

Abasand Oils Limited - - - - - *Appellant*

v.

The Boiler Inspection and Insurance Company of Canada - *Respondent*

FROM

THE SUPREME COURT OF CANADA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 27TH OCTOBER, 1949**

Present at the Hearing :

LORD PORTER
LORD GREENE
LORD MORTON OF HENRYTON
LORD MACDERMOTT
LORD RADCLIFFE

[*Delivered by* LORD PORTER]

This is an Appeal by special leave from a Judgment of a majority of the Supreme Court of Canada dated 13th April, 1948, allowing the respondent's Appeal from the Judgment of a majority of the Supreme Court of Alberta, Appellate Division, dated the 24th December, 1946, which affirmed a judgment of Shepherd J. in the Supreme Court of Alberta, Trial Division, dated 25th July, 1945. By his Judgment Shepherd J. awarded the appellants \$100,000 under a policy of insurance issued to the appellant by the respondent. In reversing this decision the Supreme Court of Canada dismissed the plaintiff's action.

The appellant owned a plant at Waterways, in the province of Alberta, at which petroleum products from the bituminous sands found there were experimentally refined. The process necessitated the use of a large boiler and separator equipment surrounding it. The boiler was fired with crude oil, at times supplemented by dry gas.

Undoubtedly an accident took place at the plant on 21st November, 1941. It was claimed by the plaintiff and found by the learned Judge that a large portion of the plant was destroyed as a result of an explosion of gas in the furnace of the boiler. The explosion, it was said, seriously damaged the boiler and caused a flame to flash back over the top of the gas line going into the boiler and to shoot out towards and impinge upon a wooden post some 6 or 8 feet in front of the boiler. The post caught fire and the fire could not be brought under control, with the result that the building was burnt down. The boiler was not, and it was claimed could not, be replaced or repaired, nor could the building be rebuilt for more than 100 days. Both the boiler and the building were essential to the operation of the plant and consequently the refinery could not operate without the use of the boiler, nor could it operate without the separation plant. The boiler was repaired and the repairs completed by 4th June, 1942, but the separation plant and the re-erection of the building were not completed until 14th June, 1942. At the time of the accident referred to the appellant was insured with the respondent by a policy and binder.

The policy expired on 1st November, 1941. On that date the appellant's insurance broker in Montreal, a Mr. Brown, called upon Mr. Wilkinson, the defendant's special agent at Montreal, and asked him to have the insurance continued from Brown's office. After some negotiation, Wilkinson stated that the defendant had not made up its mind whether to continue the cover or not, but that he would keep the cover in force until a decision was made, and later the defendant agreed to continue the insurance and a binder was issued to Brown confirming this arrangement. It is upon the contract of insurance so entered into that the action was brought.

The policy in question contained two covers. Firstly a direct insurance of the building and plant and secondly an insurance on total prevention of business on the premises. It is this latter portion of the policy with which alone the present dispute is concerned. The material portions must be stated. The terms are as follows:

"(a) In consideration of the premium the Company hereby agrees to pay the Assured \$1,000, herein called the daily indemnity, for each day of total prevention of business on the premises described and located at Waterways, near MacMurray, Alberta, caused solely by an accident . . . to an object covered by any of the schedules of this policy subject . . . to a limit of loss of \$100,000 for any one accident.

(c) The Assured shall send notice of accident by telegram at the Company's expense or by letter to the Company in its home office in Toronto, Ontario, or at its office at Winnipeg, Manitoba, and on arrival of such notice at whichever of such said cities it reaches first shall depend the commencement of liability determined with respect to 7th midnight."

Both accident and object are defined in the policy and admittedly accident includes explosion, and the boiler referred to is an object within the meaning of that term in the policy.

The policy also provides:

"(f) Commencement of Liability: 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). . . . 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.

(g) Limitation of Liability: 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 the 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 period of provision shall not be limited by the date of the end of the policy period."

As has been indicated, the plaintiff claimed the sum of \$100,000 upon the ground that the loss of business was caused by an explosion to the boiler and that consequently the carrying on of the business had been interrupted for more than 100 days. In making its original claim the plaintiff pleaded that it was insured under the original policy for a period including the month of November, 1941, but did not mention the extension of the cover brought about by the issue of the binder. The defendant, in putting in its statement of defence, originally merely denied in the first clause that it had insured the plaintiff respecting loss or accident to the boiler therein described by an insuring agreement as therein referred to or at all, but did not expressly deny that the insurance did not extend to the month of November, 1941. At a later date, however, the defendant applied to amend its defence by adding at the end of this clause the words "in as much as by the alleged agreement the defendant did not insure the plaintiff for the month of November, 1941, during which month it is alleged that the accident stated in the

claim occurred." To this amendment the plaintiff consented on the terms that it should be entitled to deliver a joinder of issue and reply. Taking advantage in that reply of this opportunity the plaintiff pleaded and relied upon the existence of the binder and alleged that the original insurance was kept in force and effect thereby, or alternatively that the binder itself constituted a fresh insurance. The plaintiff also maintained that the defendant was estopped by the conduct of and representations of its agent from denying that the binder continued the policy in full force and effect for the period covered by the binder.

