IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

INCORPORATED GENERAL INSURANCES LTD ....appellant

and A.R. SHOOTER t/a SHOOTER'S FISHERIES....respondent

Coram: RABIE CJ, JANSEN, VILJOEN, VAN HEERDEN JJA, et GALGUT AJA.

Date of Hearing: 15 August 1986. Date of Judgment: 20 November 1986

J U D G M E N T

GALGUT AJA:

This is an appeal from a judgment of FRIEDMAN J sitting in the Durban and Coast Local Division in which he gave judgment in favour of the respondent (plaintiff in that Court) in the sum of R300 000 plus interest and

/ costs .....

costs of suit. That judgment is reported as Shooter trading as Shooter's Pisheries v Incorporated General Insurances Ltd 1984 (4) SA 269 (D). I shall refer to it as the reported judgment. The facts pursuant to which the action was instituted are set out at p 271 D to 272 H. The legal issues canvassed in that Court are fully set out in the judgment. I will, therefore, set out only so much as is necessary to facilitate the reading of this judgment and will confine myself to the submissions made in this Court.

I shall refer to the appellant as the defendant and the respondent as the plaintiff. The plaintiff was the owner of a fishing trawler, the "Morning Star". On 12 April 1983 whilst it was trawling for fish near Maputo harbour it was intercepted by two trawlers of the People's Republic of Mozambique (Mozambican Government) and taken in-to Maputo harbour. The skipper and engineer were there-after brought before a tribunal. They were prosecuted on

charge of illegal fishing. It is not clear whether the charge was that they had fished illegally within Mozambican territorial waters, ie, within 12 nautical miles from the Mozambican coast or fished illegally within the declared Mozambican exclusive economic zone, ie, within 200 nautical miles off the Mozambican coast. They were found guilty and fined the equivalent of R167 000. They were advised that if the fine was not paid within 15 days the trawler would be confiscated.

There were in existence at the time two insurance policies, each for R300 000, issued by the defendant as insurer. These policies were referred to as the "Hull" policy and the "War Risks" policy in the Court a quo.

Neither the skipper nor the engineer was able to pay the fine. The plaintiff also was unable to pay it. He endéavoured to persuade the defendant to pay it and thereby obtain the release of the vessel. This the

defendant refused to do alleging that it was under no obligation to do so and also that in any event no lia-bility attached to it in respect of the seizure of the trawler under either policy. In the result the fine was not paid and the trawler was confiscated. It was sold, so the evidence indicates, to "the Spaniards".

Plaintiff sued the defendant and obtained judg-ment for R300 000 being the insured value of the trawler. The appeal is against the whole of the judgment.

The Admiralty Jurisdiction Regulation Act No 105 of 1983 ("the Act") provides for "the vesting of the powers of the Admiralty Courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa". Sec. 2 provides that these courts have jurisdiction to hear and determine any maritime claim. A claim relating to marine insurance is a maritime claim - see sec. l(r). Hence the Court a quo had jurisdiction to deal with the

/ matter .....

matter.

The two policies with which we are concerned follow the standard wording of the Lloyds S-G policy which until recently had been used in the United Kingdom and internationally for over 200 years. The wording is in many respects archaic. The defendant carries on business and has its registered office in Johannesburg. The plaintiff carries on his business in Durban, In terms of sec. 6(1)(b) of the Act, the law to be applied by a Court in the exercise of its admiralty jurisdiction is the Roman-Dutch law applicable in the Republic. Sec 63(1) of the Insurance Act No 27 of 1943 reads:

> "(1) The owner of a domestic policyissued after the first day of January, 1924, shall, notwithstanding any contrary provision in the policy or in any agreement relating thereto, be entitled to enforce his rights under the policy against the insurer concerned in any court of competent jurisdiction in the Re-public, and any question of law arising from any such policy shall be decided accord-ing to the law of the Republic:
>
> / Provided .....

> Provided that such a policy may validly provide that the amount of any liability under the policy shall be determined by arbitration in the Republic, if the insurer demands that the said amount be so determined."

