THE BOILER INSPECTION AND INSURANCE COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

AND

ABASAND OILS LIMITED (PLAINTIFF) .. RESPONDENT.

1947 Nov. 10, 11, 12, 13, 14, 17

1948 April 13

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Insurance—Boiler explosion policy—Use and Occupancy endorsement provided indemnity for each day of total prevention of business caused solely by an accident to insured object but excluded liability if resulting from fire outside of object—Total prevention of business caused by concurrent accident to object and fire outside of object—Whether words "caused solely by an accident" excluded liability.

An insurance company by clause "A" of a use and occupancy endorsement attached to an accident policy, agreed to pay the insured $1,000 for each day of total prevention of business on the premises therein described, caused solely by an accident to an object covered by any of the schedules of the policy, subject to a limit of loss of $100,000 for any one accident.

Clause "G" of the endorsement provided that: "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.) * * *

"Accident" was defined in the policy to include a sudden and accidental explosion of gas within the furnace of the object set out in the schedule. "Object" was defined to mean a boiler as described in the schedule, provided the explosion occurred while the boiler was being operated with gas and oil.

PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

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The policy expired on November 1, 1941, but at the request of the insurance broker of the insured, the company's special agent furnished a "binder", including the use and occupancy endorsement, for the month of November. The loss occurred on November 21. The insured alleged the damage was caused by an explosion followed by a fire. The company contended that there was no explosion but that all the damage was caused by the fire.

Held: (Taschereau and Estey JJ., dissenting)—That the effect of the parenthetical phrase in clause "G"—*i.e.* "(Nor for any prevention of business resulting from a fire, outside of the object, following an accident)"—was to make clear that a fire caused by an explosion was to be deemed to be completely severed from the explosion for the purposes of clause "A". It characterized "accident" in clause "A" by confining it to explosive action. It thus declared the meaning of clause "A": that the word "solely" restricted the cause for which there was liability to purely explosive effects as against a resulting fire.

Per Taschereau and Estey JJ.: The provision limiting liability inserted in clause "G" applied only to total prevention of business resulting from fire outside of the object and could not be extended to prevention of business resulting from damage to the object caused by an accident when the two results were concurrently effected. *Hobbs* v. *The Guardian Fire & Life Assce. Co.* (1886) 12 S.C.R. 631 and *Wadsworth* v. *Canadian R'y. Accident Insce. Co.* (1914) 49 S.C.R. 115 referred to.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Shepherd J. (2), at the trial, by which the plaintiff's action was maintained with costs.

The material facts of the case and the questions at issue are stated in the above head-note and are more fully related in the judgments now reported.

L. H. Fenerty K.C. and *R. L. Fenerty* for the appellant.

George H. Steer K.C. and *Roland Hartland K.C.* for the respondent.

The judgment of the Chief Justice and of Rand and Locke JJ. was delivered by:—

RAND J.—The courts below have concurred in the following findings: there was a gas explosion in the furnace which damaged the boiler; as a direct result, a flame, forced out of a small aperature in the furnace, played upon a wooden support and set a fire which spread to the structure of the building and ultimately consumed it; the plant was

(1) [1947] 1 W.W.R. 61; [1947] 2 D.L.R. 109.

(2) [1945] 3 W.W.R. 49.

necessarily idle during the reconstruction of the building; the period of reconstruction was equal to if not greater than that required for the repair of the boiler; the operation of the plant was totally prevented by each during at least one hundred days; and proper notice of the accident had been given to the appellant. On these findings judgment was given for the plaintiff; and although they were challenged by Mr. Fenerty, he was not able to satisfy me, under the well established rule, that they were so clearly wrong as to warrant interfering with them.

Several questions of law are raised, but in view of the conclusion to which I have come on that of the construction of the policy in relation to the effect of the destruction of the building by fire on liability, consideration of the others becomes unnecessary.

