to reopen, etc.).

None of these criticisms of the Judge's acceptance of the evidence of the Harleys in preference to that of Mr. Pratt survives close analysis. Mr. Davies submitted, however, that the rejection of Mr. Pratt's evidence, and the acceptance of the Harleys' denials of interference with the control arm, left the matter "on an improbable basis: that the accident was caused by the intervention of someone, not an employee of any of the parties". In urging this Court to overturn those findings, he submitted that the findings were not based on an assessment of the demeanour of the witnesses, and that this Court should form its own view of the evidence. He relied on Taylor v. Johnson (1983) 151 C.L.R. 422, 426.

The trial Judge in Taylor v. Johnson had stated that "there was nothing in the demeanour of any of the witnesses which would lead one to conclude that any of them was doing other than endeavouring, to the best of his or her ability and recollection, to tell the truth" and that, in the result, he was "left to determine the matter upon the balance of the probabilities". The High Court (by majority) endorsed the view that the appeal court had been entitled to substitute its own conclusions on the facts. In this case, there is no such declaration. Neither is there anything to suggest that His Honour was not guided to his conclusions in the usual way by an assessment of the demeanour of witnesses.

The process of reasoning disclosed by the Judge in his reasons was as follows. He found "nothing inherently improbable" in the Harleys' denial of interference with the arm, and "to some extent, it was supported by the work sheets". One could not accept both their evidence and that

of Mr. Pratt. His Honour preferred the evidence of the Harleys. He also considered whether the surrounding circumstances should influence him to reject the Harleys' evidence. In the end, that was the “critical question”, which the Judge answered in the negative. In summary then, having heard the evidence of the Harleys, His Honour found them credible witnesses, and he was not dissuaded from accepting their evidence by the surrounding circumstances, or the evidence of Mr. Pratt which he rejected. That was a perfectly orthodox approach. The submission that the Judge should be taken to have gained no assistance from an assessment of the demeanour of the witnesses is unsustainable. We consider that the Judge has taken a strong and favourable view of the credibility of the Harleys.

We were referred to the reference by the Judge in his reasons to having had “no reason to doubt the honesty of any of the witnesses in the case other than the Harleys”. His Honour did not thereby betray doubt as to the honesty of the Harleys. The statement occurs in a paragraph in which he is discussing briefly the evidence of witnesses other than the Harleys, none of whom he thought dishonest. A suggestion that the Judge doubted the honesty of the Harleys would be inconsistent with his earlier statement that he preferred their evidence to that of Mr. Pratt - and he did not find Mr. Pratt to have been dishonest.

The appellant's argument came close to a contention that the Judge was obliged to pin responsibility for the disconnection of the control arm onto one of the persons put before him. But he was obviously entitled not to be satisfied, on the evidence, on the balance of probabilities, that any of those persons was responsible. The evidence before His Honour was not so clearly exhaustive, as necessarily to exclude intervention by some person not named in the evidence. Once there was evidence from Mr. Pratt that the Harleys were in the vicinity of the burner that day, the appellant again came close to suggesting that the Judge was almost bound to reject the

denials of the Harleys, in order to pin that responsibility onto the only persons shown by any evidence (regardless of its reliability) to have been near to the relevant machinery. One can understand why the appellant would be moved to contend that the Judge's determination did not depend on an assessment of demeanour. Its only arguable prospect of succeeding in this Court depended on the Court's being prepared to review the findings solely by reference to the record. But once one acknowledges that the Judge carried out his task in the orthodox way, assessing the oral evidence by reference to considerations such as demeanour, as one should acknowledge, then the approach urged upon this Court is readily seen to be untenable. The relevant principles are of course well known, being those discussed in cases such as Uranerz (Aust.) Pty. Ltd. v. Hale (1980) 54 A.L.J.R. 378, 381-2; S.S. Hontestroom v. S.S. Sagaporack (1927) A.C. 37, 47 and Powell v. Streatham Manor Nursing Home (1935) A.C. 243, 267.