The two policies in this case are domestic policies - see the definition in sec. 1 of the said Act. In Black-shaws (Pty) Ltd v Constantia Insurance Co Ltd 1983 (1) SA 120 (A) at p 126 F it was said that the interpretation of the clauses in an insurance policy is, generally speaking a question of law. It follows that in interpreting the policies the law to be applied is the Roman Dutch law but that English decisions as to the meaning of expressions used in the policies is of assistance and is persuasive authority - cf. the Blackshaws case sup. cit. at p 126 F-H.

At pages 273 and 274 of the reported judgment the learned Judge a quo sets out the terms of two clauses which

/ are .....

are referred to as the "risk" clause and the "f c and s" clause. These appear in both policies. He also refers to a schedule and certain "Institute war and strikes"clauses annexed to the War Risks policy and concludes that it is this policy which applies to plaintiff's claim. That, in fact, was common cause in the Court a quo and still is in this Court. The relevant clause is the risk clause. It is set out in full on page 273 of the reported judgment. The portion thereof which is relevant to the peril insured against reads:

> "And touching the Adventures and Perils which the said Company is contented to bear and does take upon itself in the Voyage so insured as aforesaid they are
> Takings at Sea Arrests Restraints and Detainment of all Kings Princes and People of what Nation Condition or Quality soever ..... "

It is convenient at this stage also to mention two further provisions contained in the policies. The first is that the trawler was insured only "against the risk of Actual Total Loss and/or Constructive Total Loss

of the vessel". The second is what is commonly called the "sue and labour" clause. This reads:

> "And in the case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured".

I turn now to discuss the effect of the above passages in the War Risks policy.

Ad Arrests, Restraints and Detainments of all Kings, Princes and People of what Nation, Condition or Quality soever.

In England, Schedule 1 to the Marine Insurance Act of 1906 ("the 1906 Act") is headed "Rules for Con-struction of Policy". These Rules are in effect a codification of what had been decided in the English courts over the years. As stated earlier, what has been said in those courts is persuasive authority. Rule 10

/ declares .....

declares the above words to refer to "political or execu-

tive acts" and does not include a "loss by riot or judi-

cial process". Ivamy in his Marine Insurance 3rd ed.,

("Ivamy") states (and quotes authority) at p 171 that —

> "Whenever the ruling power in a State prevents the owner or his agents from en-joying the lawful right of user of the property insured, by an act which is not — as against the State of which the assured is a subject —an act of war, the assured is entitled to recover any loss occasioned thereby from the insurer under those words.
>
> The clause imports an unusual interference by the ruling authority, and does not apply to an arrest by the order or judgment of any judicial authority in the ordinary course of litigation."

Arnould in Law of Marine Insurance and Average

l6th ed. Vol. 2 at para. 886 ("Arnould") states (and

quotes authority) that by the word "people" is meant

the ruling power of the country. The learned author

goes on to say in para. 886:

/ "The.....

> "The words 'ordinary judicial process' relate to the administration of justice in civil proceedings. The arrest or detention of a ship by judicial process for the purpose of enforcing the public or criminal law of a country is not ex-cluded under rule 10, and the fact that a judicial process is in operation does not deprive the restraint of its charac-ter as a political or executive act."

The author relies for this latter statement on dicta by MOCATTA J in Panamanian Oriental S.S. Corporation v Wright (1970) 2 Lloyds Rep. 365 ("the Anita case"). The defendant, as will be seen later, did not accept in the Court a quo and still does not accept that the words "ordinary judicial process" refer only to civil proceedings.

In the Republic the rule of interpretation in regard to insurance policies was clearly stated by KOTZE JA in West Rand Estates Ltd v New Zealand Insurance Co Ltd. 1925 AD 245 at p 261. He said:

> "The parties by entering into the contract of insurance must be taken to have intended that they were to be bound by the terms

/ contained .....

> contained therein. The mere use.....of words, which in their strict and grammatical meaning sound strange and novel in our country, can and does not render them meaningless. The parties must be regarded as having meant a business transaction; and it is the duty of the Court to construe their language in keeping with the purpose and object which they had in view, and so render that language effectual. Such is the clear principle of our law."