The insurance covered two indemnities. The first was for loss of property, and I think it desirable to quote Section I of the general provisions dealing with it:

> To PAY the Assured for loss on the property of the Assured directly damaged by such accident (or, if the Company so elects, to repair or replace such damaged property), excluding (*a*) loss from fire (or from the use of water or other means to extinguish fire), (*b*) loss from an accident caused by fire, (*c*) loss from delay or interruption of business or manufacturing or process, (*d*) loss from lack of power, light, heat, steam or refrigeration, and (*e*) loss from any indirect result of an accident;

and the following:

> It is PROVIDED FURTHER that this agreement is subject to the conditions printed hereon and subject also to the schedules and endorsements issued to form a part hereof. The schedules and endorsements attached to this policy when it is issued are identified as follows: Schedule(s) numbered 1 and 2. Endorsement(s) numbered 1 and 2.

Under the first schedule, explosion in the furnace as "accident" is insured against, and "accident", for the purposes here, is thus defined:

> 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".

An endorsement introduced the second indemnity against prevention of use and occupancy on which this action is brought and the obligation of which is in these words:

> A. In consideration of . . ., the Company hereby agrees to pay the Assured One Thousand Dollars ($1,000) herein called the Daily

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Indemnity, for each day of total prevention of business on the premises described as . . . caused solely by an accident (occurring while this endorsement is in effect) to an object, covered by any of the schedules of this policy . . .; all subject to a limit of loss of One Hundred Thousand Dollars ($100,000) for any one accident * * *

Clause "G" of this endorsement headed "LIMITATION OF LIABILITY" provides:

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.

And it is the effect which I think must be given to this clause that, in my opinion, decides the appeal.

Mr. Steer's contention is this: the primary obligation embodied in clause "A" is to pay compensation for "total prevention of 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 parenthesis, "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.

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.

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 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 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

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of cause for which the policy provides indemnity: but as it is in fact an insurance against explosion, that limitation is not surprising.

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

The judgment of Taschereau and Estey JJ. was delivered by:

ESTEY J.:—The respondent was extracting and refining products from bituminous sand at Waterways, when on November 21, 1941, a large portion of the plant and equipment was destroyed by explosion and fire.

The appellant by a contract of insurance, No. 39855-B-Special, dated November 1, 1940, carried accident insurance on three boilers at the plant and the claim for the property damage to the boilers has been settled.

This contract of insurance also contained a Use and Occupancy Endorsement under which the appellant company, subject to the terms thereof, agreed to indemnify the respondent in the sum of $1,000 per day for each day of total prevention of business on the premises at Waterways caused solely by an accident to an object, the object in this case being the boilers. It is the claim under this endorsement that constitutes the subject-matter of this appeal.

The respondent as plaintiff brought this action alleging that it was insured by virtue of this policy for the period including the month of November 1941. The appellant contended that the contract expired on November 1, 1941, after which date a new contract of insurance was concluded and as it was not the subject-matter of respondent's (plaintiff's) cause of action the latter cannot succeed.

That the contract as issued expired on "November 1, 1941, at 12 o'clock noon, standard time * * * at the place where such accident occurs" is not questioned. On that date and before the expiration of the contract, R. C. Brown, respondent's insurance broker at Montreal, requested the appellant company, through its Montreal representative Wilkinson, to renew the insurance. Wilkinson replied that he had no particulars of the contract and would therefore have to communicate with head office, but concluded:

. . . until he got notification he would agree to continue the coverage.

Later the same day Wilkinson communicated with Brown and stated:

* * * the company were undecided as to whether they would renew the use and occupancy feature in the policy but that he would still keep the coverage in force until the decision was made.

Brown requested that the agreement of November 1, 1941, be evidenced in writing, and as a result of that request the appellant issued a binder at Montreal under date of November 19, 1941.

This binder provided for the same coverage and indemnity as the original policy but for a period of 30 days and not for the period as Brown deposed, until the company would arrive at its decision whether they would carry the Use and Occupancy Endorsement. It also contained this provision on the back thereof:

The company accepting this risk acknowledges itself bound by the terms, conditions and limitations of the policy (or policies) of insurance, and of the schedules specified, in current use by the company for the kind (or kinds) of insurance specifically ordered in the application for insurance from the effective date and hour specified therein and the assured accepts this binder under such terms, conditions and limitations.

