[HIGH COURT OF AUSTRALIA.]

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE COMPANY LIMITED
DEFENDANT, } APPELLANT;

AND

KLINKER KNITTING MILLS PROPRIETARY LIMITED AND ANOTHER
PLAINTIFFS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1938.

MELBOURNE, *Feb.* 15-17; *Mar.* 18.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

Insurance—Theft—Goods stolen—Insured to give detailed statement of loss, with estimate of market value of each article and amount of damage sustained—Failure to comply with term—Condition precedent to right to recover under policy—Compliance with condition in part—"Memoranda indorsed" on policy—Typed slips fixed to face of policy.

Clause 8 (*b*) of the conditions indorsed on a policy of insurance against theft required the insured within seven days of notice of claim to "deliver to the company a detailed statement in writing of the loss or damage, with an estimate of the market value of each article lost, and the amount of damage sustained, excluding profit of any kind." The policy also provided that the conditions indorsed on the policy should be conditions precedent to the right of the insured to recover. The insured claimed to recover under the policy in respect of goods stolen from them, but the particulars of loss supplied by the insured to the company did not contain an estimate of the market value of each article lost or the amount of damage sustained, excluding profit, though particulars as to some articles were supplied.

Held (1) that clause 8 (*b*) was a condition precedent to the insured's right to recover; (2) that the requirement that "a detailed statement in writing of the loss or damage" should be delivered was a provision the effect of which

H. C. OF A. 1938.

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

must vary with the circumstances to which it was applied; (3) that the performance of the condition in part did not entitle the insured to recover in respect of the losses details of which were, in fact, supplied; and (4) that the insured were not entitled to recover under the policy.

Per Evatt J.: Typed slips containing conditions or terms of the policy, attached to the front of it and not to the back of it, were "memoranda indorsed" thereon within the meaning of the policy.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

Klinker Knitting Mills Pty. Ltd. and William Komesarook brought an action in the Supreme Court of Victoria against L'Union Fire Accident and General Insurance Co. Ltd., claiming an amount of money alleged to be due by the defendant to the plaintiffs under a contract of insurance against burglary, theft or pillage. The contract of insurance alleged was subject to the terms of the defendant's burglary policy, which was subsequently issued by the defendant to the plaintiffs. The proposal was dated 24th May 1935. A notification of receipt of the proposal and that a policy would issue was given on 28th May 1935. The loss in question occurred on 14th June 1935, but there was no payment of premium until 15th June 1935, when the plaintiffs paid it to a broker, who paid it to the defendant company on 28th June 1935. The policy was dated 6th June 1935 but was not issued until 3rd July 1935. The policy provided that "this insurance shall not commence until the premium has been actually paid to and accepted by the company, and the company's official acceptance letter or policy has been issued; and no payment in respect of any premium shall be deemed to be payment to the company unless a printed form of receipt or policy signed by an official of the company shall have been issued therefor." The policy also provided "that the insurance hereby made is and shall be subject to the conditions and to the memoranda, if any, indorsed hereon in like manner as if the same were respectively repeated and incorporated herein, and compliance with such conditions and memoranda, and each of them, shall be a condition precedent to the right of the insured to sue or recover hereunder." One of the conditions was: "8. Upon the happening of any event giving rise or likely to give rise to a claim under this policy the

insured shall . . . (*b*) within seven days from the date of . . . notice (unless the company has in writing agreed to extend such period) deliver to the company a detailed statement in writing of the loss or damage, with an estimate of the market value of each article lost, and the amount of damage sustained, excluding profit of any kind." Some of the clauses indorsed on the policy were not capable of being construed as conditions precedent to the right of the insured to sue or recover under the policy. Within a few days of the loss the plaintiffs gave to the defendant a declaration and particulars of the loss sustained. The heads of loss contained in the particulars did not contain an estimate of the market value of each article lost or the amount of damage sustained, excluding profit of any kind, and the question which arose for determination was whether the particulars complied with the requirements of clause 8 (*b*) of the conditions indorsed on the policy. The defendant company had agreed to extend the prescribed time for compliance with the requirements of clause 8 (*b*) of the conditions, and the plaintiffs contended that the defendant had waived all compliance with that clause.

The action was heard before *Lowe* J. and a jury. His Honour ruled that clause 8 (*b*) of the conditions had not been complied with and directed the jury to find for the defendant; the jury so found, and judgment was entered accordingly. An appeal by the plaintiffs was allowed by the Full Court of the Supreme Court, and a new trial was ordered.

From the decision of the Full Court the defendant appealed to the High Court.

