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No. 52 of 1948.

# In the Privy Council.

UNIVERSITY OF LONDON W.C.1. -3 OCT 1956 INSTITUTE OF ADVANCED LEGAL STUDIES
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**ON APPEAL**  
*FROM THE SUPREME COURT OF CANADA.*

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44234

BETWEEN

ABASAND OILS LIMITED (Plaintiff) - *Appellant*

AND

THE BOILER INSPECTION AND INSURANCE COMPANY OF CANADA (Defendant) *Respondent.*

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## Case for the Appellant.

1. This is an appeal from a judgment of the Supreme Court of Canada dated the 13th April, 1948, which by a majority of three judges to two (Rinfret, C.J.C., Rand and Locke, J.J., Taschereau and Estey, J.J., dissenting) reversed the judgment of the Appellate Division of the Supreme Court of Alberta dated the 20th December, 1946, which by a majority of three judges to two (Harvey, C.J., and Ford and Macdonald, J.J.A., O'Connor and Parlee, J.J.A., dissenting) had affirmed a judgment of Shepherd, J., dated the 25th July, 1945, awarding the Appellants \$100,000 with costs under a policy of insurance issued to the Appellant by the Respondent.

2. The facts found by the learned trial judge and accepted by both appellate courts may be summarised as follows :

On the 21st November, 1941, a large portion of the Appellant's plant and equipment at Waterways, Alberta, used for extracting and refining products from bitumous sand, was destroyed as a result of an explosion of gas in the furnace of a boiler which seriously damaged the boiler and which caused a flame to flash back over the top of the gas line going into the boiler and creep up a wooden post in front of the boiler 6 or 8 feet away. The post caught fire and the fire could not be brought under control, with the result that the building was burnt down. The boiler could not be replaced or repaired, nor could the building be rebuilt, for more than 100 days. Both boiler and building were essential to the operation of the plant which consequently remained inactive for more than 100 days, in fact from the 21st November, 1941, until after the 4th June, 1942, when repairs to the boiler were completed.

3. At the time of the accident the Appellant was covered by insurance on the terms of an accident policy in respect of boilers, including

RECORD

p. 352.

p. 346

p. 328 ll. 26-43

p. 334 ll. 22-28 ;  
p. 337 l. 42-p. 338  
l. 4 ; p. 338, l. 33 ;  
p. 341, ll. 23-27 ;  
p. 353, ll. 5-17 ;  
p. 359, l. 20

p. 321, l. 28-p. 324,  
l. 9

p. 326, ll. 7-37

p. 324, l. 33-p. 325,  
l. 11.

p. 328, ll. 16-19

pp. 279-279j

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p. 280a  
p. 304, ll. 25-36  
p. 279g

furnaces, issued to the Appellant by the Respondent in respect of the period from the 1st November, 1940, to the 1st November, 1941, which was extended to include another 30 days. The Respondent duly paid a loss under the terms of the policy in respect of damage to property but disputed liability under the terms of an indorsement headed "Use and Occupancy (Business)" which was printed on a separate sheet attached to and expressed to form part of the policy. The indorsement was signed on its face by the Respondent, and on its face had the following amongst irrelevant other provisions :

A. In consideration of \$—— *the* —— premium, the Company hereby agrees to pay the Assured *ONE THOUSAND* Dollars (\$1,000.00), herein called the Daily Indemnity, for each day of Total Prevention of Business on the Premises described as *Oil Refinery*, and located at *Waterways, Near McMurray Alberta*, caused solely by an accident (occurring while this endorsement is in effect) to an object, covered by any of the Schedules of this policy excluding Schedule(s) numbered (*No Schedule Excluded*, and to pay the Assured a part of the Daily Indemnity for Partial Prevention of Business on the Premises, so caused ; all subject to a Limit of Loss of *ONE HUNDRED THOUSAND . . .* Dollars (\$100,000.00) for any one accident, . . .

B. . . .

C. . . .

Paragraphs D, E, F, G, and H printed on the back of this sheet are hereby made a part of this endorsement.

