THE CITY OF LONDON FIRE INSURANCE CO. (DEFENDANTS)..... } APPELLANTS;

AND

JOHN SMITH (PLAINTIFF)..... .RESPONDENT.

1887
*Nov. 22, 23.
1888
*Mar. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Description of property—Error in policy—Statutory condition—Just or reasonable variation—Waiver.

The agent of an insurance company filled in an application for insurance on a building built of boards and fixed the premium at the rate demanded on brick buildings, there being no tariff value for board buildings. The words "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. It this case it was in black. At the head office the word intended for boards was read "brick" and the policy issued as on a brick building. A loss having occurred the company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance.

Held, affirming the judgment of the court below, that as there had been no misrepresentation by the assured, and no mutual mistake, the parties were *ad idem* and the contract was complete, and even if it were otherwise the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy.

By the 17th condition in ch. 162 R. S. O. a loss is not payable until thirty days after the proofs of loss are put in unless otherwise provided by statute or agreement of the parties.

Held, per Ritchie C. J. and Fournier, Henry and Gwynne JJ. that this is a privilege accorded to the company and while the time may be further limited by agreement it cannot be extended.

Per Strong J.—That a variation of the condition by inserting a clause in the policy extending the time to 60 days is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one.

---

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Gwynne JJ.

1887

CITY OF LONDON FIRE INS. CO. v. SMITH.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which sustained the plaintiff's verdict and refused a new trial.

This is an action by the plaintiff against the defendants, under the following circumstances:—

On the third day of July, 1883, the plaintiff made an application to the defendants through one Stafford, their local agent at Renfrew, to insure a building at Renfrew for $2,500. A policy subsequently issued upon this application, and on the 15th day of April, 1884, a fire occurred. Proofs of loss were sent by the company to Stafford, the local agent, on the 16th April. Stafford was away from home at the time, but returned on the 24th April. He handed the papers to Smith, the plaintiff, instructing him to fill them up and to leave them with Mr Eady, a local magistrate, for him, Stafford, to get and send to the office, which Stafford says he did on the 26th April, 1884. An action was brought on the 4th June, 1884. On the 24th June, the magistrate's certificate was demanded. On the 19th July, 1884, an arbitration having been had between the parties, an award was made fixing the loss at $1,700, and the value of the property at $2,500. The action came on for trial at the Pembroke fall assizes for 1884, and was tried before Mr. Justice Rose and a jury, when judgment was given for the plaintiff. The defendants thereupon moved before the Queen's Bench Divisional Court to set aside the judgment, which court unanimously dismissed the motion with costs. The defendants thereupon appealed to the Court of Appeal for Ontario, which court unanimously dismissed the appeal with costs, and the defendants thereupon appealed to this court.

The following facts will show the nature of the

(1) 14 Ont. App. R. 328. (2) 11 O. R. 38.

1887

CITY OF LONDON FIRE INS. CO. v. SMITH.

defence to this action: When the insurance was effected the company's usual printed form of application was filled up by the agent from the answers of the plaintiff and from his knowledge of the premises derived from personal inspection and examination; the property was described as a building two stories high, &c., built of "burds" covered with shingles, situate and being No. on the west side of Raglan St., Block 2, No. 79, Goad's plan. It was a wooden building made of boards six inches wide laid flat one on top of another, and the word "burds" which is very distinctly thus written in the application, was written and intended by the agent for the word boards and seems to be a mere misspelling of that word.

On the back of the application is a diagram of the building, and the printed direction to the agent at the top of the blank space left for the diagram requires that brick or stone buildings shall be shown in red and frame buildings in black. The diagram shows the buildings in black.

The local agent fixed the rate for the premium at 1½ p. c. His authority to fix a rate was not denied. This was the company's rate for a brick building. He said on the trial that he considered a solid board building a safer risk than a brick building, and would not rate it any higher. The tariff provided no special rate for a board building.