Due regard being had to the above I have no doubt that "detainments of all kings, princes and people" would, in the Republic, be interpreted to mean the ruling power of the country.

Ad Insurance against Actual Total Loss and/or Constructive Total Loss only.

This phrase limits the liability of the insurer. He is not liable to the insured for any partial loss sustained.

"Actual total loss" and "constructive total loss" have been defined in secs. 56(3) and sec. 60(1) of the 1906 Act. These definitions are helpful but

I do not find it necessary to set them out. It is suf-ficient to say that prior to the expiry of the 15 days there was no actual total loss. The fine was not paid and the trawler was confiscated and sold to the "Spaniards". It thus became an actual total loss.

In England, where there has been a constructive total loss, the assured is entitled to abandon the subject-matter to the insurer and claim for a total loss. See Ivamy, p 410 and secs. 62(1) and 62(7) of the 1906 Act. In England the question in what cases the law requires notice of abandonment to be given has been much debated. See Ivamy, p 414. There is no statutory requirement in the Republic requiring notice of abandonment when the insured claims for a total loss.

/ The Sue and .....

The Sue and Labour Clause

The wording of this clause is as it appears in the standard form of the English marine policy, as to which see Arnould at para. 909. The clause, it is to be noted, does not compel the insured (here the plaintiff) to "sue and labour". It permits him to incur expenses for the purpose of averting the loss covered by the policy and thereafter to recover such expenses from the insurer. Despite the permissive wording of the clause, sec. 78(4) of the 1906 Act, in relation to contracts containing this clause, reads:

> "it is the duty of the assured .....
> ..... to take such measures as may
> be reasonable for the purpose of avert-ing or
> minimising a loss".

Arnould, sup. cit. at para 770 states:

> "It has, however, long been recognised, both
> in England and in the United States, that the
> assured is under a duty to sue and labour".

/ There .....

There is no statutory provision nor have we been referred to any case in the Republic dealing with the effect of a sue an labour clause. In the Republic an insured is under an implied duty to minimize his loss.

Mozambican legislation relevant to the issues.

The extracts from this legislation set out here-under are English translations.

In a Government Gazette of the People's Republic of Mozambique dated 19 August 1976 Decree-Law No 3l/76 was proclaimed. The opening paragraph reads:

> "It has became imperious to define the rights of the People's Republic of Mozambique with respect to the economic resources of the sea adjacent to the coast."

There is no need to set out all the details of the proclamation. It is sufficient to say that "the Council of Ministers" decreed inter alia that Mozambique's territorial waters would extend for 12 nautical miles and its exclusive economic zone for 200 nautical miles.

/ Thereafter.....

Thereafter Act 8 of 1978 was proclaimed by the Mozambican Government in a Government Gazette of 24 April 1978. This Act contained the following articles and provisions:

> "Article 1. For the purposes of the provisions of this Act:
>
> (a) 'jurisdictional waters' means the zone comprising the territorial waters and the exclusive economic zone, as they are defined in the Decree-Law No 31/76 of 19 August;
>
> Article 3 (1). As from the date when this Act comes into effect, the Minister of Industry and Energy will be competent to determine which foreign vessels or crafts shall be authorized to fish in the jurisdictional waters, and he will further determine, according to the circumstances, the appropriate conditions for the conduct of such an activity."

Articles 5 to 8 provide for inspection and impounding of foreign vessels found fishing in the prohibited

jurisdictional waters and the penalties and fines which can be imposed.

Articles 12 to 15 provide that a "court consisting of" a Judge, nominated by the Provincial Court, and two as-sessors is to be established by the "maritime authority" to try an. alleged fishing offence.

Article 17(b) reads:

> "If the accused is convicted and if the fine imposed is not paid within fifteen days counting from the date of the passing of the sentence, the vessel or craft involved in the offence shall be confiscated."

