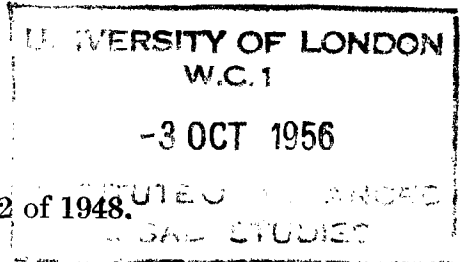


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47, 1949



In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA 44235

BETWEEN

ABASAND OILS LIMITED ... .. APPELLANT

AND

THE BOILER INSPECTION AND INSURANCE COMPANY OF CANADA ... .. RESPONDENT.

CASE FOR THE RESPONDENT

1.—This is an Appeal by special leave from a Judgment of the Supreme Court of Canada (Rinfret C.J.C., Rand and Locke JJ.) (Taschereau and Estey JJ. dissenting), dated the 13th day of April, 1948, which allowed the Respondent's appeal from the Judgment of the Supreme Court of Alberta (Appellate Division) dated the 20th day of December, 1946, which affirmed the Judgment of Shepherd J. in the Supreme Court of Alberta (Trial Division) dated the 25th day of July, 1945. In allowing the appeal, the Supreme Court of Canada dismissed the Plaintiff's action.

RECORD  
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10 2.—At all material times the Appellant owned a plant at Waterways some 200 miles north of Edmonton, in the Province of Alberta, Canada, at which plant attempts were being made to refine petroleum products from the bituminous sands found there. The operation consisted of three principal steps, namely, (A) mining sand, (B) separating the crude oil from the sand, and (C) refining the crude oil.

20 3.—The separating process was carried on in a large building (Plan Exhibit 13) in which is located Boiler No. 1. Exhibit 1 shows the building in the background, storage tanks to the left, and the separator equipment in the right middle foreground. The boiler was fired with crude oil, supplemented by dry gas obtained from the refinery when the refinery was in operation. The refining process is explained by the witness

p. 278  
p. 307  
pp. 39 e  
sub.

RECORD — Hartridge. At the conclusion of the refining process, gasoline and dry gas are separated, and the gasoline is drawn off into storage tanks and the dry gas is fed through a gas line to the furnace of the boiler where its entry into the furnace is controlled by a hand valve.

pp. 248 & 249 4.—The Refinery could not operate without the use of this boiler, nor could the separation plant. The Refinery could not operate for more than a day or two without the separation plant being in operation. The separation plant contained *inter alia* a piece of equipment known as a “Q.Z. cell,” which was an essential unit without which the separation plant could not operate. 10

p. 250 5.—On the 21st day of November, 1941, a fire occurred which destroyed the separation plant including the “Q.Z. cell,” and put the boiler out of operation, as a result of all of which the plant was out of operation until the 16th day of June, 1942. The last piece of equipment the Appellants got before the plant went into operation again was the “Q.Z. cell.”

p. 324, ll. 5-9 6.—It is alleged by the Appellant and so found by all of the Courts below that the fire was caused by an explosion of gas in the furnace of the boiler. The theory advanced in support of the contention that there was an explosion is that slugs of gasoline may have formed in the gas line, which would cause “puffs” of flame in the furnace, amounting to an explosion. This may be compared with the steady flame described by eye-witnesses, which suggests merely that there was an excess of dry gas fuel. 20

p. 71, ll. 28 & 29 p. 46, l. 1 The inference of an “explosion” is drawn from the condition of the boiler and setting after the building housing the boiler had burned down, and from what was observed by witnesses before the spread of fire. No witness heard any sound of detonation or explosion, although a witness Scott, in the building heard the door of the building slam a few moments before the flame was observed. All that was observed by any witness before the fire, other than an increase in gas pressure in the refinery, was a flame which had reversed and was blowing steadily out of the air vent at the front of the furnace across the hand valve which was intended to be used to turn off the gas and against the post, which after an interval of approximately five minutes, caught fire with the result that the separation plant and building were destroyed. A pressure of approximately equal to one-quarter inch of water would be sufficient to reverse the flame. 30

p. 55, ll. 10 and 11 and ll. 18-24, p. 66, ll. 28-40 p. 257, ll. 23-27 p. 55, ll. 34-46 p. 58, ll. 15-25, p. 67 It may be noted that the refinery continued to operate until it was shut down; and the separation plant continued to operate until the building burned down and put the boiler out of commission.