Undoubtedly the binder effected an insurance in respect of the month of November, 1941, but it is contended by the respondent that the original pleading did not rely upon that document. The binder, it was said, constituted a fresh contract of insurance and it was not permissible to rely upon the contract contained in it by way of reply. It would, it admitted, have been possible to amend the statement of claim if it had been done in time, but no application to do so had been made and at the time that the reply was delivered it was too late, in as much as the time for bringing an action had elapsed. The plaintiff maintained firstly, that this was a matter of procedure and one in respect of which the respondent was not entitled to rely in an Appeal to the Supreme Court of Canada and secondly, that in any case the amendment to the defence had been granted on terms that it should be entitled to deliver a reply and in substance the object of delivering a reply could only be to meet the fresh paragraph in the defence. Whatever may be said as to the first ground of objection, their Lordships think that the second should prevail. They agree with the learned Judge in thinking that the consent to allow an amendment of the defence upon condition that a reply should be permitted could only have been intended to meet the amended defence and to enable the plaintiff to plead the continuance or renewal of the insurance by the binder. In these circumstances it is not necessary for their Lordships to express an opinion as to whether the binder constituted a fresh contract or was as the learned Judge and the majority of the Court of Appeal in Alberta thought merely a continuation of the original insurance. In either case a contract of insurance existed which covered the plaintiff during the month of November.

Secondly, it was maintained by the respondent that the prescribed notice was not duly given. The facts as disclosed in the evidence as to this matter are that verbal notice of the accident was given by Brown, the plaintiff's insurance broker, to Wilkinson, the defendant's special agent in Montreal on December 10th, 1941. Wilkinson, when he received this notice, was requested to and agreed to notify his head office at Toronto and did so by telegram to the Vice-President of the defendant company on the same date. This verbal notice was confirmed by a letter dated 16th December from Brown to Wilkinson at the defendant company's address at Montreal. As a result of this notice, Hobson, the defendant's inspector in Alberta, was instructed by the defendant to make and did make an investigation on 12th December. Later on he visited the premises on 21st December, 1941. In these circumstances both the learned Judge and the majority of the Court of Appeal of Alberta were of opinion that there was a waiver by the defendant of the strict compliance with the provision as to notice. No objection appears to have been taken until the amended defence was delivered at earliest in November, 1942, and the appellant may well have been led to think that the respondent had accepted the notice given as sufficient compliance with paragraphs (c) and (f) of the policy. But even though the facts alleged should be held not to amount to a waiver, their Lordships think that due compliance with the obligation to give notice can be found in the telegram sent by Wilkinson to his head office at Brown's request, in as much as in forwarding the notice he must be held to have been acting on behalf of the appellant company.

But these are technical matters and the substance of the case lies rather in the contention as to the true construction of paragraphs (a) and (g) in the policy. Before the learned Judge it was first of all said on

behalf of the respondents that no explosion was proved to have taken place. This contention was maintained throughout the hearings in Canada but in as much as there were concurrent findings of fact in the two courts in Alberta to the effect that there was an explosion, the point was not pressed before their Lordships' Board. Nevertheless it was said that the loss which occurred was not proved to have been due to the explosion but due to the fire which followed it. In this contention it was urged that whether or not the explosion had taken place, the fire would inevitably have happened and that therefore the loss was caused by an independent concurrent event. In the learned Judge's view an explosion undoubtedly took place and the fire which followed was caused by the preceding explosion. The majority of the Judges in the Court of Appeal in Alberta took the same view. It was strenuously contended before their Lordships that there was no evidence to support this view. It was said that whether there had been an explosion or not the fire would have issued out of the furnace of the boiler and struck the post and that indeed the original explosion, though it caused some injury to the boiler, had no part in bringing about the fire which followed it. In their Lordships' view there was evidence both from the employees of the appellant who were called at the trial and its expert witnesses which entitled the learned Judge to find that the explosion was the cause of the fire. Indeed, at the trial the main dispute was not as to whether the fire was a result of the explosion but whether there was an explosion at all. In their Lordships' view the learned Judge had material before him upon which he could hold that the fire would not have occurred but for the explosion.