Fullagar K.C. (with him *Moore*), for the appellant. The respondents failed to comply with the requirement of the policy that they should keep proper stock and sales records in stock and sales books entered up fully and regularly. This was a condition precedent to the plaintiff's liability, and the case should not have been left to the jury (*Cheshire & Co.* v. *Vaughan Bros. & Co.* (1); *Barnard* v. *Faber* (2)). The policy is subject to the conditions and memoranda indorsed thereon. Clause 8 (*b*), which was printed on the back of

(1) (1920) 3 K.B. 240, at p. 254.

(2) (1893) 1 Q.B. 340.

H. C. OF A. 1938. L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

the policy, and the clause relating to the keeping of books, which was typed on a slip of paper attached to the front of the policy, were both "indorsed" on the policy. The question is whether the indorsement was inserted with the intention of its being part of the document (*Ex parte Yates* (1); *R.* v. *Bigg* (2)). There is a distinction between a warranty and a condition (*Welford and Otter-Barry's Fire Insurance*, 3rd ed. (1932), pp. 115, 116). The insured must give complete particulars under clause 8 (*b*). Compliance with that clause would be no hardship if proper stock books were kept.

[RICH J. referred to *Mason* v. *Harvey* (3).

[McTIERNAN J. referred to *Cook* v. *Scottish Imperial Insurance Co.* (4); *Fitch* v. *Liverpool and London Fire and Life Insurance Co.* (5).]

There must at least be substantial compliance with clause 8 (*b*).

[LATHAM C.J. referred to *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (6).]

If clause 8 (*b*) is read as requiring only substantial compliance, even that interpretation has not been satisfied. The statement supplied by the respondents was not a detailed statement of the goods lost and did not state the wholesale price or give any means of ascertaining the cost of each article. The non-payment of the premium is fatal, as liability under the policy had not commenced. The appellant company was not at risk on the date of the loss, by reason of the non-payment of the premium. There was no cover at the time. The cover does not commence until the premium is paid (*Equitable Fire and Accident Office Ltd.* v. *The Ching Wo Hong* (7)). There is no record of any case in which a premium was accepted after the loss had occurred (*Tarleton* v. *Staniforth* (8); *Newis* v. *General Accident, Fire and Life Assurance Corporation* (9)).

[LATHAM C.J. referred to *London and Lancashire Life Assurance Co.* v. *Fleming* (10).]

(1) (1857) 2 DeG. & J. 191, at p. 193; 44 E.R. 961, at p. 962.
(2) (1717) 3 P. Wms. 419; 24 E.R. 1127.
(3) (1853) 8 Ex. 819; 155 E.R. 1585.
(4) (1884) 5 L.R. (N.S.W) (L.) 35.
(5) (1862) 1 S.C.R. (N.S.W.) 89.
(6) (1920) 28 C.L.R. 305.
(7) (1907) A.C. 96, at pp. 100, 101.
(8) (1794) 5 T.R. 695, at pp. 700, 701; 101 E.R. 386, at pp. 389, 390.
(9) (1910) 11 C.L.R. 620.
(10) (1897) A.C. 499.

Clauses 8 (*a*) and 8 (*b*) do not deal with claims, but are preliminary to the making of a claim. Here there is only one claim in respect of one theft.

[STARKE J. referred to *Western Australian Bank* v. *Royal Insurance Co.* (1).]

The statement must show each article lost, not merely those claimed for. The fact that the clause may work harshly is no reason for rewriting it (*Fitch* v. *Liverpool and London Fire and Life Insurance Co.* (2); *Cook* v. *Scottish Imperial Insurance Co.* (3); *Carnofsky* v. *New Zealand Insurance Co.* (4)).

[STARKE J. referred to *Stevens* v. *London Assurance Corporation* (5).]

Ashkanasy, for the respondents. The slips which were typed and attached to the face of the policy should not be regarded as being part of the agreement at all. What is the agreement between the parties depends on the facts in each case. The slips are mere extraneous matter. The company undertakes to issue a policy in accordance with the proposal. One assumes acceptance by the proponent of a standardized document. Before the policy is issued there is a contract of insurance by reason of the proposal and the acceptance of it. It is upon that contract that the action is brought. The proposal was to accept the company's policy subject to the terms and conditions contained therein. The policy makes all the conditions indorsed thereon conditions precedent, but some of them in their nature cannot be so. Whether clause 8 (*b*) is a condition precedent or not depends entirely upon its own terms. The conditions must be read as meaning "unless the context otherwise indicates" (*London Guarantie Co.* v. *Fearnley* (6); *In re Coleman's Depositories Ltd. and Life and Health Assurance Association* (7); *Stoneham* v. *Ocean, Railway and General Accident Insurance Co.* (8); *In re Bradley and Essex and Suffolk Accident Indemnity Society* (9)).

[RICH J. referred to *Worsley* v. *Wood* (10).]