7.—At the time of the fire the Appellants carried fire insurance in fire insurance companies, and boiler explosion insurance in the Respondent boiler insurance company, each insuring against direct loss, which direct losses were paid; but the present claim is for “use and occupancy” in the 40

contractually determined amount of \$1,000.00 per day for a maximum of 100 days. This claim is advanced under an endorsement to the boiler explosion coverage only. RECORD  
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8.—The boiler insurance policy No. 39855-B on which the action was brought, insured the Appellant from the 1st day of November, 1940, to the 1st day of November, 1941, at 12.00 o'clock noon. Some days after the expiration of that period, what is known as a Binder (No. 1205), insuring the Appellant for a period of thirty days, or until the 30th day of November, 1941, was issued to the Appellant, and the fire occurred during the period covered by the Binder. The Binder is pleaded only by amended reply to which the Respondent has objected throughout. p. 279  
p. 280

The reply was so amended on the 6th day of February, 1945, the action having been commenced by Statement of Claim dated the 3rd day of November, 1942.

The form of policy appropriate either to the Policy No. 39855-B, or to the coverage provided by the Binder No. 1205, provides in Clause 10 : pp. 168 &  
169  
“ Suit shall not be brought under this policy unless commenced  
“ within fourteen months from the date upon which the accident  
“ occurred . . . ” p. 279

9.—The Binder, Exhibit 4, incorporates by reference certain descriptions and wordings from Policy 39855-B, and incorporates by reference the applicable forms of policy and schedules then in current use by the Respondent. The entire subject of use and occupancy is dealt with by a schedule and an endorsement, and the applicable forms are those contained in Exhibit 3, being the second and fifth sheets of that exhibit and entitled respectively “Schedule Boilers Schedule No. 1 (Except Cast Iron Boilers),” and “Endorsement, Use and Occupancy (Business) Endorsement No. 2.” p. 280  
p. 279

10.—The schedule is important principally for the definition of “accident” as including in this instance “a sudden and accidental explosion of gas within the furnace of the object . . .” and for the definition of “object.” These definitions are set out on the back of the second sheet of Exhibit 3 as follows :

“ B. (a) As respects any such boiler, ‘ Object ’ shall mean the  
“ boiler so described and shall include its water columns, steam  
“ and water gauges, safety valves, water walls, water screens  
“ and water grates, any superheater wholly or partly within the  
“ setting of the boiler, any steel economizer for it (if installed  
“ in such a manner that the economizer cannot be operated with  
“ any other boiler), and their interconnecting pipes and fittings ;  
“ and shall also include its feed pipe, steam pipe, return pipe and  
“ blow-off pipe to and including the nearest valve in each such

“ pipe, but if there is no valve in any of such pipes within twenty feet of the boiler, measured along the pipe, no part of that pipe is included, and shall also include that part of any apparatus under pressure of steam or water, which is within the furnace of the boiler, even though not directly in the boiler circulation, such as a reheater, water back or water front.”

“ B. (c) If the word ‘ Pressure ’ is inserted in the column of this Schedule headed ‘ Steam Piping ’ but not otherwise, ‘ Object ’ shall also include (except as respects any boiler described as ‘ Track Locomotive ’) all piping on the premises of the Assured (together with pipe coils used for warming buildings, and valves, fittings, separators and traps on said piping, but excluding feed-water heaters, feed-water purifiers, desuperheaters economizers, separately fired superheaters, blow-off piping, condenser adapters, and exhaust piping transmitting steam to the atmosphere) which contains steam generated in whole or in part in any boiler for which the word ‘ Pressure ’ is so designated, but shall not include any engines, turbines, compressors, pumps, tanks, radiators or other apparatus utilizing such steam ; and ‘ Object ’ shall also include all feed-water piping between feed pumps (or injectors) and the said boiler and all piping on the premises of the Assured which contains water of condensation to be returned to the said boiler. If, for any boiler described as ‘ Track Locomotive,’ the word ‘ Pressure ’ is inserted in the column of this Schedule headed ‘ Steam Piping ’ but not otherwise, ‘ Object ’ shall also include all steam and water piping on said track locomotive together with valves, fittings, separators and other steam containers on the said piping but shall not include any cylinders, pumps or tanks.”

“ C. (a) As respects any object described in this Schedule, ‘ Accident ’ shall mean a sudden and accidental tearing asunder of the object or any part thereof caused by pressure of steam or water therein, or the sudden and accidental crushing inward of a cylindrical furnace or flue of the object so caused, but ‘ Accident ’ shall not include the tearing asunder of any safety disc, rupture diaphragm or fusible plug.

“ (b) As respects any object, described in this Schedule, for which the word ‘ Included ’ is inserted in the column headed ‘ Furnace Explosion ’ but not otherwise, ‘ Accident ’ shall also include a sudden and accidental explosion of gas within the furnace of the object or within the tubes, flues or other passages used for conducting gases from said furnace to the chimney, provided said explosion occurs while the object is being operated

“with the kind of fuel specified for it in the column  
“headed ‘Fuel’.”