The words here printed in italics are typed, and the other words are printed. " An object " means one of the boilers covered by the insurance, including its furnace. " Accident " is also defined in the indorsement.

p. 279h (clause E) ;  
p. 279c (clause B (a) and (c))  
p. 279h (clause E) ;  
p. 279c (clause C)  
p. 279h

4. The back of the indorsement sheet sets out paragraphs D to H, of which the provision most directly relevant is as follows : 30

LIMITATION OF LIABILITY

G. The Company shall not be liable for payment for any prevention of Business resulting from an accident caused by fire or by the use of water or other means to extinguish fire (nor for any prevention of Business resulting from fire outside of the object, following an accident). The Company shall not be liable for payment for any time during which Business would not or could not have been carried on if the accident had not occurred. The Company shall not be liable for payment for any prevention of Business resulting from the failure of the Assured to use due diligence and dispatch in the resumption of Business. The period of prevention shall not be limited by the date of the end of the policy period. 40

5. The question for decision is whether in the events which happened the Respondent became liable under the " Use and Occupancy (Business) " indorsement to pay \$100,000 to the Appellant. The Appellant claimed that sum by its statement of claim issued on the 3rd November, 1942,

p. 1

and the Respondent denied liability on various grounds. The case was tried by Shepherd, J., who, on the 25th July, 1945, gave judgment in the Appellant's favour for the amount claimed, with costs.

p. 3  
p. 328

6. In his judgment Shepherd, J., considered the disputes of fact, and made the findings which are summarised above in paragraph 2. He then examined the Respondent's contentions in the light of these findings. After setting out clause G of the use and occupancy indorsement, Shepherd J. dealt separately with the different matters involved in that limitation of liability, and first considered the provision that the Respondent shall not be liable for payment for any prevention of business resulting from an accident caused by fire or by the use of water or other means to extinguish fire (nor for any prevention of business resulting from fire outside of the object, following an accident). He pointed out that No. 1 boiler (in which the explosion had occurred) was necessary to the operation of the plant and as it was put out of commission by the explosion it followed that an accident to an object insured prevented the carrying on of the business. The cause was not fire or means used to extinguished fire but solely the explosion within the boiler, and apart altogether from the subsequent fire the Appellant could not have operated its plant. Shepherd J. therefore concluded that the Appellant was totally prevented from carrying on business solely by reason of the accident to the boiler.

pp. 316-328  
p. 324, l. 15  
p. 324, l. 27-p. 325,  
l. 11

7. Shepherd J. then dealt with the second sentence of clause G providing that the Respondent should not be liable for payment for any time during which business would not or could not have been carried on if the accident had not occurred. But for the accident there would have been no stoppage, and the evidence did not show that there would in any case have been a shutdown. Neither, in his opinion, did the next limitation that the Respondent should not be liable for payment for prevention of business from the failure of the Appellant to use diligence in the resumption of business, affect the case, for there was in fact no such failure. The period of total prevention of business caused solely by the accident far exceeded 100 days, and therefore the Appellant was entitled to the maximum amount recoverable under the policy \$100,000.

p. 325, l. 12-p. 326,  
l. 5  
p. 326, ll. 7-44  
p. 328, ll. 4-21

8. In the Appellate Division, Macdonald, J.A., concurred in the judgment of Harvey, C.J., who agreed with Shepherd, J., in the conclusion reached and substantially in his reasons therefor. Harvey, C.J., thought that *Stanley v. The Western Insurance Company* (1868) L.R. 3 Ex. 71, approved by the Privy Council in *Curtis's and Harvey (Canada) Limited v. North British and Mercantile Insurance Company Limited* (1921) 1 A.C. 303 supported the view that any prevention of business due to the fire caused by the explosion was part of the prevention of business caused by the accident, and the word "solely" does not exclude anything caused by the accident. He agreed with Shepherd, J., about the exceptions from coverage in clause G, but was doubtful as to the meaning and application of the condition that there is no liability for prevention of business resulting from fire outside the object following an accident. He had no doubt, however, that it cannot mean that since the business could not have been carried on by reason of the fire damage, the Respondent was relieved from liability in respect of damage to the boiler by explosion.