The above provisions are not unusual. In the Republic, save for the constitution of the court, there are similar statutory provisions relating to illegal fishing in territorial waters (12 nautical miles) and in a prohibited fishing zone of 200 nautical miles from the coast.

/ In .....

In the Court a quo and in the heads of argument filed in this Court counsel for the defendant sought to rely on a clause in the policy in terms of which plaintiff had warranted that the trawler would not fish within Mozam-bican territorial waters. He further submitted, in the alternative, that if it was not shown that the warranty had been breached, it was not disputed that the trawler had fished illegally in the Mozambican exclusive economic zone. In either event, so he urged, the plaintiff's claim had to be dismissed. The warranty, counsel's submissions and the Court a quo's ruling thereanent are fully set out at p 279 C to p 284 A of the reported judgment. It is not necessary to repeat what is there said. Counsel (he did not draw the heads of argument) who appeared in this Court stated, wisely in my view, that he was not urging the above submissions. He then went on to submit that the appeal should be allowed on either of the following two grounds:

/ A. That .....

A. That the plaintiff had not discharged the onus of showing that the events which resulted in the loss of the trawler were covered by one or other of the risks enumerated in the "Risks Clause"; or

B. That plaintiff's claim could not succeed because, despite the fact that there was no such requirement in the contract of insurance, no notice of abandonment had been given by plaintiff to defendants.

Ad A above:

It must be accepted, having regard to the Mozam-bican legislation, that the trawler was not wrongly inter-cepted and impounded by officials acting on behalf of the Mozambican Government. It was not suggested that this "arrest and detainment" did not fall within the risks covered

/ by .....

by the Risk Clause. Counsel for defendant urged that the loss of the trawler did not result from that arrest and detainment but followed from the decision of the Mozam-bican tribunal; that the loss was pursuant to "judicial process" and not to the original arrest and the detention of the vessel. He relied on the aforementioned Rule 10: see also pp 274 D to 276 G of the reported judgment. He submitted that the words "ordinary judicial process" should not be limited to civil proceedings, that the statement by Arnould at para. 886 was wrong and that the decision on this point in the Anita case should not be followed. The reasoning in the Anita case appealed to the learned Judge a quo (see p 276 G) and he accordingly rejected this submission. He went on to hold, as I read his judgment at p 276 H, that when a court in criminal pro-ceedings has found that the precedent arrest and deten-tion were justified and then makes, as in this case, a

/ confiscatory... .....

confiscatory order, the State "is asserting and enforcing its own authority", in short that the loss results be-cause the court has confirmed the arrest.

The Court a quo (at p 276 I - p 277 A) found as a fact that the tribunal which made the order for confis-cation was not an independent tribunal and not staffed by judicial officers and that "in these circumstances there is probably much to be said for the view that the continued detention and confiscation of the vessel was not the result of ordinary judicial process at all but rather the result of the actions of officials forming part of the Mozambican Government. I have examined the evidence considered by the learned Judge a quo, viz, that of the skipper and of a Mr Dreyer who attended the trial. I, with respect to the learned Judge a quo, am unable to agree that the evidence shows that the tribunal was not constituted in terms of the Mozambican legislation. A fine was

/ imposed .....

imposed. Had it been paid the vessel would not have been confiscated.

Counsel recognized that the plaintiff could not have claimed and could not now claim the R1Ó7 000 as a partial loss. He did, however, urge that the plaintiff in terms of the policy was permitted to sue and labour; that in the circumstances of this case it was his duty to have done so, ie to have incurred the expense; that had he done so and paid the R167 000 he could, under the sue and labour clause, have claimed a refund of the said expense. The defendant did not, in the Court a quo, rely on the sue and labour clause. We thus do not have the be-nefit of the views of the learned Judge on this aspect. We were not referred to any case in our courts in which a sue and labour clause and its effects were considered. Nor do

/ I know .....