We would dismiss the appeal and order the appellant to pay the first respondent's costs of and incidental to the appeal to be taxed. We turn now to the issue of costs as between the first respondent and the third parties, joined at its instance.

This Court ordered during the hearing of the appeal that the first respondent's cross-claims against the second and third third parties be dismissed with costs. A comparable order was made at the trial, and the trial Judge went on to order that the costs order in favour of the first respondent against the appellant extend to the costs payable by the first respondent to the second and third third parties. He did that on the basis that the joinder of the third parties was reasonable. Before this Court, the appellant abandoned its challenge to that. This Court should, prima facie, make a similar order, that is, that the costs payable by the appellant to the first respondent include the costs payable by the first respondent to the second and third third parties.

The appellant relied, however, on letters passing between its solicitors and the solicitors for the first respondent, after the institution of the appeal, which bore on the question of the first respondent's reasonableness in persisting with its involvement of these third parties in the appeal. The first respondent kept them in the appeal really out of an abundance of caution, against the possibility of a finding on appeal that the explosion occurred, speaking broadly, because of defects in installation. Notwithstanding the attempt through that correspondence to limit the issues, the possibility of that finding was not effectively excluded until Counsel for the appellant ultimately defined the limits of the appeal on the first day of the hearing. There is reasonable basis for considering that the first respondent was justified in keeping the second and third third parties involved in the appeal proceedings to that point. This Court should therefore order that the costs payable by the appellant to the first respondent in respect of the appeal include those payable by the first respondent to the second and third third parties.

As to costs between the first respondent and the first third party, its insurer, the trial Judge ordered the first respondent to pay the first third party's costs. He appreciated of course that he had not resolved the issue of the insurer's liability, but nevertheless considered that to be the appropriate order. He then ordered the unsuccessful appellant (plaintiff) to pay those costs to the first respondent, on the basis that the joinder of the first third party had been reasonable. The appellant did not pursue any challenge to those orders in this Court. The question remains how we should deal with the appeal costs as between the first respondent and the first third party.

It is necessary first to consider the merits of the issues between them. The first respondent denied its liability to the appellant but alternatively sought indemnity under its insurance cover in the event of its being held liable. The first third party supported the

first respondent's denial of liability to the appellant but in the alternative denied that the first respondent was entitled to indemnity. In the further alternative it pleaded that the latter was entitled only to a limited indemnity under the policy. Consequently, there were issues which were quite outside and distinct from that of the first respondent's liability to the appellant. As to that issue these two parties were in agreement in their denial, and the defence of it was in the hands of the first respondent and being conscientiously pursued. While the first third party had an interest in that issue, it was not the point of its presence in the action.

Because, as it turned out, the first respondent is not liable to the appellant, there is no question of indemnity to be resolved and it cannot succeed in obtaining any judgment against the first third party. That however is not the trigger to an automatic award of costs, for the Court should look to the behaviour of the parties in the litigation and the effect of that behaviour on the issue of costs. For example in the present case, it is quite clear that if the first third party had agreed that in the event that the first respondent should be held to be liable to the appellant, then indemnity would be provided under the policy, it would have been unnecessary to join it in the action at all, and that would have been the result. It follows that the merit of its denial of liability to indemnify the first respondent at all or only in part is relevant to the issue of costs.

The policy carries a combination of public risk and products liability covers. It is divided into those two sections, and in the present circumstances provides total indemnity if the public liability section is applicable and a substantially reduced indemnity if the products liability section operates.

The first third party raises two issues. It says that the risk does not come within the public liability cover

because of a term in the description of the cover provided under that section reading as follows:—

> "The company shall not be liable for claims in respect of:—
>
> 1. Products Liability
>
> Personal injury or property damage caused by the nature, condition or quality of the insured's products after they have ceased to be in the actual physical custody or under the legal control of the insured ..."

