ST. PAUL LUMBER COMPANY, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

BRITISH CROWN ASSURANCE CORPORATION, LIMITED (DEFENDANT) RESPONDENT.

1923
*Feb. 9, 12.
*May 1.

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

Insurance—Fire—Description of insured property—Warranty—Statutory conditions—Agency—Non-disclosure.

To the face of a policy of fire insurance on sawn lumber there was attached a sheet of paper typewritten in black and containing the following provision: "It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, It being warranted by the assured that the several locations named herein on which lumber is piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard." The policy was indorsed with the statutory conditions in compliance with "The Alberta Insurance Act." In an action on the policy,

Held, Davies C.J. dissenting, that, as against the appellant, the warranty as to the character of the surroundings of the property insured is restricted in its application to the risk from prairie fires and cannot be regarded as part of the description of that property for the general purposes of the policy.

Held also, Davies C.J. dissenting, that upon the evidence no misrepresentation by the assured, or by any one in a position to bind him, had been shewn and that he or his representative had disclosed all material facts of which they had knowledge bearing on the risk.

Judgment of the Appellate Division ([1922] 1 W.W.R. 1048) reversed, Davies C.J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Walsh J. and dismissing the appellant's action.

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

Woods K.C. for the appellant.

Savary K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—I think this appeal should be dismissed with costs. I concur in the reasons for the judgment of the Appellate Division delivered by Mr. Justice Hyndman and concurred in by Chief Justice Scott, which clearly express my own views.

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

(1) [1922] 1 W.W.R. 1048.

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Duff J.

DUFF J.—After a careful consideration of the judgments delivered in the Appellate Division I am still of the opinion that the judgment of Mr. Justice Walsh was right and that the reasons assigned by him for the conclusion at which he arrived are sound reasons.

I agree with him that the typewritten warranty relates only to "loss or damage arising from or traceable to prairie fires."

I agree that Lebel was not the agent of the appellants and that the appellant company merely took over the application made to the London & Lancashire Company and acted upon it as if it had been made to themselves through Lebel and the inspector Hahn. As to non-disclosure, I think the view of the learned trial judge is the reasonable practical view and that it would be putting the obligation of the applicants for insurance on too high a level to hold that Meunier was under a duty to disclose as a circumstance material to the risk the fact that in the river-bed below the bench on which the lumber was piled there were some willow bushes which at the time of the application were largely immersed in the waters of the river.

The appeal should, I think, be allowed and the judgment of Mr. Justice Walsh restored.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed and the judgment of Mr. Justice Walsh restored.

Upon the question of construction I am satisfied that as against the appellant the warranty as to the character of the surroundings of the property insured is restricted in its application to the risk from prairie fire and cannot be regarded as part of the description of that property for the general purposes of the policy. The reasons for so holding are stated by Mr. Justice Walsh.

No misrepresentation by the assured or by any one in position to bind him has been shown.

Neither was there any concealment of, or failure on the part of the assured to communicate, circumstances material to the risk such as would avoid the policy under the first statutory condition. Upon the evidence it has not been

established that Lebel acted as agent for the insured and there is nothing to warrant the suggestion that Hahn, the inspector of the London & Lancashire Ins. Co., occupied that position. The insured appears to have made full disclosure to Lebel when he applied to him orally as local agent for the London & Lancashire, from which he then sought insurance. The transfer of the appellant's oral application from that company to the respondent company, which eventually took the risk, was arranged by Mr. Hahn without any participation by the appellant,—indeed, so far as appears, without his knowledge. Any mistake made by Mr. Hahn in describing the situs of the property when arranging such transfer, does not, in my opinion, suffice to avoid the policy as against the appellant.

BRODEUR J.—This is an appeal concerning a fire insurance policy on cut timber. The insurers, after having described in the policy three lots of timber situated at different places, added the following provision which was typewritten:

It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, It being warranted by the assured that the several locations named herein on which lumber is piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard.

The case turns largely on the construction of this provision. The insurance company contends that it is a condition precedent and that the facts not being as warranted the policy never attached. On the other hand, the insured claims that such a clause would extend only to damage traceable to prairie fire.

The judges in the courts below are equally divided on this point. The appellate division, by a majority of one, reversed the decision of the trial judge and came to the conclusion that this clause should be considered as a description of the property insured.

This policy is issued under the statutory conditions of the province of Alberta.

The clause in question is not artistically drawn but it means, according to my mind, that the risk covers also a loss arising out of a prairie fire, but provided that in such a case the pile of lumber should be surrounded by ploughed

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ground. If there were a serious doubt as to the construction of this clause, it should be interpreted against the insurance company, since it was drafted, inserted in the policy and stipulated by the company itself.

It is contended also by the insurance company that no liability attaches because a circumstance which was material was not disclosed, such circumstance being that the lumber was situate in a clearing in the bush and exposed to bush hazard.

A great deal has been said in connection with this about some willow brush that had grown in the river on the bank of which was piled the lumber insured.