(1) (1908) 5 C.L.R. 533.
(2) (1862) 1 S.C.R. (N.S.W.) 89.
(3) (1884) 5 L.R. (N.S.W.) (L.) 35.
(4) (1893) 14 L.R. (N.S.W.) (L.) 102; 9 W.N. (N.S.W.) 142.
(5) (1899) 20 L.R. (N.S.W.) (L.) 153.
(6) (1880) 5 App. Cas. 911.
(7) (1907) 2 K.B. 798, at p. 812.
(8) (1887) 19 Q.B.D. 237.
(9) (1912) 1 K.B. 415.
(10) (1796) 6 T.R. 710; 101 E.R. 785.

H. C. OF A. 1938. L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

Compliance with clause 8 (*b*) was waived (*Salmond and Winfield* on *Contracts*, 1st ed. (1927), p. 273). A repudiation may amount to a waiver. Time for performance was extended indefinitely; while it was running the company refused to pay, and this excused further performance (*Leake* on *Contracts*, 8th ed. (1931), p. 501; *In re Coleman's Depositories Ltd. and Life and Health Assurance Association* (1); *Re Morphett* (2); *Sandringham Corporation* v. *Rayment* (3); *Shiells* v. *Scottish Assurance Corporation Ltd.* (4); *Welford and Otter-Barry's Fire Insurance*, 2nd ed. (1921), pp. 127, 278, and note *q*; *Porter's Laws of Insurance*, 6th ed. (1921), p. 198; *Bunyon* on *Fire Insurance*, 7th ed. (1923), p. 197; *Sunderling* on *Automobile Insurance*, pp. 209, 210). The particulars given were sufficient to comply with clause 8 (*b*), but in any event the statement was good as to some items. [He referred to *Michel* v. *Colonial Insurance Co. of New Zealand* (5).] The company knew what books the respondents kept before it issued the policy with the attached slips, one of which required stock and sales books to be kept and entered up regularly and not less frequently than once a week. The company could not have intended to issue a policy which was void *ab initio*. The contract was to issue an ordinary policy, and the slips are not part of the ordinary policy which was contracted for. The clauses contained in the slips are on their face intended to be conditions going to the root of the contract and are not intended to be conditions precedent to liability. The company has affirmed the contract and cannot now use these conditions as entitling it to repudiate the contract (*Miller* v. *L'Union Fire, Accident and General Insurance Co. Ltd.* (6)). The slips were not indorsed on the policy within the meaning of the proviso therein providing that the insurance effected by the policy was subject to the conditions and memoranda indorsed thereon. An indorsement means something written on the back of the document (*In re Thornbury Division of Gloucestershire Election Petition*; *Ackers* v. *Howard* (7)). The terms on the slip should not be treated as indorsed on

(1) (1907) 2 K.B., at p. 805.
(2) (1845) 2 Dowl. & L. 967.
(3) (1928) 40 C.L.R. 510, at p. 527.
(4) (1889) 16 Rettie 1014.
(5) (1885) 2 Q.L.J. 105.
(6) Unreported. (Supreme Court of Victoria, 24th July 1936.)
(7) (1886) 16 Q.B.D. 739, at pp. 744, 751.

the policy. The clause on the slip is not a condition precedent (*Morison* on *Rescission of Contracts* (1916), pp. 53, 54; *Dumpor's Case* (1); *Hemmings* v. *Sceptre Life Association Ltd.* (2)). There was an election by the company to affirm the contract contained in the policy. As to the breach of the clause to keep "proper stock and sales records": These are not legal terms (*In re Bradley and Essex and Suffolk Accident Indemnity Society* (3); *Miller's Case* (4)). The respondents supplied sufficient evidence of the keeping of proper books. What are proper stock books is a question for the jury. The provision that the insurance shall not commence until the premiums are actually paid conflicts with the other terms of the policy, which provide for a retrospective protection, and is, therefore, void.

Fullagar K.C., in reply. The policy contains the terms of the only contract that the plaintiffs can establish. The proposal is not a contract. The proposal is an offer; the policy is a counter-offer, and the plaintiffs could have rejected it if they had objected to its terms. The slips attached to the policy prima facie formed part of the policy (*Bensaude* v. *Thames and Mersey Marine Insurance Co.* (5)). The term in the slip relating to the keeping of books is a condition precedent. *Miller's Case* (4) is wrongly decided. No proper books of stock have, in fact, been kept.

Cur. adv. vult.

Mar. 18.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal by special leave from a judgment of the Full Court of the Supreme Court of Victoria ordering a new trial in an action upon a contract of insurance against theft.