It claims that because the damage was caused by the condition of the oven in having the damper arm detached, if any cover at all is provided it is excluded by this provision from this section of the cover and comes only within the products liability cover. However its second argument is that in any case it is not liable at all because of a breach of the following general condition of the policy:—

> "4. Reasonable Care and Precautions
>
> The insured shall ...
>
> (c) comply with all statutory obligations, by-laws or regulations imposed by any public authority in respect thereof or for the safety of persons or property, particularly concerning the inspections of passenger lifts and steam pressure apparatus."

While the former term has the effect of removing the insured's liability from the higher cover of the public liability section of the policy to the reduced indemnity of the products liability section, the latter provision defeats any right to indemnity in the event of a breach. In order to comprehend their respective functions and meaning, it is necessary to appreciate the difference in approach between public risk cover and products liability cover in respect of the former provision, and to understand the relationship between the insurer and the insured in respect

of the purpose of the insurance and the duty of the insured to the insurer in respect of the latter.

The limitation of public liability cover relating to the nature, condition or quality of the product is inserted because of the special risks of liability of a manufacturer or distributor of products flowing from some feature of the product inherent in the manufacture or supply of it by the insured. Because of the existence of a special class of policy covering products liability, it is the common practice in public risk policies to sever and exclude such a special risk which is more properly the subject of cover under such a more specialised policy. This distinction becomes even more vivid where the two classes of cover are recognised in a composite policy such as in the present case.

While it may be quite acceptable to both parties to make such a distinction, it is equally accepted that the insured wishes to be covered for its ordinary public risk liability where these special circumstances do not apply. This is what has been done in the present case. Very properly the insurer has provided such public risk cover limited only by this definition of the cover itself. It is manifest that there must be occasions when, although the relevant risk may involve's product of the insured, even directly, the real cause of the harm is some act or omission to which the product is merely incidental, and the risk comes more properly under the public risk cover. Otherwise, for example, it could be argued that if the product fell while being hoisted into position and caused damage, the cover does not operate because the damage was caused by the hard and heavy nature, condition or quality of the product because the damage would not have been caused had it been soft and light. Such an absurd and non-commercial construction could not have been intended, though it could be argued to be within the ordinary meaning of the words. The insurer's construction of the term would remove from the cover virtually every occasion in which the product had some part, no matter how small and no matter

how incidental to the real cause of the loss. The removal of such a large part of the cover which is ostensibly provided otherwise, cannot be achieved by recourse to the ambiguity of causation and clearer expression would be needed to achieve such a result, which would be in conflict with the reasonable commercial expectations of an insured.

Unfortunately the insurer here now argues that although the liability of the insured was alleged to have arisen as the result of a negligent action of a workman of its sub-contractor on the installation of the product, and not even associated with the assembly of the product but rather the act of testing it, yet the liability was caused by the condition of the product as the result of that negligent act. Had the insured been held liable, it is true that the explosion could be said to have occurred because of the state of the damper control system as the result of interference with it by the sub-contractor's workman. This could certainly have been described as a "condition" of the product, but it was certainly not a condition inherent in the equipment by reason of its design or specifications, nor was it due to a soundly designed but defective product supplied by the insured in that state.

As it has been explained, the real cause of any notional liability of the insured would have been the action by the workman, and although the condition of the product resulting from that action may have had its place in the chain of causation leading to the damage, this is not that which is contemplated by the limitation in the cover described in the policy: cf. Wayne Tank and Pump Co. Ltd. v. Employers' Liability Assurance Corporation Ltd. (1974) 1 Q.B. 57 where this distinction was recognised. It is true that there may be more than one cause of the harm and that if the liability of the insured accrues from a cause which is the subject of an exclusion then the cover does not apply even though the other cause comes within the description of the cover. But that is not the end of the matter. The excluded feature must still be a cause within the meaning of the provision.

