WESTERN ASSURANCE COMPANY (DEFENDANT) ..... } APPELLANT.

AND

DAVID CAPLAN (PLAINTIFF) ..... RESPONDENT.

1923
*Nov. 16.
*Dec. 21.

1924
*Mar. 3. 4.
*April 22.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Automobile insurance—Fire and theft—Insurance Act, R.S.O. [1914] c. 183—Application of ss. 194 and 195—Special condition in policy—Representation—Materiality to risk.

Section 194 of the Ontario Insurance Act, notwithstanding its position among a group of sections under the heading "Contracts of Fire Insurance" applies to all kinds of insurance and requires the statutory conditions to be printed on every policy insuring against fire and other causes of loss.

Qu. Should they be printed on a policy that does not insure against loss by fire?

In an action on a policy insuring, on payment of a single premium, an automobile against loss by fire or theft in which action loss by theft is alleged, the insurer cannot invoke breach of a special condition restricting the use of the automobile when such condition is not printed in the form required by section 195 of the Act.

If the insured, on applying for the insurance, in answer to a question asked by the company's agent states that the car was paid for when he had given a promissory note for part of the price which was paid at maturity he is not guilty of omitting to disclose a circumstance material to the risk which would avoid the policy.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The respondent brought action on a policy insuring his automobile against loss by fire or theft alleging that it had been stolen. The main defence of the appellant was that the insured had violated a condition indorsed on the policy prohibiting the use of the automobile in carrying passengers for hire. The other defence was that the insured had suppressed a fact material to the risk, namely, that the car was not fully paid, a note having been given for part of the price. The trial judge held against the insurers on both grounds and his judgment was affirmed by the Appellate Division.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Mignault JJ.

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The Chief Justice.

J. H. Fraser for the appellant referred to *In re Keet* (1) on the question of non-disclosure.

H. J. Scott K.C. for the respondent relied on *Rockmaker* v. *Motor Union Ins. Co.* (2) as to the application of section 194 of the Insurance Act.

THE CHIEF JUSTICE.—After the argument of this appeal, and during it, I entertained some doubts as to its proper disposition. After giving the facts a very thorough investigation, I am still somewhat doubtful, though inclined on the whole to dismiss the appeal. Since I have had the opportunity of reading the judgment of my brother Duff, my doubts have been very largely removed and my conclusion is to dismiss the appeal, concurring with the reasons stated by him.

IDINGTON J.—This appeal arises out of an action by the respondent to recover from appellant insurance under and by virtue of a policy of insurance issued by said appellant to respondent upon his automobile, and covenanting thereby to indemnify him against loss or damage to said automobile, by fire, or by stranding, or by burglary, pilferage or theft.

The learned trial judge held defendant, now appellant, liable and directed a reference to determine the amount of damage suffered by reason of the said automobile having been stolen in Detroit.

The defences set up were that the auto had, contrary to the condition in said policy, been used as a taxi on some horse-racing days in Windsor, and that the respondent had represented the car to have been paid for when bought.

It turned out that the purchase price was $3,700, of which $2,675 had been paid in cash, and the balance by a promissory note, paid when due, within two months after the insurance in question. And some other trivial suggestions, not taken seriously below, seem to have been made.

There is no pretence that there was any lien or charge against the auto for the said promissory note. And as there was no written application for the policy, but merely a note or memorandum by the appellant's agent of the material features in question, I think the answer made to him

(1) [1905] 2 K.B. 666. (2) 52 Ont. L.R. 553.

in this regard was quite justifiable and the attempted defence in that connection not a thing to be entertained here.

The condition, or so-called warranty, relative to the payment indicates, I submit, nothing more than an assurance that there was no lien or mortgage or other charge against the auto.

The appellant, on appeal to the Appellate Division of the Supreme Court of Ontario, had the satisfaction of that court dividing equally, and hence this appeal here in which the only important question raised is whether or not the policy of insurance in question falls within the provisions of section 194, and subsequent sections, of the Ontario Insurance Act.

The learned trial judge held that it does and in support thereof pointed out subsection 14 of section 2 of the said Insurance Act, defining " Contract of Insurance " as therein used.

I would add thereto the due consideration of subsection 32 of said section 2 of said Act, and the further subsections (*a*) to (*g*) inclusive, of said subsection 32.

And I beg to call attention to subsection 45 of said section 2 defining " Policy " as follows:—

> " Policy " shall include any contract of insurance within the meaning of this Act.

I submit that there are many other features of the said interpretative section 2 aforesaid, which may also be referred to, if we are to decide correctly the issue of law that turns upon the application of sections 194, 195 and 196 to the policy in question herein.

And moreover the entire scope and purview of said Act must be considered.

These statutory conditions no doubt originated half a century ago when fire insurance and the conduct of those carrying on the business gave rise to a rather acute situation needing remedy.

The legislature has made many changes since (as the business of insurance has grown in many directions) but they have ended in grouping all in one Act, and continuing amendments thereof.

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The policy in question herein covers fire insurance as well as theft, yet the appellant has paid no regard to the provisions of the Act and therefore I agree with the learned trial judge and those supporting him in the Appellate Division below, that the conditions in this policy upon which appellant relies are null.