I know of one. It will be seen from p 277 D that in the Court a quo counsel for the defendant argued that the proximate cause of the loss of the trawler was not the arrest of the vessel; that the loss, ie the confiscation, was due to the failure of the plaintiff to pay the fine. If this argument is correct there is no need to discuss the effect of the sue and labour clause. The learned Judge a quo rejected the argument. At p 277 B he said:

> "The confiscation order was one made in respect of the plaintiff's vessel by reason of the failure of the skipper and engineer to pay the fine imposed upon them. But in any event it seems to me that the initial arrest and subsequent restraint and detainment of the vessel was an act of "kings princes and people of what nation condition or quality soever" within the meaning of the risk clause; it was a continuous process commencing with the initial arrest of the vessel and resulting in its ultimate confiscation and loss and it would be artificial to regard it in any other manner. The interposition of the de-cision of the court between its initial arrest and its subsequent loss does not, in my view, alter the position".

/Counsel .....

Counsel for plaintiff accepted that for the plaintiff to recover under the policy the occurrence of the insured peril must be the proximate cause of the loss. He urged that the Court a quo was correct in holding that the interception and arrest of the vessel and its continued detention by the Mozambican Government until its confis-cation and sale by that Government was a single cohtinuous process. He then went on to submit that if the plaintiff was not obliged to sue and labour that obligation cannot be reimposed indirectly in the guise of a contention that the failure to pay the fine was the proximate cause of the loss. The submission loses sight of the concession which counsel made at the outset, viz, that in order to succeed plaintiff must show that the loss was proximately caused by the peril insured against. In Becker, Gray and Com-pany v London Assurance Corporation [1918] AC 101 at p 11] Lord SUMNER put it as follows:

/ "In .....

> "In a contract of indemnity .....
> the insurer promises to pay in a cer-
> tain event and in no other, namely,
> in case of loss caused in a certain
> way, and the question is whether the
> loss was caused in that way, ..."

No difficulty arises when one cause only has to be considered. The difficulty arises when there are two or more possible causes. In such a case the proximate or actual or effective cause (it matters not which term is used) must be ascertained, and that is a factual issue. I cannot put it better than is done by Ivamy at p 255, where it is said that an earlier event may be a dominant cause in producing the damage or loss; it may be the causa sine qua non but the issue is, is it the causa causans? Ivamy at the above page, Arnould at p 773 and Gordon and Getz at p 383] all stress that the rule to be applied is causa proxima non remota spectatur.

Counsel for plaintiff does not dispute what is

/ said .....

said by the learned authors. He contends that the loss was the result of the continuous process set out above and that one cannot single out any one event as being the proximate cause - the causa causans. He sought to rely on the following statement by BAILLACHE J in Fooks v Smith (1924) 2 KB 508 at p 514:

> ".... if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss - as, for instance, if there is a capture followed by confiscation - the underwriter is liable in respect of the total loss. If, however, the ultimate total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable."

That case does not support his contention. It is in fact against him. There the Austrian Govcrnment, because of bhe immincnce of war, ordered all Austrian ships to put their

ships in safety. The ship in issue in the above case put into Trieste and did not complete its journey. The goods on board were landed there. That was held to be a constructive loss. No notice of abandonment was given. A year later the Austrian Government requisitioned the goods and sold them. This resulted in a total loss. It was held that the confiscation was not an event which in the ordinary course of events followed the restraints of princes and the underwriter was not liable.

I am, with respect, unable to agree with the find-ing of the Court a quo that the loss of the trawler was due to a continuous process. The Mozambican tribunal imposed a fine. Had that fine been paid the loss would not have resulted. In my view the confiscation did not result from the arrest of the trawler, it resulted from the fai-lure to pay the fine. That failure was therefore the proximate cause of the confiscation of the trawler. The fact that the plaintiff was unable to pay the fine is

/ irrevelant .....

irrelevant. The issue is not his ability to pay the fine. The issue is what caused the confiscation. That, as we have seen, was the fact that the fine was not paid. That was not a peril covered by the Risk Clause. Because of the above finding it is not necessary to discuss the abandonment issue raised in B above.

In the result the appeal must succeed. The order made is:

1. The appeal succeeds with costs;

5. The order of the Court a quo is set aside and there is substituted an order which reads: "Plaintiff's claim is dismissed with costs."