It was further maintained, however, that even if an explosion took place, there was nothing to show that the damage done was sufficient to cause a cessation of business for the time claimed or indeed for any definite time. It was contended that upon the evidence at the trial no distinction had been made or was possible to be made between the fire damage and the explosion damage. Again their Lordships are of opinion that the learned Judge had evidence before him on which he was entitled to find that the damage by the explosion alone was sufficient to bring about the cessation of work for more than 100 days. As he points out, Mr. Hobson, the respondent's assessor, visited the premises and after doing so said that a very short examination of the large boiler setting showed there had been a furnace explosion of considerable violence. Moreover, Mr. Watson, the Fire Loss Adjuster for the Fire Insurance Companies which had insured the premises and Mr. Jones, the Alberta Provincial Boiler Inspector, visited the premises some four or five days after the accident, and Jones considered the damage sufficient to entitle him to order the rebuilding of the whole setting. In these circumstances their Lordships consider that the evidence was sufficient to justify the learned Judge in finding that there was an explosion and that the damage thereby caused had put the boiler out of action for more than 100 days.

There remains, however, the difficult question as to the true effect of the wording of Clause (g) of the policy in connection with Clause (a). As found by the learned Judge, the explosion alone was sufficient to put the plant out of action and it is common ground that the succeeding fire and the damage which it did was also sufficient to prevent the use of the premises for more than 100 days. In these circumstances the question arises, was the total prevention of business caused solely by the explosion within the meaning of Clause (a)? Even apart from the provisions of Clause (g), it was maintained on behalf of the respondent that it was not so caused. It was, said the respondent, caused partly by the explosion and partly by the subsequent fire and therefore does not come within the original cover. The answer to this contention is to be found in the cases quoted on behalf of the appellant. In *Hobbs v. The Guardian Assurance Company* (1885) 12 S.C.R. 631, it was held that insurance of loss by explosion covered loss by fire following that explosion, on the ground that the explosion and the fire were all one. This case was supported by *in re Hooley Hill Rubber and Chemical Company v. The Royal Insurance Company* [1920] 1 K.B. 257 at 272, a case which in *Curtis's and*

Harvey (Canada) Limited v. North British and Mercantile Insurance Company [1921] 1 A.C. 303 at 310 Lord Dunedin in delivering the judgment of the Board stated to have been rightly decided. If therefore the policy had contained Clause (a) only, upon the principles contained in those decisions the damage done by the fire was part of and included in the damage done by the explosion for which the appellant was entitled to recover.

But even if wrong in its argument as to the effect of these cases the respondent maintained that the insurance was not against loss by explosion but loss caused *solely* by explosion. It relied upon such cases as *Stanley v. Western Insurance Company* (1868) LR 3 Ex. 71 in which it was held that, in an insurance against fire an exception of loss by explosion covered all loss from explosion whether brought about by a preceding fire or not. This case also was approved in *Curtis's and Harvey's case* (*supra*). In reliance upon this decision it was maintained that in the present case loss by fire following the explosion was taken out of the risk because when Clause (a) and Clause (g) are read together the phrase "caused solely by an accident" means that the prevention of business must be caused by the explosion alone without the intervention of any other cause operating concurrently, and that the same result follows even if the wording of Clause (g) is regarded as an exception and not a qualification of the risk involved. In their Lordships' view Clause (g) is an exception and not a qualification of the risk. Obviously the first part of Clause (g) is an exception and their Lordships do not think that the mere fact, as was urged, that the phrase "nor for any prevention of business resulting from fire outside the object, following the accident" is included in a bracket is sufficient to change its character from an exception to a qualification. If it had been desired to qualify the risk in (a) it could easily have been done by an insertion of appropriate words in that clause without relying upon words in another and separate provision.

On the findings of the learned Judge, undoubtedly the explosion alone prevented the carrying on of the business and prevented it before the fire had begun to operate. The working of the plant had already ceased to be possible before the fire began. That prevention was caused solely by the explosion in as much as the explosion alone was sufficient to prevent any work being done and had prevented the doing of any work before the fire began. The meaning to be attributed to the Policy in their Lordships' opinion is that the risk is covered provided prevention of business on the premises has been brought about by the explosion and solely brought about thereby before some other risk such as fire succeeding the explosion has come into operation.

Taking this view, their Lordships would humbly advise His Majesty that the Appeal should be allowed and the judgment of the learned Judge in the Trial Court in Alberta and that of the Appellate Court in that Province should be restored. The respondent must pay the plaintiff's costs in the Supreme Court of Canada and before their Lordships.

In the Privy Council

ABASAND OILS LIMITED

v.

THE BOILER INSPECTION AND INSURANCE COMPANY OF CANADA

DELIVERED BY LORD PORTER

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.
1949