The defendant company relied upon the non-performance by the plaintiffs of certain alleged conditions precedent. The plaintiffs replied that the provisions relied upon were not conditions precedent, that, if they were conditions precedent, they had been performed, and that,

(1) (1601) Smith's Leading Cases, 13th ed. (1929), vol. I., p. 35.
(2) (1905) 1 Ch. 365.
(3) (1912) 1 K.B. 415, at p. 433.
(4) Unreported. (Supreme Court of Victoria, 24th July 1936.)
(5) (1897) A.C. 609, at p. 612.

H. C. OF A. 1938.

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

Latham C.J.

if they had not been performed, performance had been waived by the defendant. The learned trial judge held that there was no evidence that a certain condition precedent had been performed and that there was no evidence that performance of it had been waived. He, therefore, directed a verdict for the defendant. The Full Court held, by a majority, that the condition in question was capable of performance *pro tanto*, that it had been performed in part, and that there should, therefore, be a new trial.

The condition which was the basis of the judgments in the Supreme Court was in the following terms :—" 8. Upon the happening of any event giving rise or likely to give rise to a claim under this policy the insured shall . . . (*b*) within seven days from the date of such notice (unless the company has in writing agreed to extend such period) deliver to the company a detailed statement in writing of the loss or damage, with an estimate of the market value of each article lost, and the amount of damage sustained, excluding profit of any kind." The policy which contained this provision had not been issued nor had any premium been paid when the alleged loss took place, but it is not disputed by the plaintiffs that this clause formed part of the contract between the parties. That contract was constituted by a proposal and an acceptance letter, followed by payment and receipt of a premium. The proposal contained an agreement to accept " the company's policy subject to the terms and conditions contained therein." It is not disputed that clause 8 (*b*) is a clause contained in the ordinary form of the company's policy—and in the policy subsequently issued to the plaintiffs.

That form contains a proviso " that the insurance hereby made is and shall be subject to the conditions and to the memoranda, if any, indorsed hereon in like manner as if the same were respectively repeated and incorporated herein, and compliance with such conditions and memoranda, and each of them, shall be a condition precedent to the right of the insured to sue or recover hereunder." The condition mentioned is indorsed on the policy. Some of the clauses indorsed on the policy are, however, not capable of being construed as conditions precedent to the right of the insured to sue or recover under the policy. Some provisions relate to such

matters as limitation of risk and reinstatement, and cannot operate as conditions precedent to suing or recovery. This cannot be said of clause 8 (*b*). It is true that pars. *a* and *e* of clause 8 expressly provide that no compensation shall be payable or claim be recoverable unless they are performed. This feature is also found in other clauses, such as 12 (arbitration) and 13 (limitation of time for action). An argument is based upon these facts to the effect that clauses which do not in their own terms provide that they are conditions precedent should therefore be construed as not being conditions precedent, though they might nevertheless be conditions a breach of which would entitle the insurer to rescind the whole contract. The insurer did not purport to rescind the contract on account of any alleged breach of clause 8 (*b*), and it is contended that therefore a breach of this provision cannot be relied upon as a defence to the plaintiffs' claim. But there is nothing in the character of clause 8 (*b*) which makes this provision incapable of being a condition precedent. On the contrary, it is fully capable of being such a condition. In view of the importance of the prompt supply of information in order to verify allegations of theft and to give opportunity for recovery of stolen goods, there is every reason for giving effect to this clause as a condition on account of its own character, and there is no reason for not giving effect, in the case of this clause, to the proviso that indorsed conditions shall be conditions precedent. What Lord *Watson* said in *London Guarantie Co.* v. *Fearnley* (1) is applicable : " When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a court of law ought not to enforce it, or to be *sua natura* incapable of being made a condition precedent." Thus, clause 8 (*b*) should be regarded as a condition precedent.

The requirement that " a detailed statement in writing of the loss or damage " shall be delivered is a provision the effect of which must vary with the circumstances to which it is applied. The degree of detail required in the case of a theft of jewellery would be greater than in the case of a theft of a quantity of coal. This part

(1) (1880) 5 App. Cas., at p. 919.

H. C. OF A. 1938.

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

Latham C.J.

of the clause is satisfied if the details given are sufficient to show what the loss or damage is upon which the claim is based, so that it may be reasonably practicable to ascertain its character and amount and to make it possible to check possible exaggeration or deliberate falsity.

In the present case the articles alleged to have been stolen consisted of a large number of articles of men's, women's and children's clothing which were contained in a motor car. The statements supplied by the plaintiff did not specify any articles whatever as being lost or damaged. They showed, when read with other documents, such as invoices and cheques, to which they referred, (1) amount of invoices for specified goods, (2) moneys received by credit sales for certain of those goods, (3) moneys received for cash sales of unspecified goods included in the goods referred to under 1, and (4) a balance representing the deficiency of total credit and cash receipts as compared with the total of the invoice prices.