Then on the face of the binder was a provision reading in part "the applicant is insured in accordance with the binder on the back hereof". These terms were not in the original contract of insurance. It was submitted that the presence of these new and additional terms evidenced an intention to make a new contract rather than to continue the old one. This submission assumed contrary to fact that the parties had agreed upon these new and additional terms. The only agreement arrived at between the parties, apart from the original contract, was that made on November 1, 1941, as deposed to by Brown whose evidence was not contradicted. On that date the agreement was to continue the old agreement, not for 30 days or upon any of these new or additional terms, but until the appellant arrived at its decision with respect to the Use and Occupancy Endorsement. This 30-day period and these additional terms were included in the binder dated December 19, 1941, by the company of its own volition and not by virtue of any agreement, and therefore they are not binding upon the parties. If one assumes that the binder was mailed on the 19th from Montreal, it would be

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doubtful whether this binder would have reached the respondent before the date of the loss, and certainly not within any time sufficient for its examination and repudiation before the loss occurred.

The evidence establishes that on November 1st the parties agreed to continue the original contract varied only as to the date of its termination, *Royal Exchange Assurance* v. *Hope* (1). This contract so varied was the only contract of insurance between the parties at the time the loss was sustained. The pleading, therefore, in the statement of claim is sufficient and the action is brought within the statutory period.

The appellant further submits that respondent's action cannot be maintained because notice was not given in compliance with the terms of the Use and Occupancy Endorsement, which required the notice to be given by telegram or letter to appellant's home office in Toronto or at its office in Winnipeg. It is not contended that a letter or telegram was sent to either of these offices, but that the company accepted and acted upon a notice received by it on December 10, 1941. On that date Wilkinson, the appellant's representative at Montreal, was advised of the loss by Brown, respondent's insurance broker at Montreal, and in the course of the interview Brown gave him all the information he had with respect to the loss and discussed the Use and Occupancy Endorsement. As a result Wilkinson notified the home office of the appellant company and on the same date, December 10th, the company's chief engineer, Gregg, instructed by air mail Hobson, appellant's inspector for its western district which included the Province of Alberta, to investigate the claim. Hobson called at respondent's office in Edmonton on December 12th and visited the plant on December 21st. Under date of December 22nd he made his report to the appellant.

In the meantime, on December 16th, Brown wrote a letter to the appellant's Montreal office marked "Attention Mr. Wilkinson" confirming his interview of December 10th, and explaining that notice had not immediately been given by the assured as the contract was in Montreal in connection with its renewal and respondent was not aware of the requirements with respect to notice.

(1) [1928] 1 Ch. 179.

On January 31, 1942, the respondent submitted its figures relative to the property claim and included this paragraph:

> This covers only the direct damage caused by the explosion, and does not include anything under the use and occupancy clause, for which we shall later make a separate claim.

Moreover, in the course of his examination for discovery the representative of the company admitted that Wilkinson had considered the Use and Occupancy Endorsement in relation to this particular claim by December 16, 1941.

The foregoing indicates that while the respondent did not comply with the terms of the policy requiring notice, the appellant company acted upon the notice of December 10th. Then, notwithstanding Brown's explanation that the notice was not given immediately, and in effect not in the terms of the policy, the appellant took no exception thereto but continued in a course of conduct that indicated its acceptance of the notice given as sufficient. In so far as the record discloses, no objection was ever taken to either the delay in giving or the form of the notice until the defence was filed. I am therefore in agreement with the conclusion of the learned trial Judge that the appellant's conduct amounted to a waiver of the requirements in the contract with respect to notice.

In the furnace under the main boiler respondent used for fuel either crude oil or dry gas or both. The oil was carried by one pipe line and the dry gas by another into the furnace. In the dry gas line was a 10-pound pressure valve so that until the pressure in the dry gas line exceeded 10 pounds no gas flowed through to the furnace. Shortly after the plant started up on the evening in question the employee Hartridge observed an abnormal pressure in the fractionating column and went to the boiler house to ascertain if the dry gas line leading into the furnace was open. On his way he was joined by another employee, Rosychuk, and as they reached a point where they could see the front of the furnace they saw a flame coming through the opening or vent in the front of the furnace and playing on a wooden post. They, with a third employee, endeavoured to close the valve and stop the flow of dry

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gas but the flames and heat made that impossible. The post caught fire, from which it spread and destroyed a large part of the plant.