O. GALGUT.

RABIE CJ)
JANSEN JA) CONCUR. VAN
HEERDEN JA)

/mb

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CORAM : RABIE, CJ, JANSEN, VILJOEN, VAN HEERDEN, JJA et GALGUT, AJA

HEARD : 15 AUGUST 1986 DELIVERED :

20 NOVEMBER 1986

J U D G M E N T

VILJOEN, JA

Save/ ...

Save for disagreeing with my Brother Galgut in one small respect I agree with him that the appeal in this matter should succeed on the ground of causation. It is therefore, in my vlew,' not necessary to consider the other legal issues. The disagreement relates to the law to be applied.

It is true that policies of marine insurance fall in the category of "any other matter" with regard to which, in terms of s 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act"),the Roman-Dutch law is applicable but s 6(5) of the Act provides:

> "The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute."

therefore, the parties agreed, either expressly or impliedly, that a different system of law is to be applled, that agreement should prevail. In English law the system of law to be applied to a contract is referred to as the "proper law of the contract." In Ameen Rasheed Corporation v Kuwalt Insurance (H L(E)) 1984 AC 50 (the "Al Wahab case") one issue which the House of Lords had to decide was what the proper law of the contract was. (The issues are, in my view, correctly set out and explained in an article The proper law of a marine insurance contract: The Al Wahab case by J P van Niekerk in Modern Business Law Vol 6 No 2 July 1984 87 - 93). As in the present case the contract concerned was a marine insurance Lloyd's S G policy.

At E - G Lord Diplock said:

> "The applicable English conflict rules are those for determining what is the 'proper law' of a contract, i e, the law that governs the interpretation and the valldity of the contract and the mode of performance and the consequences of breaches of thê contract: Compagnie Tunisienne de Navigation S A v Compagnie d'Armement Maritime S A (1971) A C 572, 603. To identify a particular system of law as being that in accordance with which the parties to it intended a con-tract to be interpreted, identifies that system of law as the 'proper law' of the contract. The reason for this is plain; the purpose of entering into a contract belng to create legal rights and obli-gations between the parties to it, inter-pretation of the contract involves deter-mining what are the legal rights and ob-ligations to which the words used in it give rise. This is not posslble except by reference to the system of law by which the legal consequences that follow from the use of those words is to be ascertained."

At 61 B - D the following dictum appears:

"English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed. So the first step in the determination of the jurisdiction point is to examine the policy in order to see whether the parties have, by its express terms or by necessary implication from the language used, evinced a common in-tentlon as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained. As Lord Atkin put in Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft (1937) A C 500,529:

> 'The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their in-tention will be ascertained by the in-tention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.'"

At 62 C - E Lord Diplock dealt with Lord Atkin'3 reference to the surrounding circumstances as follows:

> "I can state briefly what Lord Atkin refers to as the relevant surrounding circumstances, at the time the policy was issued before I come to deal with its actual terms; since although the policy contains no express provision choosing English law as the proper law of the contract, nevertheless its pro-visions taken as a whole, in my oplnion, by necessary implication point ineluc-tably to the conclusion that the inten-tion of the parties was that their mutual rights and obligations under it should be determined in accordance with the English law of marine insurance."

At 62 E - F the learned Law Lord referred to the facts in the context of the remarks by Lord Atkin relating to the surrounding circumstances

commented that in these days of modern methods of communication where international contracts are so frequently negotiated by telex, the lex loci contractus has lost much of the significance in determining what is the proper law of the contract. As respect the lex loci solutionis premiums and claims are frequently pald in international rather than national currency, he said, which shows how little weight the parties themselves attach to the . lex loci solutionis .

In the instant case the contract was entered into in this country and the payment of premiums was to have been effected in South African currency. This, in my view, however, is not impor-

tant. What is important is the form of the policy under consideration and the language in which it has been couched. Lord Diplock described this type of policy at 63 C - D as follows:

> "The contract of marine insurance is highly idiosyncratic; it involves con-cepts that are peculiar to itself such as sue and labour, subrogation, abandon-ment and constructive total loss, to give but a few examples. The general law of contract is able to throw but little light upon the rights and obli-gations under a policy of marine in-surance in the multifarious contingen-cies that may occur while the contract is in force."