The foregoing was written shortly after the first argument and before the second argument being ordered.

This second argument does not present anything to change my opinion relative to the result. I may be permitted, however, to add that the references to the evidence of the respondent's use of the car as a taxi cab are far from being conclusive and go no further than to suggest a possible suspicion. The occasions on which said use was alleged were of the kind when the respondent may have merely been helping friends. As read to us I could not find any proof of payment for the carriage of passengers, and against that there is the oath of respondent.

Again as to the case of *Curtis's & Harvey* v. *North British & Mercantile Ins. Co.* (1), I may remark that that arose under Quebec law, whereas this policy was issued under the entirely different Ontario Act as it now stands. And I may add that if *Citizens Ins. Co.* v. *Parsons* (2), could ever have been circumvented by means of joining a trifling item of other insurance than as against fire, it is remarkable that no one ever was ingenious enough to suggest and apply such a method as presented in argument herein to frustrate the operation of the Act. I may remark in that connection that there was only one premium for a named sum paid or thought of. It turns out that such total single sum covered separate rates. When that is considered without any explanation on the face of the contract, I fail to see how appellant can be helped herein especially in view of the fact that more than half of the total premium entitled respondent to have the statutory conditions observed.

I think it is conceivable that one policy might, if so expressed, as this is not, be made to cover two substantially different contracts, but this is not of that character.

Hence I would dismiss this appeal with costs here and in the Appellate Division below.

(1) [1921] 1 A.C. 303.

(2) 7 App. Cas. 96.

DUFF J.—The appellants, the Western Assurance Company, on the 19th June, 1920, delivered to the respondent, David Caplan, a policy of insurance upon an automobile, the property of the respondent. The perils insured against are described in Articles I and II of the policy, in the following words:—

Art. 1. Against direct loss or damage to the automobile hereby insured caused by fire arising from any cause whatsoever, including explosion, self-ignition and lightning; also while being transported in any conveyance by land or water, against loss or damage caused by stranding, sinking, collision, burning or derailment of such conveyance; also against general average and salvage charges for which the assured is legally liable; and

Art. 2. Against loss or damage by burglary, pilferage or theft of automobile or accessories or spare parts in or on same belonging to assured and described in said declaration, by persons not in the employment, service or household of the assured, excluding, however, other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment.

Among the conditions to which the policy is expressly declared to be subject is Condition "K," in these words:—

It is a condition of this policy that the automobile hereby insured shall not be used for carrying passengers for compensation, nor rented, nor leased, nor operated in any race or speed contest during the term of this policy, unless assented to by the company in writing.

Whether this condition is operative as part of the contract is the important question on the appeal, and strictly it turns upon the view to be taken of section 194 of the Ontario Insurance Act. If that section applies to this contract, as it does *ex facie*, then condition "K" is not operative as part of the insurance contract. On the contrary, if that section has no application to this contract in so far forth as the contract creates an obligation on the part of the company to indemnify the respondent in respect of loss arising from the perils insured against other than fire—from theft, to be precise—then effect must be given to the condition in accordance with its terms.

The introductory words of section 194 are these:

The conditions set forth in this section shall as against the insurer be deemed to be part of every contract in force in Ontario with respect to any property therein or in transit therefrom or thereto, and shall be printed on every policy with the heading *Statutory Conditions*, and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by sections 195 and 196;

and it will be observed that the section by its express terms

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applies to "every contract in force in Ontario," which *prima facie* means every contract of insurance. *Prima facie*, therefore, the policy under consideration comes within the sweep of this enactment, and the rights of the parties must be governed by the enactment, unless there be something in the section itself—that is to say in the Statutory Conditions, which are set out as part of the section—or in the context, pointing to a different conclusion.

As to the context, section 194 is one of a group of sections, beginning with section 191, which are all brought together under the heading, "Contracts of Fire Insurance"; and sections 191, 192 and 193, by their terms or by necessary implication, are limited in their application to fire insurance. Moreover, the plan of bringing together provisions relating to a particular class of insurance in a group under an appropriate heading seems to have been contemplated by the authors of the Act, although in practice this plan does not appear to have been carried out with any great exactitude. Compare, for example, section 154 with section 159. As to the Statutory Conditions, the terms of them, no doubt, do suggest in a pointed way that they are framed as stipulations of a contract which is, in part at least, a contract of fire insurance.

The position of section 194 as part of a group of sections labelled "Contracts of Fire Insurance," the character of the provisions with which this section is grouped, as well as the terms of some of the Statutory Conditions, afford some grounds for reading section 194 as relating exclusively to contracts of fire insurance in the sense of contracts providing for indemnity against loss arising from fire, as defined by the conditions.

When the history of the legislation, however, is considered, these considerations appear to lose much of their force. In the Revised Statutes of 1897 the section corresponding to the present section 194 was numbered 168, and the operation of that section was limited in express terms to contracts of the insurance. Section 168 read: "The conditions set forth * * * shall * * * be deemed to be part of every contract *of fire insurance* in force in Ontario." In 1914, the words, "of fire insurance," were struck out. This change of language cannot be disregarded as without

significance, but still more significant are the changes in the Statutory Conditions themselves.