The learned trial Judge has found, and his finding in this regard was accepted by all of the learned Judges in the Appellate Court, that on November 21, 1941, an explosion occurred in the furnace. Upon this appeal this finding was vigorously contested by counsel for the appellant, who submitted that it was "based on incorrect inferences or misapprehensions of the evidence, or both".

Hartridge and Rosychuk, employees at the plant who discovered the fire, deposed as to the relevant equipment, its operation, the discovery of the fire and as to their observations during and after the fire. Rosychuk in particular stated that after the fire he found cracks from one-half to three-quarters of an inch on both sides of the brick setting of the furnace and that these cracks were not there before the fire. It is upon their evidence that E. H. Boomer and other experts in the main based their conclusions. E. H. Boomer, professor of chemical engineering, stated that in his opinion the increased pressure would cause "liquid droplets or drops or slugs of gasoline" to pass through the dry gas line into the furnace where they would vaporize with great rapidity creating a surplus of fuel in the furnace, and stated:

> It is my opinion that the initial occurrence that took place when the surplus fuel arrived in the furnace was an explosion * * *

He explained in detail the reasons for his opinion and the consequences of an explosion. It is particularly significant that Hobson in his report of December 22, 1941, stated:

> A very short examination of the large boiler setting showed that there had been a furnace explosion of considerable violence.

and later in the same report:

> I believe it certain that gasoline siphoned over through the "dry gas" fuel feed pipe.

These gentlemen arrived at substantially the same conclusion both as to the fact of explosion and the presence of gasoline in the dry gas line. Several of the other witnesses expressed the opinion that an explosion took place and even the witness who expressed the opinion that the injury to the boiler was caused from the outside in effect admitted

that the presence of the cracks was consistent with the fact of explosion. Counsel particularly emphasized the fact that the explosion was not heard. There were two employees called as witnesses who were in the building which housed both the separation plant and the boiler. Neither of them in their description of what took place mentioned having heard an explosion. Neither was asked particularly with regard thereto. Moreover, it is clear there was considerable noise in the building. The fact was stressed that the breeching was not disturbed in the furnace, but the witness who made the most of that fact admitted that it was possible that the breeching would not be disturbed by an explosion sufficient to crack the side walls which were of weaker construction than the end walls. The contention that the cracks were not seen until after four days is not consistent with the evidence of Rosychuk.

There were differences of opinion expressed by the several witnesses and the learned trial Judge had to find as between these differences. His conclusion is supported by the evidence and ought not to be disturbed.

The explosion which occurred in the furnace caused both damage to the boiler and the flame to go through a vent in the front of the boiler setting fire to a post from which it spread and destroyed the separation plant.

It is clear upon the evidence that the boiler was essential to the operation of the plant and that because of the damage from the explosion it could not be used and the necessary repairs thereto were not completed until June 4th. It is equally clear that the plant could not be operated without the separation plant and that the parts essential to the operation thereof were not repaired until June 16th. The plant was therefore closed down from the date of the fire until June 16, 1942. The appellant contends that these facts do not bring the loss due to a total prevention of business within the terms of the Use and Occupancy Endorsement.

The Use and Occupancy Endorsement provides, in para. A, for an indemnity of $1,000 per day (the maximum 100 days) "for each day of total prevention of business on the premises * * * caused solely by an accident * * * to an object, covered * * *" It is conceded that an explosion is

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an accident and the boiler an object within the meaning of this policy. The total prevention of business was caused solely by the explosion which cracked the boiler and set the fire. That the word "solely" applies only to the word "accident" and not to the word "object" is indicated to some extent by the presence of the words in brackets in para. A, but more particularly by the use of both of these words in the first sentence of para. G, where they deal with the cause of the accident and a fire outside of the object following an accident. If para. A alone had to be considered the issue would be concluded upon the principles of causation in favour of the respondent: *Hobbs* v. *The Guardian Fire & Life Assce. Co. of London* (1). In that case the insurance company under the contract of fire insurance was held to be liable for both the damage caused by fire and that by an explosion incidental to the fire. It is, however, open to the parties to limit the liability of the company by inserting appropriate clauses in the contract. In the policy here in question, unlike that in the *Hobbs* case, the parties have inserted para. G under the heading "Limitation of Liability". Para. G 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 payments 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.