The limitation of the cover here refers to "claims in respect of ... Property Damage caused by the nature, condition or quality of the insured's products", and it is unhelpful to take a narrow view of causation unrelated for example to the contextual association of the claim of the party suffering loss, and the influence of that element upon the construction of the provision. It is at this point that it is useful to reflect upon the nature and purpose of the contract of insurance of this class. These features give the causation referred to a particular meaning conformable with the general design of the distinct types of cover adverted to earlier in this explanation. Because the notional liability of the insured would have been so essentially associated with the result of the conduct of the sub-contractor's workman rather than any liability related to the supply of a product in the relevant condition, the former would have been the only effective cause within the meaning of the term of the policy; and the condition of the product secondary to that conduct would not have come within the relevant provision because it did not cause the damage within its meaning.

It may even be the case that the form of expression adopted in this policy has the effect that if the damage was caused by more than one cause, it could not be said that it was caused by one of them. It is not necessary to resolve this.

The position here is much stronger against the insurer than that in Mutual Acceptance (Insurance) Ltd. v. Nicol (1987) 4 A.N.Z. Insurance Cases 60-821 where the Court of Appeal of New South Wales upheld the claim of an insured to indemnity against liability to the purchaser of a boat by whom harm was suffered in an accident caused by a defect in the steering of the boat. The defect resulted when a part became unscrewed because the insured had failed to check and remedy the loose part prior to sale. The insurer failed in its attempt to invoke an exclusion of its liability for "claims arising directly or indirectly out of any defect or deficiency in ... goods sold or supplied ... after such

goods have passed from the actual physical custody of the insured". The reasoning of the Court was identical in principle with that set out above.

The second term of the policy under consideration, that is, the condition requiring compliance with all statutory obligations, etc., must also be construed according to a reasonable understanding of the nature and purpose of the policy and the duties of the parties towards one another, in this case particularly the duty of the insured towards the insurer. For example, it is not uncommon as in this case for this condition to be associated with a related condition requiring an insured to take reasonable care or precautions to prevent personal injury and property damage. Obviously if the latter were read without reference to the purpose of the policy, it would have the effect of excluding almost every case of negligence, contrary to the obvious intention of the parties. Having regard to the commercial purpose of the contract, it has been so construed that the reasonableness of the precautions required to be taken is to be measured by reference to the duty of the insured to the insurer rather than that of the insured to the claimant: Woolfall & Rimmer Ltd. v. Moyle (1942) 1 K.B. 66; Fraser v. B.N. Furman (Productions) Ltd. (1967) 1 W.L.R. 989. He does not lose his cover merely by his negligence towards the claimant providing he is not also negligent towards the insurer by courting the risk. Further, the obligation of the insured is personal so that it is satisfied if he takes reasonable care, in the sense stated, to engage competent workmen or supervisors.

So too in the present case, if the insured's obligation is read in the same light, where some sub-contractor fails to comply with a statutory obligation or by-law, then the insured will not be held thereby to be in breach of the condition of the policy. However the position in the present case is a little more complicated because s. 60A of the Gas Act 1965-1988 requires any person who installs any system used, designed or intended for use in

connection with the consumption of gas to comply in every respect with the provisions of the Act and Regulations and to ensure that all work is carried out competently and with due regard for safety. In accordance with the above principles, the insured would comply with his duty to the insurer in respect of the last part of the section by engaging a competent sub-contractor. No default in this respect is suggested.

Regulation 92(2), upon which the insurer more heavily relies, provides that "a person shall not employ any other person, whether as a servant, contractor or agent, to perform gas-fitting contrary to" certain provisions of the regulations, including a provision requiring suitable formal qualifications. Assuming for the purposes of argument that the work done by the relevant employee of the sub-contractor was gas-fitting and that he was not qualified as a gas-fitter, there is still an obvious difficulty for the insurer. The insured certainly did not employ the relevant workman as its servant, contractor or agent to do the work, for he was employed by the sub-contractor. While the word "employ" must mean more than a contract of service because of its reference to "contractor" and "agent", however, any suitable extension of the connotation of the term cannot comprehend such an indirect relationship as existed here between the first respondent and the workman. Any argument that the former employed the sub-contractor company, which was unqualified, to do the gas-fitting also fails for, as the insurer itself argued, the word as used could not extend to the engagement of a company for it is not a living person, and such an entity cannot be qualified or licensed to act as a gas-fitter. Consequently the regulation does not apply to the conduct of the insured in the present case in engaging a company to perform the work.