This willow brush being at some period of the year entirely covered by the waters of the river its green and moist condition for the part which emerged from the water during the balance of the year could not constitute a serious source of danger. The brush or bush to which reference is made in a correspondence and about which inquiries were made had reference to the slashings or underbrush resulting from the cutting of the timber. This had been removed and the pile of lumber was on clear ground and was not exposed to risk arising out of this heavy underbrush which might be a great source of danger.

It was suggested also that this bush would include the standing timber.

I think that the circumstances disclosed show that a bush of heavy timber could not be considered as constituting a material fact to be disclosed and that the parties fully understood that the validity of the policy would not be affected by the fact that there was in the vicinity some standing timber.

I have then come to the conclusion that the plaintiff company has a right to recover under the policy of insurance in question.

The appeal should be allowed with costs of this court and of the court below and the judgment of the trial judge restored.

MIGNAULT J.—The action of the appellant is to recover on an insurance policy issued by the respondent covering, *inter alia,*

150,000 feet of sawn lumber piled on bank of river on section 3, township 63, range 10, west of the 4th meridian, province of Alberta.

It is contested on three grounds:—

1. There was in the policy a special warranty that the several locations therein named on which lumber was piled, should be entirely surrounded by ploughed ground and in no way exposed to bush hazard, and the lumber destroyed did not conform to this warranty.

2. It was represented by the insured and his agents that the lumber would be under some kind of supervision, ploughed around and in no way exposed to bush hazard.

3. By the conditions of the policy it was the duty of the insured to disclose any circumstance material to enable the insurer to judge of the risk it undertook, and the insured did not disclose the fact that the lumber in question was entirely surrounded by bush and underbrush and was exposed to the risk of bush fire.

The first point involves the construction of the following typewritten clause contained in the policy:—

> It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, It being warranted by the assured that the several locations named herein, on which lumber is piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard.

In my opinion, the warranty here is restricted to the insurance against loss or damage arising from or traceable to prairie fires. It is not a general warranty. I think the words "It being warranted," etc., cannot be severed from the words which precede. The punctuation shews that although the word "It" begins with a capital "I," the warranty is really a part of the whole clause. If severed, it would not form a complete sentence, while, if taken with the preceding words, the sentence is a perfect one, and the idea expressed is quite conceivable, for a strip of ploughed ground around the lumber would be a great protection in case of a prairie fire. The insurer, when stipulating a warranty applicable, as he now contends, to the whole risk, should have made it perfectly clear that it did so apply, and I would not detach the warranty clause from its context to give it a greater effect than it has when read in this context. On this point, for the fire here did not arise from a prairie fire, I am in full agreement with the learned trial judge.

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On the second point, the contention is that the appellant is bound by the statement of Mr. Hahn, the inspector of the London & Lancashire Fire Insurance Co. (which company found itself unable to insure the lumber and passed on the risk to the respondent), who in his letter to Mr. Dunham, the agent for the respondent company, said that he had arranged with Mr. Lebel that

> all this lumber was to be under some kind of supervision, ploughed around, and in no way exposed to bush hazard.

This involves a question of agency, and the claim of the respondent is that Mr. Lebel was the appellant's agent for this insurance. Mr. Lebel is a solicitor and incidentally an agent of the London & Lancashire Fire Insurance Co., Mr. Hahn's company. He explains that he never acted as solicitor for the appellant. He had written to Mr. Meunier of the appellant company claiming from the latter a certain amount for a client of his, and as Meunier could not pay he then suggested to him that the lumber should be insured in order to protect his client, to which suggestion Meunier acquiesced. This certainly does not make Lebel the appellant's agent, the more so as, to Meunier's knowledge, in addition to being a solicitor he was an insurance agent. And in his letter to Mr. Hahn, with reference to the insurance of the lumber in question, Lebel merely said that it was piled on the bank of a river, on the timber limit of the owner. Without questioning the sincerity of Mr. Hahn's statement to Mr. Dunham, I do not think that the appellant is bound by its terms. The respondent could have incorporated this statement in its policy, and not having done so the appellant cannot be bound by Mr. Hahn's representations.

On the third point, I think that Mr. Meunier fairly disclosed all the circumstances connected with the risk. The lumber was on the bank of a river, this bank being some ten feet above a flat through which the river flowed, and the lumber was about fifty feet from the river, on a clearing made by the appellant. There was timber around the clearing and on the flat there were willows which, when seen after the fire, were ten or fifteen feet high. But the insurance was effected in the early spring when the water was high and the willows, much smaller then, were covered

by water. I do not think that the appellant's representatives failed to disclose any material fact of which they had knowledge bearing on the risk. On the contrary, they appear to have acted in good faith and to have described the situation of the lumber as it then was. The willows certainly grew during the summer, but even if the risk thereby became greater I do not think that the appellant can be taxed with misrepresentation or failure to disclose material facts. On this point also I am against the respondent.

With great deference therefore, I would allow the appeal and restore the judgment of the learned trial judge with costs here and in the Appellate Court.

Appeal allowed with costs.

Solicitors for the appellant: *Woods, Sherry, Collisson & Field.*

Solicitors for the respondent: *Savary, Fenerty & Chadwick.*