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FORD MOTOR COMPANY OF CANADA, LIMITED (*Plaintiff*) ..... APPELLANT;

*Mar. 5, 6
Apr. 28

AND

THE PRUDENTIAL ASSURANCE COMPANY LIMITED, SUN INSURANCE OFFICE, LIMITED, HARTFORD FIRE INSURANCE COMPANY, THE WORLD FIRE AND MARINE INSURANCE COMPANY, THE BRITISH NORTHWESTERN INSURANCE COMPANY, PHOENIX ASSURANCE COMPANY, LIMITED, INSURANCE COMPANY OF NORTH AMERICA, THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, BRITISH TRADERS' ASSURANCE COMPANY, LIMITED, BRITISH AMERICA ASSURANCE COMPANY, THE LONDON AND LANCASHIRE INSURANCE COMPANY, LIMITED, NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Policies covering property damage and loss of profits or business interruption caused by riot—Riot of workmen forcing closing down of plant—Resultant damages to property and loss of profits—Whether exclusion clause applicable.

The plaintiff company was insured under two sets of policies covering physical damage to property and loss of profits or business interruption due to *inter alia*, "riot" the meaning of which was extended to include "open assemblies of strikers (inside or outside the premises) who have quitted work and of locked-out employees". By cl. 6(*c*) of the policies, it was provided that there should "in no event" be any liability in respect of loss due to physical damage caused by "cessation of work or interruption to process or business operations or change in temperature".

On December 3, 1951, a number of the plaintiff's employees left their employment and compelled every employee to leave the plant with the result that the plant was shut down. The winter weather caused serious physical damage to the machinery up to the time the power was restored on December 14. The defendants argued that no part of the loss was caused by riot but by a combination of stoppage of work and change in the temperature.

The trial judge maintained in part the action brought under the policies. This judgment was reversed by the Court of Appeal. The plaintiff appealed to this Court.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

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Held: The appeal should be dismissed.

What occurred was plainly a "riot" within the meaning of the policies, and liability was excluded by cl. 6(*c*) since the damage was caused by cessation of work or by interruption to process or business operations, or by change in temperature.

The problem was one of attribution of cause and was not solved by a mere determination that the riot was the proximate cause of the loss. The parties had in contemplation that a riot might cause not only direct physical damage to the property but might also bring into being cessation of work, interruption to process or business operations, and change in temperature, and that for losses assignable to these causes or exceptions there was to be no liability. These causes operated concurrently with the riot and resulted solely from it, but none the less limited liability. The argument that the exceptions operate only when they result from causes other than riot was not supported by the cases under fire policies containing an exclusion for damage by explosion. Furthermore, the Court of Appeal was right in rejecting the limitations put by the trial judge on the causes enumerated in cl. 6(*c*) when he held that they did not operate because they had no independent existence apart from the riot, and restricting its meaning to change in atmospheric temperature.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Gale J. Appeal dismissed.

A. S. Pattillo, Q.C., and *A. J. MacIntosh*, for the plaintiff, appellant.

P. Wright, Q.C., and *B. J. MacKinnon, Q.C.*, for the defendants, respondents.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, Ford Motor Company of Canada, Limited, sued a number of insurance companies on twenty-four policies of insurance for a total claim of $905,111.71 for loss alleged to have been caused by riot. On twelve of the policies the claim was for $217,478.71 for property damage, and on the other twelve policies for $687,623.00 for loss of profits or business interruption claimed as the necessary result of the physical damage flowing from the riot. The policies were all in uniform and standard form and were basically contracts of fire insurance, providing the plaintiff indemnity against loss or damage by fire. By virtue of statutory condition no. 4, these did not cover, in the first instance, loss or damage caused by riot.

[1] [1958] O.W.N. 295, 14 D.L.R. (2d) 7.

But each policy had attached to it an Additional Perils Supplemental Contract which provided that the coverage was extended to "direct loss or damage to the property covered under said 'Fire' Policy caused directly by the after-noted additional perils", one of which was riot "as hereinafter defined and limited."