By Condition 13, as it appears in section 168, R.S.C. 1897, it was stipulated that the assured with his proofs of loss should furnish a statutory declaration declaring, among other things,

when and how the fire originated, so far as the declarant knows or believes, (and) that the fire was not caused through his wilful act or neglect.

In the revision of 1914, the corresponding condition is numbered 18, and there the paragraphs prescribing the contents of the statutory declaration in relation to the matters dealt with by the paragraphs just quoted from the Act of 1897 assume a different form. They read thus:

When and how the loss occurred, and if caused by fire, how the fire originated, (and) that the loss did not occur, or if caused by fire, that the fire was not caused through any wilful act or neglect * * * of the assured.

These changes, first in the form of the enactment prescribing the Statutory Conditions (section 194), and then in the form of the conditions themselves, seem to imply a deliberate intention that the operation of the enactment shall not be limited to policies of insurance in which fire, as defined by the conditions, is the only peril insured against. It is not necessary to pass upon the question now whether or not section 194 applies to policies of insurance in which loss by fire is not one of the subjects of indemnity. As already indicated, arguments of some plausibility may be derived from the conditions themselves in opposition to that view; but I see no reason to doubt that section 194 in its present form does contemplate the application of the conditions to policies of insurance in which the perils insured against are not limited exclusively to fire, and in which there is a single, indivisible contract of indemnity in consideration of the payment of a single premium. That appears to be the view of the Court of Appeal as expressed in *Rockmaker* v. *Motor Union Ins. Co.* (1), and I think on the whole it is the preferable view. The contract of insurance in question being governed by section 194, it follows that section 195 applies also, and that Condition "K," not being evidenced in the manner thereby prescribed, is not operative as part of the contract.

(1) 52 Ont. L.R. 553.

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Mr. Fraser argued that the policy was a policy containing several contracts of insurance; in other words, that the contract of insurance against loss by theft is severable from the contract providing for indemnity for loss by fire. I cannot agree with that view. The so-called application upon which Mr. Fraser relies—it is described on its face as a Daily Report—does, it is true, profess to apportion the total premium, ascribing to part the office of premium for fire insurance and to the remainder that of premium for theft insurance; but the evidence is conclusive that the assured had nothing to do with this so-called application, which he never saw, of the contents of which he was ignorant, and which he did not in any way authorize. The evidence of the responsible agent, Mr. Morton, leaves no doubt upon the point.

Two questions remain: The first arises from the contention of the appellant that the first statutory condition was violated in the statement of the assured that the automobile had been "fully paid for by the assured." It appears that at the time the policy was issued the vendor of the automobile, from whom the respondent purchased it, held the respondent's promissory note, which had been given in part payment of the purchase money. In the autumn of 1921 the obligation under this note was discharged by payment. In these circumstances it cannot be seriously disputed that the statement of fact attributed to the respondent was strictly correct. *Marreco* v. *Richardson* (1); *Hadley* v. *Hadley* (2). The appellants argue, however, that the respondent's representation ought to be construed in a popular sense and given a larger meaning than the words themselves strictly express. I can see no justification for this. The appellants must establish their case. They do not prove a misdescription under the first condition by giving evidence of a representation which, strictly and accurately construed, is no misdescription. The appellants further suggest that there was within the meaning of the first condition an omission to communicate a circumstance material to the risk, the circumstance being that the automobile, though fully paid for, had been in part paid for by a promissory note, which was still current.

(1) [1908] 2 K.B. 584. (2) [1898] 2 Ch. 680.

This contention must also be rejected. The respondent's statement was elicited by a question put by the appellants' agent. The question was fully answered: it was answered correctly. If the mode of payment—in cash or by promissory note—had been regarded by the company as material to the risk, we may fairly assume that a further question would have been directed to the elucidation of that point. In the absence of any such inquiry, I think the circumstance relied upon must be treated as immaterial.

The other point arises out of a contention based upon the second of the Statutory Conditions, which provides that any

change material to the risk within the control or knowledge of the assured shall avoid the policy as to the part affected thereby.

There was, it is said, a breach of this condition in the fact that the respondent, as it is alleged, used his automobile on one or two occasions during the currency of the policy for the purpose of carrying passengers for hire; and in support of their contention the appellants rely upon a statement in the policy that

the uses to which the automobile described are and will be put are private and business calls, excluding commercial delivery.

The requirements of section 195 not having been complied with, this statement cannot take effect as an addition to or variation of the Statutory Conditions; and assuming that as against the assured this must be taken as a correct description of the uses to which the automobile was put at the date of the policy, and assuming further that the adoption of a new practice in this respect might be a "change material to the risk" within the second Statutory Condition, the appellants must fail on this point, for the reason that there is no evidence of any such change of practice as could fairly be held to fall within the words of the condition.

The appeal should be dismissed with costs.

MIGNAULT J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated by my brother Duff.

Appeal dismissed with costs.

Solicitor for the appellant: *W. M. Cox.*
Solicitors for the respondent: *Millar, Ferguson & Hunter.*