The total prevention of business was caused solely by an accident to an object, but because this accident (explosion) also set a fire which destroyed the separation plant and in itself was sufficient to cause a total prevention of business, the appellant contends it is not liable. In view of the *Hobbs* decision this result can only follow if the circumstances of this case are such as bring it within the provisions for the limitation of liability in para. G.

The first sentence in para. G, apart from that portion in brackets, excludes liability if the total prevention of business is caused solely by an accident as required under para.

(1) (1886) 12 S.C.R. 631.

A, if that accident is "caused by fire or by the use of water or other means to extinguish fire." The accident (explosion) was not so caused in this case. Then we come to the words in brackets in the same sentence, "(nor for any prevention of business resulting from fire outside of the object, following an accident)". The inclusion of these words in brackets is significant and shows an intention to treat them as parenthetical or inserted to explain or clarify the other or earlier portion of that sentence. The clarity of the earlier portion does not eliminate the possibility of the inclusion of these words as abundant caution on the part of the draftsmen. So regarded they can relate only to an accident due to one of the enumerated causes in that sentence and, therefore, do not exclude the liability of the appellant under the circumstances of this case.

If, however, the brackets be disregarded and the words therein be construed not as parenthetical but as they have been construed both in the courts below and at the hearing as constituting a separate sentence to be read "the company shall not be liable * * * (nor) for any prevention of business resulting from fire outside of the object following an accident", they would exclude the liability of the company where an explosion, however caused, did not injure or damage the boiler but which did set fire outside of the boiler and thereby cause a total prevention of business and consequent loss to the respondent.

The explosion in this case effected two results: damage to the boiler and a fire that destroyed the separation plant. Either one of these results was of itself sufficient to cause a total prevention of business. The appellant company in drafting the terms of this policy and the parties hereto in executing this contract must have contemplated the possibility of an explosion in a furnace or thereabouts causing the two-fold effects of boiler and fire damage. They have, however, in drafting this limitation restricted it to fire outside the object and left the liability for the prevention of business caused by damage to the object intact, whether it was accompanied by or concurrent with other results equally effective in causing a total prevention of business. They have not provided a limitation in para. G to the effect that the company shall not be liable when the loss

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from total prevention of business is caused concurrently by an explosion which effects boiler and fire damage either of which is sufficient to cause the total prevention of business.

These clauses of limitation are drafted on behalf of the companies by those familiar with insurance law and where any ambiguity exists they have been construed strictly against the insurer. As stated by Anglin, J. (later Chief Justice Anglin):

> "Clause (G) is a clause of limitation introduced by the company in its own favour and, like a clause of exception, is to be given a strict construction." *Wadsworth* v. *Canadian Rly. Acc. Ins. Co.*, (1914) 49 S.C.R. 115, at p. 133.

The limitation here provided applies only to that total prevention of business resulting from fire outside of the object (boiler) and cannot be extended to prevention of business resulting from damage to the object caused by an accident (explosion) even where these two results are concurrently effected. The total prevention of business here caused is within the provisions of para. A and not excluded by those of para. G. This total prevention of business resulting from damage to the object continued for more than the maximum of 100 days as provided in para. A.

Counsel for the appellant contended that the respondent company failed to use due diligence in effecting the necessary repairs to the boiler. The evidence, however, does not support this contention but rather leads to the conclusion that the respondent company was anxious to complete the repairs and took all reasonable steps under the circumstances to attain that end.

The judgment in favour of the respondent should be affirmed and this appeal dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty & McGillivray.*

Solicitors for the respondent: *Milner, Steer, Poirier, Martland & Bowker.*