The policy issued by the company insures "the property hereinafter described, and more fully described in the requisition for insurance, that is to say," on the building only of a two story brick building, situate, &c., the word written "burds" in the application being read at the head office as "brick."

It was contended by the defendants on the motion to set aside the verdict that the parties were never *ad idem*, and consequently no valid contract existed be-

1887

CITY OF LONDON FIRE INS. CO. v. SMITH.

tween them. The courts below held that, assuming this was a valid defence, the company could not claim the benefit of it as, under a clause in the policy, they caused the plaintiff's claim to be submitted to arbitration, and by so doing recognized the existence of a contract between them.

Another objection to the verdict was that the evidence showed the insured premises to have been occupied, at the time of effecting the insurance, by objectionable characters who had been threatened with violence by the villagers and were finally driven out of the place, the company contending that the insurance was effected under an apprehension of an incendiary fire on the premises. As to this it was shown that the premises were vacant for some time before the fire, and the jury found that the risk was less when vacant than when occupied by the above mentioned tenants.

A further objection was that the action was brought too soon. A statutory condition in the policy was that the insurance should not be payable until thirty days after due proofs unless otherwise provided by statute or the agreement of the parties. In this case the policy provided that the loss should not be payable until sixty days after completion of claim which the court below held was an unreasonable condition.

Robinson Q.C. for the appellants.

As to weight of evidence see *Campbell* v. *Hill* (1); *Sutherland* v. *Black* (2).

The weight of evidence may make the judgment perverse. *Greet* v. *Citizens Ins. Co.* (3).

The company had a right to notice when the premises became vacant which was a change material to the risk. (Ritchie C.J. refers to *Foy* v. *Etna Ins.*

(1) 23 U. C. C. P. 473. (2) 10 U. C. Q. B. 515; 11 U. C. Q. B. 243.
(3) 5 Ont. App. R. 596.

1887

CITY OF LONDON FIRE INS. CO. v. SMITH.

Co. (1) where the contrary was held.)

Then as to the condition that the insurance shall not be payable for thirty days after proof of loss. The judge at the trial held this condition to be unreasonable, but it is submitted that the company can make what conditions they choose. The statutory condition is that it shall not be payable for thirty days unless otherwise provided by statute or agreement. That clearly authorizes an extension of the time to sixty days

This special condition has never been the subject of judicial decision, but there are a number of cases in which the reasonable nature of conditions has been discussed. *Ballagh* v. *The Royal Mutual Ins. Co.* (2); and the judgment of Moss C.J., in the same case on appeal (3); *May* v. *The Standard Ins. Co.* (4); *Butler* v. *The Standard* (5); *Parsons* v. *Queen's Ins. Co.* (6); *Ulrich* v. *National Ins. Co.* (7); *Morrow* v. *Waterloo County Mut. Ins. Co.* (8).

McCarthy Q.C. for the respondents.

There is no misdirection complained of and no error in law in the judgment on the trial. All that is complained of is in the discretion of the judge and jury with which discretion an appellate court, and especially a second appellate court, will not interfere. *Metropolitan Ry. Co.* v. *Wright* (9); *Allen* v. *Quebec Warehouse Co.* (10); *Eureka Woollen Mills Co.* v. *Moss* (11); and *Bickford* v. *Howard* (12); *Black* v *Walker* (13).

As to the condition extending the time of payment to sixty days that can be placed on no higher ground

(1) 3 All. (N.B.) 29.
(2) 44 U. C. Q. B. 70.
(3) 5 Ont. App. R. 87.
(4) 5 Ont. App. R. 605.
(5) 4 Ont. App. R. 391.
(6) 2 O. R. 45.
(7) 42 U. C. Q. B. 141.
(8) 39 U. C. Q. B. 441.
(9) 11 App. Cas. 152.
(10) 12 App. Cas. 101.
(11) 11 Can. S. C. R. 91.
(12) Cassels's Dig. 163.
(13) Cassels's Dig. 461.