There is nowhere, except in two cases to which separate reference will be made, any statement that any particular article was lost. The information given in the statements only shows that the unsold goods, whatever they were, would have to be sold for the amount of the balance in order to bring the total receipts up to the total of the invoice prices. The statements do not state and do not make it possible to discover whether any single article of the goods not sold on credit had been sold for cash or had not been sold at all. Thus, the statement, though it supplies details of certain dealings, is not a detailed statement of loss or damage.

Condition 8 (*b*) also requires an estimate of the market value of each article lost. The articles lost are not shown in the statements delivered, and there are not any estimates of the value of each article lost.

Thus, the plaintiffs did not comply with this condition precedent. As both *Lowe* J. and the Full Court have held, there was no waiver of this condition—but an insistence upon performance of it. There was no evidence that performance of this condition, except as to time, had been excused by the defendant.

Accordingly, the judgment of *Lowe* J. must be upheld unless, as the majority of the Full Court held, the condition can be performed

pro tanto. The statements delivered to the defendant did state that certain specified samples of stated values and eight men's leather coats of stated values were lost.

If the provision in the policy had been that the insured could recover only in respect of the loss of articles as to which the required details were given, the view of the Full Court would plainly have been correct. But condition 8 (*b*) is not expressed in such language. Reference to its terms shows that the statement required must state in detail each article lost and its estimated market value. If this is not done, the condition has not been performed, and the insured cannot recover. There is no general principle which can be applied so as to bring about the result that if the condition is partly performed, part of the damage can be recovered. Particularly in the case of theft, there are obvious reasons why the insurer may desire to know the extent and magnitude, ascertained by a full statement of details, of the loss which is stated to have taken place. Thus, both the words of the condition itself and a consideration of its purpose support the view that the condition is not one which is capable of relevant partial performance.

But it is further argued that the claim made in this case, which is made under six headings, should be regarded as six claims and that condition 8 (*b*) should be applied separately in respect of each of those six claims. Thus, there is a claim with adequate details in respect of, for example, eight men's leather coats. The condition is plainly satisfied, it is urged, with respect to those coats, and the plaintiffs should recover in respect of them even if they fail in respect of other claims.

The difficulty in adopting this construction of the clause arises from the clear terms of the introductory words which precede all the sub-clauses of clause 8. These words are : " Upon the happening of any event giving rise or likely to give rise to a claim under this policy " the insured shall " (*b*) within seven days . . . deliver to the company a detailed statement in writing of the loss or damage." The loss or damage referred to is the loss or damage, whatever it may be, resulting from the happening of the event referred to in the introductory words—not the loss or damage in respect of which a claim is made. So, also, the words " each article lost " must be

H. C. OF A. 1938.

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

Latham C.J.

taken in their natural meaning, and cannot be read as meaning "those articles lost in respect of which a claim is made." This construction of the clause is supported by a consideration of its purpose, to which reference has already been made. Complete information as to articles stolen may assist in the discovery of the thief and recovery of the goods. If the information concerning the theft given to the insurer is limited to the articles in respect of which the insured elects to make a claim, there is not the same probability of providing useful clues.

It is true that this construction of the clause may work hardship where there is an accidental or unavoidable defect in the statement made under the clause and where that defect cannot be ignored under the *de minimis* principle. But this circumstance cannot be relied upon so as to prevent the court from construing and applying the clause according to its actual terms.

It is unnecessary to consider other questions which were raised, because this view of clause 8 (*b*) is fatal to the plaintiffs' case.

For these reasons the judgment of *Lowe* J. was right. The judgment of the Full Court should be set aside and the judgment of *Lowe* J. should be restored. The plaintiff should pay the costs of the appeal to the Full Court. The defendant undertook, upon the application for special leave to appeal, to abide by any order as to costs which this court might make. The defendant has succeeded upon the appeal, but, in view of the undertaking given, there should, in my opinion, be no order as to the costs of the appeal to this court.

RICH J. I have had the advantage of reading the judgment of the Chief Justice and have nothing to add to it.

STARKE J. The respondents to this appeal brought an action in the Supreme Court of Victoria against the appellant upon a contract of insurance against burglary. One of the terms of the contract was that upon the happening of any event giving rise or likely to give rise to a claim under the contract the insured should forthwith give notice thereof in writing to the company stating the circumstances of the case and within seven days from the date of such notice (unless the company in writing agreed to extend such period)

deliver to the company a detailed statement in writing of the loss or damage, with an estimate of the market value of each article lost, and the amount of damage sustained, excluding profit of any kind. And it was agreed that the insurance made was and should be subject to the conditions and to the memoranda, if any, indorsed on the contract in like manner as if the same were respectively repeated and incorporated in the contract, and compliance with such conditions and memoranda, and each of them, should be a condition precedent to the right of the insured to sue or recover under the contract.