Riot was given the following extended meaning:

> 6. Riot: The term "Riot" shall in addition to Riot include open assemblies of strikers (inside or outside the premises) who have quitted work and of locked-out employees.

Then, in the same paragraph, there are certain pertinent exclusions which are in the following terms:

> There shall in no event be any liability hereunder in respect to
>
> (*c*) Loss due to physical damage to the property insured caused by cessation of work or by interruption to process or business operations or by change in temperatures, whether liability in respect thereto is specifically assumed now or hereafter in relation to any other peril or not.

The facts which give rise to this claim are clearly set out in the judgment of the learned trial judge. They were accepted in full by the Court of Appeal[1] and need no extensive repetition. On December 3, 1951, a certain number of employees of the Ford Company in Windsor left their employment. By concerted action these employees compelled every employee to leave the plant with the result that the whole plant was shut down and operations ceased early in the afternoon of December 3 with the exception of the powerhouse, which was also completely shut down on the following morning. Until the evening of December 14, no employee was permitted to enter the plant and there was no heat or electricity in the buildings. December 3 had been an unusually mild day and many of the windows throughout the plant, all of which were electrically operated, were open when the trouble began. When the electricity was shut off there was no way of closing these windows and they remained open until the powerhouse was again in operation and power restored on December 14. The mild weather of December 3 did not continue. With rain, snow and freezing conditions outside and no internal heat in the plant, the result was serious physical damage to the plant machinery

[1] [1958] O.W.N. 295, 14 D.L.R. (2d) 7.

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and work in process and consequent loss of profits and business interruption after the resumption of work on December 14, all of which is claimed for in the two sets of policies.

As a result of a full examination of the events which occurred, the learned trial judge held that the conduct of the employees amounted to a riot as that term was understood at common law, as well as being within the extended meaning of riot given by the Supplemental Contract. The Court of Appeal concurred in this finding and would have held, had it been necessary, that there was a riot within the definition of the *Criminal Code* and within the ordinary dictionary meaning of the term. There cannot be any question of these findings and in any event, what occurred in Windsor was plainly a riot within the definition of the Supplemental Contract, that is "open assemblies of strikers (inside or outside the premises) who have quitted work". The substantial question is whether the damage was caused by cessation of work or by interruption to process or business operations or by change in temperature. Damage caused in this way was within the exclusion defined in cl. 6(*c*) of the supplemental contract.

The learned trial judge found that the riot was the proximate cause of all the property damage and loss of profits. He then held on the construction of the Supplemental Contract that there could be no recovery for any loss or damage attributable to a cause named in the exclusionary clause notwithstanding that those causes were not proximate causes. The problem was not solved when he had ascertained that riot was the proximate cause. It was, in addition, necessary to read the policy as a whole and ascertain what the parties meant by providing a coverage for riot with these exclusions. He concluded that "cause" meant "proximate cause" when related to the cover but not when related to the exclusionary clause. The insurance companies on the construction of this policy were not to be responsible for any damage brought about or contributed to by any of the causes mentioned in the exempting clause notwithstanding that such damage was a consequence of the riot.

Notwithstanding this construction, he still found that cessation of work and interruption to process or business operations did not operate as causes because they had no

independent existence apart from the riot. He therefore qualified the meaning of these phrases accordingly and did the same with the phrase "change in temperature" by restricting its meaning to change in atmospheric temperature. These are very serious limitations and come close to destroying any efficacious power in the exclusionary clause.

The Court of Appeal[1] accepted the learned trial judge's findings that there was a riot and that riot was the proximate cause of the damage, and also found that the causes mentioned in the exclusionary clause were concurrent causes but referred to these as concurrent proximate causes. It seems to me that there is no substantial difference between the judgment of the learned trial judge and that of the Court of Appeal on this point. According to both, the riot was a continuing event or cause and was operating along with the other causes mentioned in the exclusionary clause, and whether these are called concurrent causes or concurrent proximate causes, the loss due to physical damage to the property arising when these causes operate is excluded.