11.—The actual insuring agreement with respect to use and occupancy is contained in the “Endorsement, Use and Occupancy (Business),” and when completed as directed by the Binder, Exhibit 4, reads in paragraph A thereof as follows :

10 “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 . . .”

20 Paragraph C of the Endorsement on Policy No. 39855-B reads as follows :

“C. The Assured shall send notice of accident, by telegram  
“ (at the Company’s expense) or by letter, to the Company at its  
“ Home Office in Toronto, Ontario, or at its office at 221 Curry  
“ Building, Winnipeg, Manitoba, and upon the arrival of such  
“ notice at whichever of said cities it reaches first, shall depend  
“ the Commencement of Liability determined with respect to  
“ Seventh Midnight in accordance with paragraph F.”

30 If paragraph C is completed in accordance with the Binder 1205, the only difference will be that the space occupied in Policy No. 39855-B by the words “221 Curry Building, Winnipeg, Manitoba,” will be left blank.

Paragraph F of the Endorsement, applicable to either the policy or the Binder is entitled “Commencement of Liability ” and reads as follows :

40 “F. The liability of the Company under this endorsement for  
“ payment on account of an accident shall commence at a time  
“ fixed by the arrival of the notice of the accident as provided in  
“ paragraph C. If the Commencement of Liability is stated as  
“ determined with respect to ‘Time of Accident,’ the Company  
“ shall not be liable for payment for prevention of Business during  
“ any period before the twenty-fourth hour prior to such arrival  
“ of the notice. If the Commencement of Liability is stated as  
“ determined with respect to a midnight, the Company shall not  
“ be liable for payment for prevention of Business during any  
“ period prior to the specified midnight after such arrival of  
“ the notice.”

RECORD

The Endorsement contains a clause limiting liability, being paragraph G which reads as follows :

“ 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.” 10

pp. 146 &  
147

12.—The minority of the Judges of the Supreme Court of Canada (Taschereau and Estey JJ.), held there was an oral agreement made on the 1st day of November, 1941, extending Policy No. 39855-B for an undetermined period embracing the 21st day of November, 1941, when the fire occurred. There is no comment on the uncontradicted evidence of Byrne that Wilkinson had no authority to give oral coverage. 20

pp. 172-174

It was also held by the minority, that the Appellant by adjusting the direct explosion loss, waived the contractual provision of the Use and Occupancy Endorsement, requiring written notice to fix commencement of the indemnity period.

It was further held by the minority that because of explosion damage to the boiler on the 21st day of November, 1941, the plant could not be operated, that repairs to the boiler were not completed until the 4th day of June, 1942, and that fire damage to the plant was not repaired until the 16th day of June, 1942.

In the result, the minority held that the limitation in paragraph G of the Use and Occupancy Endorsement, excluded liability only in cases where the “ fire . . . following an accident ” was the sole cause of the prevention of business, and that prevention of business caused by the concurrent operation of explosion damage to the boiler and of fire damage outside of the boiler is within the coverage in paragraph A providing for indemnity for prevention of business “ caused solely by an accident ” (explosion) to the boiler. 30

13.—The majority of the Judges in the Supreme Court of Canada held that Clause G was applicable to the circumstances of this case, thereby excluding liability and obviating consideration of several other points of law which had been argued. Rand J. (with the concurrence of the Chief Justice and Locke J.) stated in part : 40

pp. 354 &  
355

“ Mr. Steer’s contention is this : the primary obligation embodied in clause ‘ A ’ is to pay compensation for ‘ Total prevention of

10 “ ‘business . . . caused solely by an ‘accident’ ’ as defined.  
 “ Without more, ‘accident’ would include a fire resulting directly  
 “ from an explosion ; and the cessation of business caused solely  
 “ by such a fire or solely by explosion and such a fire acting  
 “ concurrently would be within the obligation. Then comes  
 “ clause ‘G.’ This is an exception to and not a qualification  
 “ of ‘A’ within which the Plaintiff must bring himself. The  
 “ phrase in parentheses, ‘nor for any prevention of Business  
 “ ‘resulting from fire outside of the object, following an accident’  
 “ means a cessation resulting solely from a fire caused by an  
 “ explosion. Where, as here, both the disabled boiler and the  
 “ destroyed building concurred in preventing the business, the  
 “ case is outside the exception and remains within the primary  
 “ obligation.

20 “ The vital words are ‘caused solely by an accident.’  
 “ ‘Accident’ under the definition originates in ‘explosion,’  
 “ whatever may be its antecedents. The words then may mean  
 “ ‘solely’ with reference to concurrent causes unconnected with  
 “ ‘accident,’ only ; or with reference also to causes themselves  
 “ arising out of ‘accident,’ which would involve the limitation of  
 “ ‘accident’ to explosive effects, as distinguished from new causes  
 “ resulting from them.