The action was tried before *Lowe* J. and a jury. Evidence was led that the respondent Klinker Knitting Mills Pty. Ltd. was a company manufacturing clothing and that the respondent Komesarook was a traveller engaged in selling clothing and procuring orders on commission for the company and also in selling goods on his own behalf. Evidence was also led that goods belonging to the company and in the possession of Komesarook and also goods belonging to Komesarook himself were stolen from a motor vehicle used by Komesarook and that these goods were covered by the contract of insurance and within the risk assured. A declaration and particulars of the loss sustained were given to the appellant within a few days of the loss. The heads of loss were set out in such manner that a jury might conclude that it was "a detailed statement in writing of the loss or damage." But it did not contain an estimate of the market value of each article lost and the amount of damage sustained, excluding profit of any kind. The declaration gave the ledger account of Komesarook with the company. The debit side of the account coupled with the invoice numbers, which were referred to, particularized the goods supplied to Komesarook and the prices charged to him. The credit side of the account coupled with invoices which were referred to particularized some of the goods that were sold by Komesarook and the amounts paid by him to the company. The invoices, I should add, were subsequently dissected by the respondents and supplied to the appellant. But nearly one half of the amounts credited to Komesarook consists of cheques or cash paid to the company by him. Further particulars were given of cash sales by Komesarook corresponding with the credits in his ledger account with the names and

H. C. OF A. 1938.

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

Starke J.

addresses of the various purchasers. But the account does not particularize either the kind or quantity of goods sold to these purchasers or refer to any invoices or other documents identifying the goods. The balance to the debit of Komesarook in this ledger account amounted to £222, which is part of the claim of the respondents. The declaration also supplied a samples account of Komesarook with the company in which he was debited with a sum of £23. This account particularizes the samples supplied to Komesarook and the amount debited to him in respect of each entry. It does not purport to give the market value of each article, excluding profit of any kind, though it seems probable that is what the amounts really represent. The declaration and particulars also contained a statement of a loss sustained by Komesarook in respect of his own goods, amounting to £102 14s. The main item, ladies' underwear, &c., purchased from Novic and Pogorelske, £52 9s., balance of account in hand as per invoices, is only a balance of account and does not particularize the goods in hand or give any estimate of the market value of each article lost or the amount of damage sustained, excluding profits of any kind. Another item, men's wear estimated £20, is not particularized in any way. But two other items, 8 leather coats at £2 7s. 6d. and 30/35 frocks, average 7s. 6d., seem, taken alone, a substantial compliance with the condition.

On this evidence *Lowe* J. directed a verdict for the appellant, the defendant in the action. On appeal to the Supreme Court of Victoria a new trial was ordered. *Mann* C.J. was of opinion that there was evidence fit to be submitted to the jury that the plaintiff had furnished the particulars required by the contract in respect of (1) £23 worth of samples; (2) £69 worth of articles details of which were contained in an invoice delivered on 13th February; (3) 8 leather coats of the value of £2 7s. 6d. The item £69 refers to an item debited in the ledger account under date 13th June, invoice 362, £69 17s. 7d., supplied immediately before the date of the alleged theft on 15th June. Special leave to appeal to this court was granted, and this appeal, so instituted, is now before us.

The object of the condition which has been set out is to secure to the insurer a full statement of the loss claimed so that he may have notice and the opportunity to test its correctness. It was

argued that the condition is not, in its context, a condition precedent to the respondents' right to recover in this action. The only reason given was that the contract contains a number of conditions, e.g., one limiting the risks covered by the contract, which cannot in their nature be conditions precedent to a right to recover. But the condition relied upon in this case is in its nature capable of being a condition precedent to a right to recover, and the contract explicitly provides that it " shall be a condition precedent to the right of the insured to sue and recover " under the contract.

Next it was argued, supporting the opinion of the learned Chief Justice, that the condition must be construed as admitting of compliance *pro tanto* so that a claim would be enforceable at least to the extent to which it had been particularized under the condition. It is to be observed in the present case that there were really two claims, one by the company and by Komesarook in respect of their rights and interests in the goods belonging to the company and held on commission by Komesarook or supplied to him as samples, the other by Komesarook for a loss sustained in respect of his own goods. These claims were made in the same document, but they are separate and independent claims and must be so dealt with. But the words of the condition cannot, I think, bear the construction put upon them by the Chief Justice. The condition requires that a detailed statement of the total loss or damage sustained shall be delivered. A statement which sets forth part only of the loss or damage sustained does not comply with the requirements of the condition. Moreover, the statement must give an estimate of the market value of each article lost and the amount of damage sustained, excluding profit of any kind. Further, it was argued that the respondents —the plaintiffs in the action—had complied substantially with the condition (*Mason* v. *Harvey* (1)). The respondent had, I think, given the appellant sufficient information to enable any business man to test the correctness of the claim. But that is not enough. The condition explicitly provides that the insured shall deliver a detailed statement of the loss or damages with an estimate of the market value of each article lost and the amount of damage sustained, excluding profit of any kind. The condition must be construed

(1) (1853) 8 Ex. 819 ; 155 E.R. 1585.