The real point of departure between the judgment of the Court of Appeal and that of the trial judge is in the matter of construction of the exclusionary clause. The Court of Appeal held that it was plain that the parties foresaw that in the event of a riot there would be cessation of work, interruption to process and business operations and change in temperature of the buildings. They rejected the limitations imposed by the learned trial judge and held that if these events occurred, there was no liability for damage so caused. In the result there could only be recovery for the physical damage to the hinge on the gate of the powerhouse. The appeal was allowed and the judgment at trial, which had directed a reference to ascertain the damage sustained by the plaintiff as a result of the riot from causes other than change in temperature, was set aside. The cross-appeal of the plaintiff was dismissed and judgment was given for the plaintiff only for the amount of the physical damage resulting from causes other than those specified in sub-clause (*c*), which was, of course, only the damage to the hinge on the gate.

[1] [1958] O.W.N. 295, 14 D.L.R. (2d) 7.

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Counsel for the appellant argues before this Court that the learned trial judge, having found that the riot was the proximate cause, had really decided the case at that point, that there was no need and, indeed, no power to go further, and that there was error even in the limited meaning and operation assigned to cl. 6(*c*). He further submits that the 6(*c*) causes did not do the damage in themselves and that therefore they were not proximate causes but at most contributory causes, and that if they were merely contributory causes, the exclusionary clause had no operation at all—either to reduce or extinguish liability. He also assigns error to the judgment of the Court of Appeal based, as it was, upon a finding of concurrent proximate causes not only upon a denial of any such theory of causation but also because it was made in the absence of any evidence to support it. I have no difficulty in deciding that this last objection has no validity. There is no uncertainty or controversy about the facts of this case. The problem is not one of explanation of fact but one of attribution of cause and, in these circumstances, the inference of causation is as much a matter for the appellate tribunal as for the trial judge.

In cases such as this the problem is not solved by a mere determination that riot was the proximate cause of the loss. Causation is not being considered in the abstract but in relation to a claim for indemnity under an insurance policy which contains an exclusion. Liability for causation by riot is limited by the exceptions stated in cl. 6(*c*). It seems to me clear, as it did to the Court of Appeal, that the parties had in contemplation that a riot might cause not only direct physical damage to the property but might also bring into being cessation of work, interruption to process or business operations, and change in temperature and that for losses assignable to these causes or exceptions there was to be no liability. The peril insured against was riot "as hereinafter defined or limited" subject to the exception that there should in no event be any liability for losses as caused in clause 6(*c*). These causes were unquestionably operating concurrently with the continuing riot. It is true also that they resulted solely from the riot except "change in temperature", which was a combination of the

lack of internal heat, the open windows and an external factor, change in atmospheric temperature. But they are none the less limitations on liability.

There is nothing new in the appellant's submission that since the riot brought the causes enumerated in cl. 6(*c*) into being, the riot is the proximate cause of the loss and the 6(*c*) causes are to be disregarded. This is merely another way of stating that the 6(*c*) causes are only to be regarded if they are the result of a cause other than the riot. This same argument has been put forward and rejected in cases having to do with claims under fire policies which contain also an exception or exclusion that the insurer is not to be liable for loss or damage by explosion. A fire occurs and it is followed by an explosion caused by the fire. The insurer is liable for the fire damage but not the explosion damage. The exclusion of explosion is not limited to an explosion from a cause other than the fire. This line of authority is very clear and consistent and is of long standing. It goes back at least as far as *Stanley v. The Western Insurance Company*[1], and has been applied in *Re Hooley Hill Rubber & Chemical Co. Ltd. v. Royal Insurance Co.*[2]; *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co. Ltd.*[3]; *Sin Mac Lines Ltd. et al v. Hartford Fire Insurance Co. et al.*[4] The principle to be deduced is no more than this—that liability for the consequences of what the Court holds to be the proximate cause of the loss may be negatived by a properly framed clause of exclusion and it seems to me that if it is found, as a matter of construction, that the causes specified in the clause of exclusion apply, then it is of no significance whether these are referred to as proximate causes or simply causes.