1887

CITY OF LONDON FIRE INS. CO. v. SMITH.

Ritchie C.J.

than that of its reasonable or unreasonable character. That is dealt with in the case of *Queen's Ins. Co.* v. *Parsons* (1). In the same case in the Privy Council (2) it was held that this was a question to be decided at the trial.

The latest case on the question is *The Great Western Ry. Co.* v. *McCarthy* (3) decided on a statutory condition similar to that in question here. I would also refer to *Sands* v. *Standard Ins. Co.* (4); *May* v. *The Standard Ins. Co.* (5).

As to the authority of the agent to bind the company see *Insurance Co.* v. *Wilkinson* (6).

Sir W. J. RITCHIE C. J.—The first and really the substantial objection proceeds entirely upon this, that the company took the word spelt "burds" in the application to mean bricks and issued the policy describing the subject matter of insurance as a brick building. In the language of the statement of defence they say that if the plaintiff intended to insure the building as a wooden one, no contract was made by reason of a want of mutual understanding between the parties as to the subject matter of the agreement.

Stafford, the agent who filled in the application says:

I say that that is meant for boards, it is not very plain; it is my own handwriting.

The plaintiff swears it was—

Never meant for a brick building in the application. The agent filled in the diagram on the back of the application.

I have examined the original application and am unable to make "brick" out of the word in dispute, and am of opinion it must have been intended for boards, spelt "burds." But if there is any difficulty in deciphering the word I think the intention of the parties and the identification and character of the pro-

(1) 2 O. R. 56.
(2) 7 App. Cas. 96.
(3) 12 App. Cas. 218
(4) 26 Gr. 113; 27 Gr. 167.
(5) 5 Ont. App. R. 605.
(6) 13 Wall. 222.

perty to be insured is clearly established beyond all reasonable question by the diagram in black on the application, which clearly indicated to the company that the house was not a brick building. That such were the view and intention of both the agent of the insurers and the insured is conclusively shown by the certificate of the agent indorsed on the application and his evidence that he had inspected the property personally and therefore knew that the building to be insured was constructed of boards and not of brick, and therefore, acting honestly (and neither his *bona fides* nor that of the assured has been assailed) he could not have transmitted the premium on a brick building when he knew from personal examination it was a board one. He also certifies that the property was steadily profitable and fully recommended the risk; that the premium was paid and the company was now in the risk. What risk but the one he had personally inspected, which, unquestionably, was a house built with boards?

Under these circumstances had the company honestly considered that the word written was intended for brick and not for boards, in view of the discrepancy between the word and the diagram surely they should have placed the matter beyond all doubt and not have retained the premium of the assured and allowed him to remain under the impression that his property was covered by the policy transmitted to him. In addition to which the defendants clearly recognized the policy as an existing contract of insurance by calling for further proofs of loss and the magistrates' certificate mentioned in condition 13, after they had notice of the error in the description; a thing, as Mr. Justice Osler justly remarks, they clearly had no right to do except upon the assumption that there was an existing contract.

1888

CITY OF LONDON FIRE INS. CO. v. SMITH.

Ritchie C.J.

I think the jury were right in finding that the vacating of the premises by the Bromleys was not material to the risk in the view of increasing it and that, on the contrary, that the risk was less after the Bromleys had left and that there was no incendiary danger threatened at the time of the application, and such finding should not be disturbed.

The 17th statutory condition is :—

The loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided by statute or the agreement of the parties.

With reference to this condition I am inclined to adopt the construction put upon it by Mr. Justice Burton, namely,

That it is a privilge given by law to the companies and the statute does not seem to contemplate any further extension but simply that the company shall have that delay, unless, under a statute or by their own agreement, that period is shortened.

STRONG J.—I concur generally in the conclusion of the judgment of Mr. Justice Gwynne, and also in the reasons given therefor with the exception of those relating to the defence based on the variation of the 17th condition. That variation I hold not to have been warranted by the agreement of the parties and not to be just and reasonable, agreeing in this respect with the judgments of Mr. Justice Osler and Mr. Justice Rose.

