

Unexplained Loss or Mysterious Disappearance

By François Duprat



In *Carmen Jewellery Manufacturing Inc. v. AXA Insurance (Canada)*, REJB-24061, the Court of Appeal specified the burden of proof imposed upon an insured claiming compensation for property whose loss or disappearance is unexplained or mysterious.

The Facts

Carmen Jewellery manufactures and sells gold jewellery. After a partially cancelled sale to an American company, Carmen Jewellery agreed to take back part of its merchandise. The return of the jewellery took place in Las Vegas during a trade show at which Carmen Jewellery had a booth. Having briefly checked the contents of the brown bag that had been delivered to him and having estimated the weight of the jewellery at approximately 2 kilos (it was expected that 1913 grams would be returned), the president of the insured and his employee returned to Montreal by plane the following day. Both witnesses stated that they had seen the bag for the last time when they passed through customs; it was in the trolley used to carry their luggage to the taxi. They could not explain its mysterious disappearance: theft or loss?

Carmen Jewellery claimed the value of the jewellery from its all-risk insurer which argued, firstly, that the insured had not established the occurrence of the covered risk, namely the theft. Alternatively, the insurer raised the application of the “unexplained loss or mysterious disappearance” exclusion. The insurer also argued that there was no evidence as to the quantity of gold actually lost.

The trial judge dismissed the insured’s action on the grounds that there was insufficient evidence of a loss and of the value and quantity of the missing jewellery.

Mr. Justice Philippon, writing for the Court, allowed the appeal. He was of the view that the insured merely needed to show the occurrence of an unforeseen event which constituted a covered risk. Therefore, he agreed that there had been a loss of jewellery and he deemed acceptable the estimate of the weight made by the witnesses based upon their experience, although he subtracted 200 grams to cover a “possible

margin of error”. Given that the value of an ounce of gold had been admitted, the assessment of the loss did not present any problems.

As for the exclusionary provision, Mr. Justice Philippon considered that he was in as good a position as the trial judge to decide on its application given that the trial judge, having ruled on the prior issue, namely the existence of a covered claim, had not ruled on the exclusionary provision.

According to Mr. Justice Philippon, there was no reason to believe that the bag had fallen off the trolley; however, it could have been stolen or forgotten on the trolley. In his view, not only was theft a possibility, but it was the most likely explanation, so the disappearance was not mysterious within the meaning of the insurance policy. He therefore concluded as follows:

[TRANSLATION] “[35] In summary, the fact that there are two possible explanations does not necessarily lead to the conclusion that the loss is unexplained or that this is a mysterious disappearance if the events described are well defined as to time and place. In any event, in this case, the sequence of events provides an explanation for the loss and allows one to solve the mystery and determine which possibility is the most likely. Therefore, the appellant has proved its loss and has provided a plausible and logical explanation.”

Will *any* plausible explanation regarding the disappearance of an item be sufficient to set aside such a provision, even if we can never determine what really happened? Only time will tell.

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