H. C. OF A. 1938. L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD. Starke J.

reasonably having regard to its object. The description of the articles lost and their market value depend upon the circumstances of the particular case. A collective description might in some cases suffice, e.g., 100 doz. shirts of a stated market value, whilst in other cases a precise description of a particular article might be required (Cf. *Boyle's Sons* v. *Insurance Co.* (1)).

The question whether a statement required by the condition has been delivered is, within reason, a question of fact (*Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand* (2)). But in the present case the principal claim in each case was in respect of a balance of account, and in neither can it be said that there was a detailed statement of the loss or damage with an estimate of the market value of each article lost, described collectively or separately, or of the amount of damage sustained.

Finally, it was suggested that there had been a waiver on the part of the appellant of the condition. No jury could, on the evidence, reasonably find such a verdict. The appellant throughout insisted upon the respondents complying with the condition even though prepared to accept a statement delivered after the time fixed by the condition.

The appellant raised some further objections to the order for a new trial: namely, that the risk never attached owing to non-payment of the premium before the theft and that there was a breach of a warranty to keep sale and stock records in stock and sales books. But it is unnecessary to consider these matters in the view I take of the condition already discussed.

The appeal should be allowed and the judgment entered by *Lowe* J. restored.

EVATT J. The plaintiff has been quite unable to avoid the adverse operation upon his case of clause 8 (*b*) of the conditions of the printed policy.

The plaintiff put an alternative case, by which he relied upon the official letter of acceptance which was dated May 28th 1938, prior to the alleged loss (June 14th 1935); which loss was prior to the issue of the policy (July 3rd, 1935, although dated June 6th,

(1) (1895) 169 Penns. S.R. 349, at p. 356. (2) (1896) A.C. 372.

1935). But, assuming in the plaintiff's favour that he can rely upon the official letter of acceptance as constituting a definitive acceptance of the proposal, the terms of the letter make the contract subject to the terms of the defendant company's burglary policy. Thus, the plaintiff was bound to show what that policy was; and there is no evidence to show the contrary of the fact that the policy as issued on July 3rd was the ordinary burglary policy of the defendant company. Thus, clause 8 (*b*) became applicable.

Again, the court was presented with an argument that the terms of clause 8 (*b*) were not a condition precedent to the defendant's liability. But conditions of the character typified by that clause are in themselves apt to operate as conditions precedent to liability, the policy expressly says that the indorsed conditions are conditions precedent to liability, and there is overwhelming authority that in similar circumstances conditions of a like character have always been treated as conditions precedent to liability.

Next, the plaintiff says that condition 8 (*b*) was "waived" by the defendant in the sense that performance of the duty imposed by the condition was excused. On the contrary, however, the defendant always insisted upon performance of the obligation imposed by the condition although, no doubt, the defendant must be taken as having agreed to extend the prescribed time for its performance. But, by granting so limited a concession, the defendant cannot be taken as having altogether excused performance of the substantial obligation.

Further, the plaintiff contends that he complied with clause 8 (*b*). What the clause requires is the delivery of "a detailed statement in writing of the loss or damage" together with "an estimate of the market value of each article lost, and the amount of damage sustained, excluding profit of any kind."

Did the plaintiff deliver such a statement? Whether he did so would ordinarily be a question of fact for the jury to determine. But the learned trial judge had the particulars before him, and the question is whether there was any evidence upon which a jury could reasonably find that the particulars so delivered answered the description in clause 8 (*b*). In my opinion, what the clause requires is reasonably plain. There must be a written description of what

H. C. OF A. 1938.

L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD.

Evatt J.

was lost by theft sufficiently itemized to be regarded in the circumstances as " detailed " and accompanied by estimates of value and loss applicable to each of the lost articles. No one doubts that such a requirement is a very onerous one. But equally no one doubts that what is " detailed " has to be determined in the light of all the circumstances, including the nature of the trade in which the goods are being used, the nature of the goods themselves, the method of packing them in certain parcels or quantities and so forth. For instance, the statement that " I have lost by the theft two dozen men's leather coats valued at £2 each " would, in the case of the plaintiff's business, be regarded as satisfying the condition.