FOURNIER J.—I entirely agree with the learned Chief Justice in both questions raised in this appeal, on the one as to the description of the property insured as well as that relating to the interpretation of the 17th statutory condition. I think the proper construction of that condition is, that the parties can agree to a shorter period than thirty days but not to a longer. The variation here is, that the loss shall not be payable until sixty days after completion of the claim which, I think, is not allowable under the statute.

1888

CITY OF LONDON FIRE INS. CO. v. SMITH.

Henry J.

HENRY J.—I am in favor of dismissing this appeal. I think it is clear what the respondent intended to insure, and the mistake in the policy was due to the company, who cannot be allowed to retain the premiums and, at the same time, claim the benefit of the mistake.

GWYNNE J.—Upon the question as to the property insured being described in the policy as a "brick" building when in fact it was built of boards laid across each other and plastered at both ends, I do not think we can now interfere. The policy may I think be read as

insuring against loss and damage by fire the property more fully described in the requisition for this insurance No. 7270, which forms part and parcel of this policy and hereafter described, that is to say, as the building only of a two story brick building, &c.,

We must, I think, read the finding of the jury to be that in the requisition the building was described as being built of boards.

The company's agent, whose duty it was to fix the rate, inspected the building before accepting the risk, and was aware of the precise nature of the structure which he considered to be safer than brick as against loss or damage by fire, and he fixed the rate according to the company's rate for a brick building. The description of the building in the policy as being of brick appears to have been the mistake of the company themselves, and in a matter which, in their opinion, was not material, judging by their acts after they had full knowledge that the building was not of brick, for they instituted a reference to arbitration under the 16th statutory condition to determine the amount of the plaintiff's loss in respect of the property insured. This reference, although not interfering with the defendant's right to dispute the plaintiff's right to recover under the policy (having regard to its conditions) is based however upon the fact of the existence of the

1888

CITY OF LONDON FIRE INS. CO. v. SMITH.

Gwynne J

policy as a contract between the insurers and the insured, and was a recognition by the defendants of the then existence of the policy. The institution by the defendants of such reference after their attention had been specially drawn to the fact that the building was not brick appears to be quite inconsistent with their present contention, namely, that there never was any contract in existence by reason of the defendants and the plaintiff never having been *ad idem*. Neither do I think, in view of the finding of the jury upon the other questions submitted to them to support which findings I cannot say that there was not sufficient evidence if believed, that we can disregard these findings and order a new trial.

The only remaining question is that arising upon the construction of the 17th statutory condition and the variation thereof endorsed upon the policy.

It may perhaps seem singular that so much difficulty should have arisen in construing these statutory conditions when we reflect that they were framed by a committee of the learned judges of Ontario specially commissioned for the purpose.

This 17th condition is not one affecting the validity of the policy or the right of the insured to indemnity for his loss, it is a condition affecting the insured's remedy only and it prescribes merely the time when his loss shall be exigible. This being its nature, its more natural place would seem, I think, to have been in the body of the act rather than as a condition endorsed upon the policy.

If the condition be one which is subject to variation under the provision in the act relating to variations I must say that I can see nothing which would justify a court in adjudging a variation from 30 days to 60 days from the completion of the proofs of loss before the loss should be paid to be unjust and unreasonable. I cannot concur in the opinion that every variation

1888

CITY OF LONDON FIRE INS. CO. v. SMITH.