Nor do I think that this principle is in any way disturbed by the decisions in *Boiler Inspection and Insurance Co. of Canada v. Sherwin-Williams Co. of Canada Ltd.*[5] and *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.*[6], upon which the appellant really

[1] (1868), L.R. 3 Exch. 71, 37 L.J. Ex. 73.
[2] [1920] 1 K.B. 257.
[3] [1921] 1 A.C. 303.
[4] [1936] S.C.R. 598, 3 D.L.R. 412.
[5] [1950] S.C.R. 187, 1 D.L.R. 785; affirmed [1951] A.C. 319, 3 D.L.R. 1.
[6] [1918] A.C. 350.

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founded its argument. In the first of these cases the insurance was against accident and excluded losses from fire and from accident caused by fire. There was an explosion —an accident within the meaning of the policy—and that accident caused a fire. There was never any question that the subsequent fire loss was excluded. The whole case was argued throughout on that basis. The real controversy was whether there had been a fire preceding the explosion. If there had been such a fire, then the loss from the explosion was excluded because it would then be a case of accident caused by fire. It was held that there had been no such antecedent fire. Consequently, the proximate cause of the loss was accident, the peril insured against, and there was no exclusion that applied to cut down the loss from this cause. This case, therefore, cannot be taken as deciding that once the proximate cause is ascertained to be the peril insured against, an exclusionary clause has no operation if the causes mentioned in it result from the proximate cause. The ratio of the decision in this Court is at p. 209 in the reasons of Locke J., where he says: "I agree that loss of which fire is the direct or proximate cause is excluded but in my view the loss was not so caused."

The *Leyland* case was concerned not with a clause of exception or exclusion but with a warranty in a marine policy against all consequences of hostilities. The ship was torpedoed but succeeded in reaching port, where she sank before she could be repaired because of repeated grounding with the ebb and flow of the tide. The effect of a warranty such as this is well understood. Unless it is complied with exactly, the insurer is discharged from liability, as of the date of the breach. Compliance with the warranty, in other words, is a condition precedent to liability on the policy. The only point to be decided in this type of case is whether the proximate cause of the loss is one against which the warranty was given. If it is, the action fails for non-compliance with the warranty. The very nature of the problem compels the Court to determine proximate cause —whether it is a matter of "consequences of hostilities" within the warranty or "perils of the sea" within the coverage of the policy. It must be one or the other and no problem arises concerning the modification or limitation of "proximate cause" by an exclusionary clause.

I turn now to the meaning to be given to the causes enumerated in cl. 6(c). The learned trial judge held that there was no "cessation of work or interruption to process or business operations" as contemplated by the clause because, in his opinion, these conditions were brought about by the compulsion of the riot. It is quite clear that the plant protection men were available for work and would have entered the plant and saved the damage, had it not been for the display of force by mass picketing that prevented their entry. It seems to me that this limitation upon the application of these causes is to be rejected for two reasons. The first is that as a matter of construction it is impossible to read into the exclusionary clause any such limitation and, in the second place, such a limitation is inconsistent with the finding of the learned trial judge and the line of authority, beginning with *Stanley v. Western, supra,* relied upon by him, that these causes operate notwithstanding the fact that they were brought into being by the riot.

The learned trial judge also imposed a limitation upon the operation of the cause "change in temperature". He rejected the appellant's submission that the cause was too vague and uncertain to have any operation but he adopted the same principle in dealing with this cause as with the other two named causes in 6(*c*). Anything attributable to the riot was not within this cause. He therefore limited its operation to change in atmospheric temperature. I think that there is the same error here as there is in the limitation of the other two causes and that the Court of Appeal was correct in rejecting the limitations imposed by the learned trial judge upon any of these 6(*c*) causes.

I am therefore of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendants, respondents: Wright and McTaggart, Toronto.