But the documents furnished to the company by the plaintiff were not and could not possibly be regarded as being detailed statements of the loss alleged to have been sustained. The plaintiff's case is sufficiently tested by reference to the documents furnished in relation to the first part of the claim, namely, £222 0s. 9d. From the documents a detailed statement could be made up of the goods purchased by the plaintiff between September 8th, 1934, and June 13th, 1935. If all such goods had been the subject of the alleged loss, then a detailed statement of the loss was forthcoming. But, upon their face, the documents furnished show that, out of the goods so purchased, costing £857 in all, a large quantity of goods had been sold and £635 had been received from purchasers, the balance of account being £222 0s. 9d. The statement furnished also asserts that, of the sum of £635 referable to purchases, no less than £342 represented cash sales. But the goods delivered by the plaintiff upon such cash sales were not specified in any way whatsoever. Thus, it is perfectly consistent with the documents furnished that every one of the goods purchased between September 8th, 1934, and June 13th, 1935, was disposed of by delivery to customers and that the £222 0s. 9d. balance was no more than the loss resulting after all the goods had been sold. At any rate it is utterly impossible to tell from the statement what article or articles were alleged to be in the plaintiff's possession at the time of the alleged loss. It is nothing to the point that the plaintiff might supplement the written statement by giving sworn evidence at the trial that, at the time of the theft, he had in his possession goods amounting in all to the

value of £222. Clause 8 (*b*) required that, before the trial and while the investigations were proceeding, he should state what he had lost and state it in detail. In my opinion the evidence shows that he did not by his written statements even purport to give the aggregate quantity of articles which he lost, let alone the classes to which the articles belonged, and the number and value of each article in the class or even of each class. For these reasons it was impossible for a jury to find that, in respect of the £222 0s. 9d., portion of the plaintiff's claim, there had been compliance with clause 8 (*b*).

Finally, the plaintiff contended that, in some respects at least, he had complied with clause 8 (*b*) and that, so long as he was able to prove that, in respect of any portion of the loss sustained, he had furnished the necessary detailed statement, he would be entitled to recover in respect of such portion of the total loss. This argument was accepted by the majority of the Full Court, *Mann* C.J. putting the case thus :—

> "I agree with his opinion that there was no evidence that the plaintiff had ever delivered to the company a detailed statement of the loss for which he claimed with an estimate of the market value of each article alleged to have been lost, but in my opinion the condition in question must be construed as admitting of compliance *pro tanto* so that a claim would be enforceable at least to the extent to which it had been particularized under this condition. Any other construction would, I think, lead to absurdly unreasonable results."

Whether the construction in question is permissible depends upon the language used in clause 8 (*b*) and upon its general scope and purpose. The language seems to me to be quite intractable. The obligation imposed by the clause is, upon the happening of any event giving rise to a claim, to deliver to the insurance company a detailed statement of the loss or damage sustained. There is only one obligation. The object of insisting upon its performance is that the company shall, *inter alia*, be enabled to determine upon the genuineness of the claim as well as upon its extent. I do not see how it is possible to construe the words of the clause as though it was referring to a detailed statement of any portion of the loss or damage sustained. There has been a theft. What the company requires is to know and to know with some precision what has been lost by the theft. By obtaining full information the company may be able to recover all the goods stolen. The failure to give detailed information as to a substantial portion of the loss may be the means

H. C. OF A. 1938. L'UNION FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD. v. KLINKER KNITTING MILLS PTY. LTD. Evatt J.

of preventing recovery even of the goods which have been specified in detail and for which alone the assured seeks to recover compensation. In my opinion the obligation is indivisible, and compliance *pro tanto* with it is not an admissible interpretation. Such an interpretation finds no support in any of the long line of cases dealing with similar clauses.

The above reasoning is sufficient to dispose of the appeal, but, in view of the elaborate argument of counsel, perhaps I should add that in my opinion the fact that the slips attached to the policy are attached to the front of it, not the back of it, does not prevent their being " memoranda . . . indorsed hereon " within the meaning of the policy.

In relation to modern business documents, the word " indorsed " does not invariably suggest the back of a document rather than the usually far more prominent position upon the face of the document. Indeed, here, having regard to the way in which the insurance policy was usually folded, it is not a document which is easily divisible into a back and a front.

If the attached condition providing for the keeping by the assured of stock and sales books is a memorandum indorsed on the policy, as in my opinion it is, it is equally plain that the condition was not complied with by the plaintiff; but such compliance was also made a condition precedent to the defendant's liability to pay. As the provision as to the keeping of such books is in itself apt to operate as a condition precedent, so the proved non-compliance was fatal to the plaintiff's case.

For these reasons the appeal should be allowed, the order of the Full Court discharged, and the judgment for the defendant as entered by *Lowe* J. should be restored.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Appeal allowed. Judgment of Full Court set aside. Judgment of Lowe J. restored. Plaintiff to pay costs of appeal to Full Court. No order as to costs of appeal to High Court.

Solicitors for the appellant, *Bullen & Burt.*
Solicitor for the respondent, *Maurice Goldberg.*

H. D. W.