Gwynne J.

which makes a condition more onerous upon the insured than is the statutory condition is of necessity unjust and unreasonable—that, in fact, the terms "more onerous and burdensome" are equivalent to "unjust and unreasonable." I cannot bring my mind to believe that either the committee of judges who framed these conditions or the legislature which gave to them the force of law were of opinion that the conditions thus made statutory reached the utmost limit of exaction that was just and reasonable. As framed they were no doubt deemed to be just and reasonable, but if they were intended to express the utmost limit of exaction that was just and reasonable the provision as to variations could not have been framed as it is, nor, indeed, would any provision at all as to variations have been necessary. It is as exactions that the variations are authorized. Now an exaction is something forced upon the insured against his will, at the sole will of the insurer if the policy is accepted. If then only such variations were intended to be authorized as should be less onerous and burdensome upon the insured than the statutory condition in the same matter, neither the committee of judges nor the legislature would have spoken of such variations as "exactions" and it would have been quite absurd that the legislature should have clogged such variations with the condition that to acquire validity

they should be held by the judge or court before whom a question is tried relating thereto, to be just and reasonable to be exacted by the company.

The statutory conditions being themselves framed as being conditions just and reasonable to be exacted a variation which should make any such conditions to be less onerous, must of necessity be just and reasonable, and it is only in the case of a variation exacting something more onerous upon the insured than the statutory condition in the same matter enacts, that any

1888

CITY OF LONDON FIRE INS. CO. v. SMITH.

Gwynne J.

question could arise calling for the decision of a judge or court to determine whether the variation is a just and reasonable one to be exacted by the company.

I do not see that any rigid rule can be laid down applicable to all cases as a test adequate to determine whether a variation of any of the statutory conditions is just and reasonable or not. The question can only arise when to an action on the policy the defence is rested upon the breach by the insured of some or one of the statutory conditions as varied, which defence is met by the contention set up by the plaintiff that the condition as varied is not just and reasonable, and that therefore the statutory condition without the variation (which is suggested to be unjust and unreasonable) should apply. Such affirmative proceeding from the insured to avoid the effect of the variation would seem to require, in accordance with the ordinary rule, that he should suggest in support of his contention some reason to the court or judge called upon to determine the question. Every case must, as it appears to me, depend upon its own circumstances and the sound sense of those who are called upon to determine the question, and no rule can be laid down applicable to all cases. In the present case the question does not, as it appears to me, arise, for the language of this 17th statutory condition is peculiar and seems to me to exclude this condition from the general provisions as to variations in conditions. The condition is:—

> The loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided by the statute or agreement of the parties.

What is meant by the words "unless otherwise provided by statute" it is difficult to see but with this we are not at present concerned; but the latter words, "or agreement of the parties," seem to me to point to an actual, positive agreement of the parties and not to a variation exacted by the company—as to which the

1888

CITY OF LONDON FIRE INS. CO. v. SMITH.

Gwynne J.

provision of the statute is that the court or judge before whom the question arises is to determine whether the variation be just and reasonable. I agree with Mr. Justice Burton that the condition critically examined is that the loss shall not be payable until thirty days after completion of the proofs of loss unless a shorter period is agreed upon by the parties. It shall not be payable *before* the expiration of thirty days from completion of the proofs of loss, unless otherwise provided by agreement of the parties—that is to say unless the parties agree that it shall be ; the language of the condition is not that the loss shall be payable upon and after the expiration of thirty days from the completion of the proofs of loss unless otherwise provided by agreement of the parties—the object is merely to postpone the insured's remedy for thirty days after completion by him of his proofs of loss ; that such a length of time shall elapse after completion of his proofs of loss before he can bring his action unless the parties shall provide otherwise, that is to say shall agree that such a length of time shall not elapse after completion of his proofs of loss before he can bring his action. This being the literal construction of the 17th condition I think we should so read it to prevent the plaintiff's right of action being, as it would now be, wholly barred by the provision of the 22nd statutory condition which provides that

> Every suit, action or proceeding against the company for the recovery of any claim under or by virtue of the policy shall be absolutely barred unless commenced within the term of one year next after the loss or damage occurs.

For the above reasons I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Morphy & Millar.*

Solicitors for respondent: *McCarthy, Osler, Hoskin & Creelman.*