p. 336, l. 43  
p. 334, ll. 17-21  
p. 335, ll. 11-33  
p. 335, ll. 34-42  
p. 335, l. 42-p. 336,  
l. 30

p. 337, l. 38-p. 338,  
l. 4

p. 338, ll. 11-16

p. 338, ll. 17-24

p. 338, ll. 25-41

p. 345, l. 45

p. 341, l. 23

p. 342, l. 40-p. 343,  
l. 8

p. 343, l. 9-p. 345,  
l. 33

9. Ford, J.A., agreed that the appeal should be dismissed as there was evidence to support the finding that the Appellant was prevented by reason of the accident to the boiler, i.e., by the explosion, from carrying on business for at least 100 days. Ford, J.A., considered that the provision of clause G that the Respondent shall not be liable for payment for any prevention of business resulting from fire outside the object following an accident, recognises that a fire following the explosion might occur and that the time of prevention of business might be increased beyond that which would have followed as a result of the accident insured against. He also considered that the provision of clause G referring to time during which business would not or could not have been carried on if the accident had not occurred has reference to events subsequent to the accident insured against which increase the period of prevention due to the accident. This view is, he thought, supported by the rest of clause G. 10

10. Parlee, J.A., with whom O'Connor, J.A., agreed, said that the finding of the trial judge that there was an explosion in the boiler should not be disturbed. He summarised his view of the facts as follows:—

There was an accident to an object insured against in the endorsement. The object, namely, the No. 1 boiler, was not repaired until June 4th, 1942. The fire which followed the explosion also damaged the separator, which was not made ready to operate until subsequent to June 4th, 1942. The refinery could not operate until the separator was repaired. Thus, the operation of the separator was essential to the continuance of the plaintiff's business. There would have been a total prevention of the plaintiff's business even if the insured boiler was not damaged and was capable of performing its proper functions. The operation of the No. 1 boiler was essential to the continuance of the plaintiff's business and the damage to the boiler was sufficient totally to prevent the plaintiff's business being carried on until the boiler was repaired. 20 30

Parlee, J.A., then examined the endorsement and criticised the reasoning of the learned trial judge. He thought that both the explosion and fire were caused by an excessive amount of fuel in the furnace, but he based on the fact that fire did result, whether or not it was caused by the explosion, his conclusion that there was not a prevention of business caused solely by an accident, since the indemnity only applied to a prevention of business which was capable of being and would have been carried on if the object, that is the boiler in this case, was capable of performing its proper functions. The Appellant could not carry on business even if the boiler was capable of being operated. There was thus, in his view, no prevention of business caused by the accident within the meaning of the endorsement. Parlee, J.A., thought that the Appellant's action should be dismissed, but as the Respondent failed on several issues at trial and on appeal, he thought that the Respondent should only recover part of its taxed costs. 40

11. The Appellant submits that Parlee, J.A., is quite wrong in saying that there would have been a total prevention of the Appellant's business even if the insured boiler was not damaged and that therefore the prevention of the business was not caused solely by the accident. The

fire cannot be treated as an independent cause, although the Appellant's claim is only for the prevention of business caused by the damage to the boiler from explosion. The Appellant submits that the wording of clause G as a whole is inconsistent with the meaning which Parlee, J.A., seeks to give to it.

12. In the Supreme Court of Canada Rinfret, C.J., and Rand and Locke, J.J., held that the Appellant's action should be dismissed with costs throughout, notwithstanding the Appellant's success on several distinct issues. Taschereau and Estey, J.J., were of opinion that the judgment in the Appellant's favour should be affirmed and the appeal dismissed with costs.

13. The reasons for judgment for the majority were delivered by Rand, J., who set out the concurrent findings of fact which should not be disturbed, and stated that it was only necessary to consider the construction of the policy in relation to the destruction of the building by fire. Rand, J., then set out material provisions of the policy and his summary of the Appellant's contention. He thought the vital words are "caused solely by an accident" which originates in explosion. In his view "solely" might refer only to concurrent causes unconnected with "accident" or also to new causes resulting from accident. The first item of clause G was clearly an exception from the generality of clause A. The next item is parenthetical, and Rand, J., thought this showed a clear intention to hark back to clause A and to make explicit what was implied by the words "solely by an accident" so as to make it perfectly clear that under clause A a fire caused by an explosion is a fire following an accident and not within the accident, so that "accident" is confined to explosive action. Rand, J., thought the parenthesis thus declared the meaning of clause A, restricting liability to purely explosive effects. He distinguished between "caused by explosion" which would include a resulting fire, and "caused solely by explosion" which in his view would exclude such a fire. The rest of clause G confirmed him in thinking that apart from the first exception clause G is an explanation of clause A. Rand, J., ended his judgment by suggesting conceivable situations which confirmed him in his conclusion.