This construction is both logical and reasonable when the person performing the work is employed by a company which may be a contractor or sub-contractor of another party. The work must ultimately be done by a living person

and the purpose of the regulation is to ensure that, if he is employed, his employer as well as he will be responsible to ensure that he is qualified and licensed. In the usual case, his direct employer is the person upon whom responsibility should obviously lie to ensure compliance. If the workman himself is an independent contractor or agent rather than an employee, then the regulation is wide enough to place responsibility also upon the person who directly engages him, even though there be no contract of employment. Because these provisions are enough to catch all classes of case so as to render the person in direct relationship with the workman also responsible, it is unnecessary to its purpose for the regulation to extend beyond that first level of engagement so as to catch up other persons whose relationship with the workman is more indirect. This is perfectly reasonable because of the usual incapacity of such a person to control the contractor's choice in his selection of employees.

While these reasons are enough to show that there was no breach of the by-law by the first respondent and consequently no breach of the condition of the policy, it may be queried whether some construction should be put on this condition similar to that put on the “Reasonable Care” condition. This would mean that a simple breach of a regulation or by-law would not be enough to constitute a breach of the policy, so that the default would need to be deliberate or reckless. Although this is an attractive explanation it is not necessary to decide it.

For these reasons, if the first respondent had been held liable to the appellant, the first third party would have been held liable to indemnify it and it would have lost on the only issues between them. Conversely the first respondent was correct in commencing third party proceedings to enforce its entitlement to indemnity under the contract and has succeeded in establishing its right over the first third party's repudiation of the claim. It is within this situation that the question of costs be

considered as between the first respondent, the first third party and indeed the appellant.

While there has been no appeal against the trial Judge's order that the first third party's costs be paid by the first respondent who should in turn be reimbursed by the appellant, that question re-emerges in respect of the costs of the appeal. As O. 18 r. 14 of the Rules of the Supreme Court are identical in substance with the relevant rules in New South Wales, the discussion in Lever v. Golsby (1964) 5 N.S.W.R. 1833 on this topic is relevant. From that case, the following principles may be derived -

(a) that although a plaintiff has no interest in proceedings for contribution between the defendant and the third party (Barclay's Bank v. Tom (1923) 1 K.B. 221 at pp. 223-4), the third party still has an interest in the trial between the plaintiff and the defendant and its result;

(b) that it is logical that where a defendant has added a third party and a verdict has been found in favour of the defendant against the plaintiff, in the ordinary course of events the defendant should have his costs against the plaintiff but should pay and bear the third party's costs himself; and

(c) that although the plaintiff has no interest in the private claims by the defendant against a third party, if the plaintiff or a third party in the course of litigating the plaintiff's claim against the defendant in the third party procedure, in which each has an interest, is guilty of some misconduct such as aborting the trial and causing costs to be thrown away, then the Court may in its discretion visit an order for costs upon the offending party.

In In re Salmon; Priest v. Uppleby (1889) 42 Ch. D. 351 it was held that in ordinary circumstances if the defendant joins a third party whose presence is wholly immaterial to the plaintiff and is solely for the benefit

of the defendant, the unsuccessful plaintiff should not be liable in costs for such joinder. Further, where the plaintiff failed against the defendant who had claimed an indemnity from the third party in the contingency of his own liability to the plaintiff, as the third party escaped only because of the plaintiff's failure against the defendant, it was ordered that the third party should have no costs.