30 “ In order to treat clause ‘G’ as an enumeration of exceptions,  
 “ we must find them included within the generality of ‘A.’ Now,  
 “ the first item of ‘G’ is clearly an exception ; ‘accident’ in ‘A’  
 “ would not be restricted to a particular origin, and here there is  
 “ removed from ‘A’ an explosion resulting from a fire or from  
 “ measures taken to extinguish a fire. There is next the  
 “ parenthetical provision. Why parenthetical ? I think the  
 “ reason is clear : It is intended to hark back to ‘A’ and to make  
 “ explicit the implication of the words ‘solely by an accident’ ;  
 “ it makes perfectly clear that a fire caused by an explosion is to  
 “ be deemed to be completely severed from the explosion  
 “ for the purposes of ‘A.’ It is ‘fire . . . following an  
 “ accident.’ If ‘accident’ in ‘A’ meant explosion and its  
 “ consequential fire, the word ‘following’ in ‘G’ would be  
 “ inappropriate ; the fire would not follow the accident, it would  
 “ be embraced within the accident. What the parenthetical  
 40 “ phrase does is to characterize ‘accident’ in ‘A’ by confining  
 “ it to explosive action. It thus declares the meaning of ‘A’ ;  
 “ that the word ‘solely’ restricts the cause for which there is  
 “ liability to purely explosive effects as against a resulting fire :  
 “ that ‘solely by accident’ means ‘solely by explosion’ : If  
 “ the language had been ‘caused by explosion’ a resulting fire

“ would be included as a cause ; ‘ caused solely by explosion ’  
 “ excludes such a fire. This characterization of ‘ A ’ is confirmed  
 “ by the second sentence of ‘ G ’ which excludes unconnected  
 “ concurrent causes ; and finally by the specification of the  
 “ concurrent cause of failure to use diligence. Apart from the  
 “ exception at the beginning, the clause makes explicit the  
 “ meaning of ‘ A.’

“ The view that prevention of business by concurrent  
 “ explosive effects and resulting fire is within the liability can  
 “ be tested in conceivable situations. If, for instance, there was 10  
 “ an explosion which left the boiler intact but a resulting fire  
 “ had prevented business, the parenthetical phrase on any  
 “ construction would exclude liability. If, on the day following  
 “ that condition, a second explosion had disabled the boiler, the  
 “ insurance would not attach because of the language of the  
 “ second sentence, the words ‘ the accident,’ in which, meaning  
 “ that giving rise to the claim. This confirms the conclusion  
 “ drawn as to the strictly limited area of cause for which the  
 “ policy provides indemnity ; but as it is in fact an insurance  
 “ against explosion, that limitation is not surprising. 20

“ I would, therefore, allow the appeal and dismiss the action  
 “ with costs throughout.”

14.—The Respondent respectfully submits that the appeal should be dismissed for the following amongst other

### REASONS

- (1) BECAUSE the only insuring agreement pleaded in the Statement of Claim was not in effect at the date of the “ accident ” or fire.
- (2) BECAUSE failure by the Appellant to give notice in accordance with the Use and Occupancy Endorsement resulted 30 in no date being fixed for commencement of liability. (See Clause F of the Use and Occupancy Endorsement.)
- (3) BECAUSE there was no evidence that the “ accident ” (if any) did such damage to “ the object ” as would totally prevent the carrying on of the business for any period whatsoever.
- (4) BECAUSE the business would not have been carried on even if an “ accident ” had not occurred. (See Clause G of the Use and Occupancy Endorsement.)



- 10
- (5) BECAUSE as held by the majority of the Supreme Court of Canada, the parenthetical phrase, “(nor for any prevention “of Business resulting from fire outside of the object, “following an accident),” in paragraph G, characterizes “accident” in paragraph A by confining it to explosive action and thus declares that “solely,” in paragraph A, restricts the cause for which there is liability to purely explosive effects as against a resulting fire.
  - (6) BECAUSE alternatively, the fire, following the “accident” (if any), was an excepted cause of prevention of business, and having been so excepted by paragraph G should be treated as a proximate cause of the prevention of business caused by the fire damage, so that such prevention of business cannot be said to have been caused “solely” by explosion within the meaning of paragraph A.

R. L. FENERTY.

**In the Privy Council,**

No. 52 of 1948.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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BETWEEN

ABASAND OILS LIMITED

AND APPELLANT

THE BOILER INSPECTION AND  
INSURANCE COMPANY OF  
CANADA ... .. RESPONDENT.

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CASE FOR THE RESPONDENT

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LAWRENCE JONES & CO.,  
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