14. Taschereau, J., concurred in the reasons for judgment of Estey, J., who, after dealing with issues of fact, considered whether the established facts brought the loss due to a total prevention of business within the Use and Occupancy Endorsement. In his view, the total prevention of business was caused solely by the explosion which cracked the boiler and set the fire. If clause A stood alone the issue would be concluded upon the principles of causation in the Appellant's favour. The parties, however, had limited liability by clause G. Liability in the present case was not excluded by the first sentence, the parenthetical part of which relates only to an accident due to one of the causes enumerated in the sentence. Even if the parenthesis were read as an independent provision liability would not be excluded in the present case, for the explosion caused both damage to the boiler and a fire which destroyed the separation plant. Either of these results was sufficient to cause total prevention of business, but

clause G restricts the limitation to fire outside the object and leaves intact liability for total prevention of business caused by damage to the boiler even when there is a concurrent cause also sufficient to cause the total prevention of business.

15. The Appellant submits that the reasoning of Estey, J., is sound, and that the reasoning of Rand, J., is fallacious in the following respects:

(a) The authorities show that clause A would, but for the limitation of liability in clause G, insure the Appellant in respect of the prevention of business caused by fire resulting from an accident to the object, and there is no ground for treating part of clause G as an interpretation of clause A altering its natural meaning. 10

(b) Rand, J., attaches great importance to words being in parenthesis, without testing his view by considering the use of parenthesis elsewhere in the policy. When so tested his view appears, in the Appellant's submission, to be clearly untenable.

(c) The natural meaning of clause G is that it limits the liability which would otherwise arise under clause A, and Rand, J., applies it so as to control and to restrict the meaning of clause A.

(d) While recognising that "solely" in clause A might refer only to concurrent causes unconnected with an accident, Rand, J., does not apply the rule that if there is ambiguity the clause should be construed in the Appellant's favour. 20

16. The Appellant submits that clause G deals with certain specific cases of prevention of business which, while falling within clause A, are to be excluded from the Respondent's liability. Clause G is headed "Limitation of Liability" and each of the first three sentences begins "The Company shall not be liable for payment". As there could be no liability for payment unless there had been a prevention of business caused solely by an accident to an object, clause G only takes effect where there has been such a prevention of business. Moreover, the repeated words "prevention of business resulting from" indicate that clause G is dealing with certain results of an accident which has happened and which falls within clause A, which deals with causes. It is therefore wrong to say that if business is prevented by fire outside the object following an explosion that such prevention of business is not caused solely by an accident, since clause G does not restrict the meaning of clause A but only comes into operation when a prevention of business caused solely by an accident, within the meaning of clause A, has occurred. 30

17. The Appellant also calls attention to the careful distinction in wording between the first sentence of clause G, dealing with kinds of prevention of business, and the second sentence dealing with time. The Appellant submits that the first sentence does not say the Respondent shall not be liable for any time during which business is prevented by fire outside an object because it is recognised that such time might be the same time as that during which business is prevented by damage to the object. 40

18. Accordingly the Appellant submits that the judgment of the Supreme Court of Canada is wrong and should be reversed and the judgment of the learned trial judge restored for the following amongst other

### REASONS

- (1) BECAUSE the facts as concurrently found by the courts below entitle the Appellant to recover from the Respondent \$100,000.
- (2) BECAUSE within the meaning of clause A of the Use and Occupancy Endorsement there was a total prevention of the Appellant's business caused solely by an accident to an object.
- (3) BECAUSE clause G does not exclude the Respondent's liability for such prevention of business.
- (4) BECAUSE the minority of judges in the Appellate Division and the majority of judges in the Supreme Court of Canada misconstrued the policy.
- (5) BECAUSE Shepherd, J., Harvey, C.J., Ford, J.A., Macdonald, J.A., Taschereau, J., and Estey, J., rightly construed the policy.

GEO. H. STEER.

FRANK GAHAN.

In the Privy Council.

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**ON APPEAL**

*From the Supreme Court of Canada.*

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BETWEEN

**ABASAND OILS LIMITED**

(Plaintiff) - - - *Appellant*

AND

**THE BOILER INSPECTION  
AND INSURANCE COMPANY**

**OF CANADA** (Defendant) *Respondent.*

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**Case for the Appellant**

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