In Welch v. Bank of England (1955) 1 Ch. 508, the plaintiff brought a claim against the bank in respect of transfers of stock which had been, forged by a trustee and the bank issued third party proceedings against stock brokers who presented the transfers. The plaintiff succeeded in respect of some transactions but failed in respect of others and the question of costs of the latter was discussed by Harman J. at p. 549 where he said:

> "There arises then the much-vexed question of the four-fifths of the plaintiff's costs which the defendants have been ordered to pay. I think that it is not disputed that the two third parties who have failed are under some liability in that respect. But it is said that the three other third parties were successful; so they were in the sense that the transfers which they lodged cannot be set aside and stand in spite of the fact that they originated in fraud. They say therefore: no indemnity. I do not think that is right, because, unless the defendants had fought to the end, it may well have been that the action would not have resulted as it has. But, apart from that, they did deny, at any rate right up to the hearing, that they were bound to give any indemnity at all, whatever the result of the suit; and the bank was therefore bound to fight the action, not only to protect itself but also to justify its claim to indemnity. It seems to me on the whole that the costs which the defendants have been bound to incur viz-a-viz the plaintiff in fighting the main battle must be paid by the third parties."

In Allman v. Daly (No. 2) (1959) V.R. 614 at pp. 618-9, it was said:—

> "Counsel were unable to refer me to any case in which a third party has been ordered to pay the costs of the

> defendant who has joined him, where that defendant has been successful in the action and has had judgment entered for him against the plaintiff, and I have not myself been able to find any such case. In my view, it would be contrary to principle to hold that, in a case such as this, third party should be ordered to pay the successful defendant's costs. My reasons for taking this view are as follows:—
>
> '1. There is in this *action* no issue between the plaintiff and the third party. It is true that in cases of indemnity, and perhaps in other cases as well, the interest of the third party is two-fold - his first interest is to resist the claim of the plaintiff, so that the situation will never arise in which the defendant can look to him for indemnity or contribution. To this end he may be permitted to take part in the trial and oppose the plaintiff's claim against the defendant: cf. Eden v. Weardale Iron and Coal Co. (1887) 34 Ch. D. 223; Eddison & Swan United Electric Light Co. v. Holland (1889) 41 Ch. D. 28; Daniels Chancery Practice (8th ed.) p. 223. His second interest arises only after the defendant's liability has been determined, and is one of no concern to the plaintiff. It is merely to establish that he is under no liability to indemnify the defendant, or to contribute to the amount of the judgment entered against him.'"

These authorities demonstrate that the award of costs in such circumstances is entirely within the discretion of the Court and various results may follow, depending on the circumstances, although the discretion must be exercised judicially; and they provide examples of factors which are taken into account in the exercise of that discretion. In the present case, the first third party was bound to indemnify the first respondent if it had been held liable and so it had some interest in that issue, but the latter was defending the claim so that it was unnecessary for the first third party to join In that exercise. However, the first third party was necessarily brought into the action and incurred its costs only in respect of the issues upon which it lost. In these circumstances, although there is room for substantial argument to the contrary, an order for

costs against it should not be made because it was ultimately successful, but conversely it still should not have its costs against the first respondent.

Nor should it have its costs against the appellant because that party had no interest in the private issues in the third party proceedings; nor had the first respondent necessarily joined the first third party because of the nature of the plaintiff's claim: Edginton v. Clark (1964) 1 Q.B. 367; Thomas v. Times Book Co. Ltd. (1966) 1 W.L.R. 911; Klawansky v. Premier Petroleum Co. Ltd. (1911) W.N. 94.

In summary, the appeals and cross-appeals should be dismissed and the following orders for costs should be made:—

(i) the appellant should pay the respondents' costs of the appeal to be taxed;

(ii) the Court having already ordered that the first respondent pay the costs of the appeal of the second third party and third third party, further order that the appellant pay to the first respondent the costs so paid by it;

(iii) there should be no order in respect of the first third party's costs.