Subrogation is a well-known concept in South African insurance law but the others referred to are completely foreign to our law and peculiar to English marine insurance law. At 64 A - C

Lord Diplock dealt as follows with the terms of the policy:

> "Turning now to the terms of the policy itself, the adoption of the obsolete language of the Lloyd's S G policy as scheduled to the Marine Insurance Act 1906 makes it impossible to discover what are the legal incidents of the mutual rights and obligations accepted by the insurers and the assured as having been brought into existence by the contract, unless recourse is had not only to the rules for construc-tion of the policy contained in the first schedule, but also to many of the substantive provisions of the Act which is (accurately) described in its long title as: 'An Act to codify the law relating to marine insurance.'"

The learned Law Lord proceeded to give some examples and referred i a to the sue and labour clause,the legal effect whereof is laid down in

section 78 of the first schedule to the Marine Insurance Act, 1906. He proceeded as follows (D - G):

> "These are but a few examples of the more esoteric provisions of the policy of which the legal effect is undiscoverable except by reference to the Marine Insurance Act 1906; but the whole of the provisions of the statute are directed to determining what are the mutual rights and obllgations of parties to a contract of marine insur-ance, whether the clauses of the contract are in the obsolete language of the Lloyd's S G policy (which, with the F C & S clause added, is referred to in the Instltute War and Strikes Clauses Hull-Time, as 'the Standard Form of English Marine Pollcy'), or whether they are in the up-to-date language of the Institute War and Strike Clauses that were attached to the policy. Except by reference to the English statute and to the judicial exegesis of the code that it enacts it is not possible to inter-pret the policy or to determine what those mutual legal rights and obligations are."

Adverting at 65 A - C to the judgment of Robert Goff L J a quo who identified what he described as the basic fallacy in the argument of counsel for the assured as being:

> "that, although the historical orlgin of the policy may be English and although English law and practice may provlde a useful source of persuasive authority on the construction of the policy where-ever it may be used, nevertheless the use of a form which has become an inter-national form of contract provldes of itself little connection with English law for the purpose of ascertaining the proper law of the contract.",

Lord Diplock remarked at 65 (C - E):

> "My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which de-fines the obligations assumed by the

> parties to the contract by their use of particular forms of words and pre-scribes the remedies enforceable in a court of justice for failure to perform any of those obligations; and this must be so however widespread geographically the use of a contract employing a parti-cular form of words to express the obligations assumed by the parties may be. To speak of English law and practice providing a useful source of persuasive authority on the construction of the policy wherever it may be used, begs the whoie question: why is recourse to English law needed at all?"

Lord Wilberforce agreed that English law was the proper law of the contract but he came to that conclusion on the basis of the system of law with which the contract has its closest and more real connection and not on,the basis of the parties' mutual intention. Lords Roskill, Brandon of Oakbrook

and Lord Brightman agreed with Lord Diplock.

I agree, with respect, that, even though the policy concerned contains no express provision choosing English law as the system to be applied, nevertheless, in the words of Lord Diplock "the provisions taken as a whole, by necessary impli-cation, point ineluctably to the conclusion that the intention of the parties was that their mutual rights and obligations under it should be determined in accordance with the English Law of Marine insurance." See Mitchell, Cotts & Co v Commissioner of Railways, 1905 TS 349 at 355 - 6. See also Gordon & Getz The South African Law of Insurance 369 where reference is made in footnote 27 to an article in 1977 SAILJ

Jl at J6 by Hyman, who also, apparently, propounds

same view. This journal, however, is not available in the library of this Court and I could accordingly not consult the article.

If the other issues had to be resolved I fail to see how it could have been done without applying English marine insurance law as it has evolved around the type of Lloyd's policy concerned.

JUDGE OF APPEAL