1968
*May 24
1969
May 16

AUTOMOTIVE PRODUCTS COMPANY LIMITED and MAURICE GAGNON (*Plaintiffs*) ..... APPELLANTS;

AND

INSURANCE COMPANY OF NORTH AMERICA (*Defendant*) ..... RESPONDENT;

AND

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED ..... MIS-EN-CAUSE.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—"Blanket or reporting policy"—Clause obliging insured to report all sales—Interpretation—Whether reporting requirement a condition of the contract—Policy null—Art. 1013, 2490 and 2491 of the Civil Code.

The appellant company is a dealer in heavy equipment. Its sales are often made on a deferred payment basis and were, during the period relevant to this case, financed by one of the finance companies with which it had arrangements. Through the agency of its brokers and representatives, which incidentally were also brokers for the other party, the appellant negotiated with the respondent three blanket insurance policies very similar in substance, one related to each of the three finance companies. These policies contemplate insurance coverage from the date the sale is completed to the end of the financing period. The contract, *inter alia*, provides that "all such

*PRESENT: Fauteux, Judson, Ritchie, Spence and Pigeon JJ.

sales" shall be reported "as soon as practicable" to the respondent or to its brokers. The appellant company sold a tractor to the appellant G. This sale was referred to and approved by the finance company (mis-en-cause) but before notice of such sale had been given to the respondent or its brokers, the tractor was damaged beyond repairs. It was then found that some of the clients of the appellant company had insured their financed equipment through their own finance company. Upon request by the appellants for the issuance of an insurance certificate, the respondent denied all liability under the contract and refused to issue such a certificate on the grounds that all financed sales had not been reported and that such a failure amounted to a breach of a condition which is of the essence of the contract. In the Superior Court the trial judge came to the conclusion that the disputed clause of the blanket policy could not be interpreted as being a reciprocal undertaking by the appellant company to report all financed sales. In his opinion, this interpretation found support in another clause of the blanket policy which provides that, if other valid and collectible insurance exists at the time of the loss, the respondent's policy shall apply only as excess after all other insurance has been exhausted. The Court of Appeal found that the reporting requirement was a promissory condition of the blanket policy and that the respondent was justified under the terms of art. 2490 of the *Civil Code* to ask that the policy be considered as null and void on account of the failure of the appellant company to report all financed sales.

Held (Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Judson and Ritchie JJ.: The obligation to report all financed sales amounted to a promissory condition and was of the essence of the contract in that the acceptance of the risk and the rate of premiums were directly related to the volume of business. The reporting requirement was, thus, truly a condition of the contract within the meaning of art. 2490 of the Quebec *Civil Code* and the failure by the appellant company to comply with that condition justified the respondent to ask that the contract be declared null and void.

Per Spence and Pigeon JJ., *dissenting*: The existence of two other similar contracts shows that the insurance policy sued upon did not intend to cover all financed sales made by the appellant company. The respondent's plea also is not that all three policies should be considered as one single document but that only one should be voided. As to the contract in question, it further contains no express stipulation that it should be void if the sales are not promptly reported. It follows that, as the literal reading does not show the true intention of the parties, recourse must be had to interpretation in compliance with the rule enunciated in art. 1013 of the Quebec *Civil Code*. The true question is, therefore, whether or not in the light of relevant circumstances, the contract did become void by reason of the appellant's failure to report, as soon as it was feasible, full details of all financed sales. Inasmuch as there was no provision regarding the avoidance of the contract if the reporting requirement was not

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

complied with, such requirement was simply one among many stipulations of the contract most of which are certainly not resolutive conditions. Every stipulation in an insurance policy is not necessarily a warranty or condition within the meaning of art. 2490 of the *Civil Code* with the drastic consequences that this implies. Notwithstanding the provisions contained in art. 2490 and 2491 of the *Civil Code,* the general rule remains that the breach of an obligation does not bring about dissolution of a contract unless there is a resolutive condition, but only gives rise to the remedies enumerated in art. 1075 of the *Civil Code.* Otherwise, any breach whatsoever of any stipulation would *ipso facto* make the contract void. The insurer could then disclaim liability even if the breach is immaterial to the loss and thus make the protection illusory.

Assurance—Police d'assurance en compte-courant—Disposition obligeant l'assuré de déclarer toutes ses ventes—Interprétation—La nécessité de déclarer les ventes est-elle une condition du contrat—Nullité—Art. 1013, 2490 et 2491 du Code Civil.

La compagnie appelante fait le commerce de matériel lourd. Ses ventes comportent souvent des versements échelonnés et, au cours de la période comprise dans cet appel, le financement des ventes à paiements différés se faisait par l'entremise de l'une des compagnies de finance avec lesquelles la compagnie appelante s'était préalablement entendue. Par l'intermédiaire de son courtier et représentant, qui incidemment était aussi le courtier de l'autre partie, la compagnie appelante avait négocié et obtenu trois polices d'assurance en compte-courant, fort semblables quant au contenu, chacune se rapportant à l'une des trois compagnies de finance. Ces polices d'assurance prévoient que la protection qu'elles accordent s'étend à compter du jour où la vente est complétée jusqu'à la fin de la période de financement. La compagnie appelante a vendu un tracteur à l'appelant G. La compagnie de finance (mise-en-cause) fut informée de cette vente et l'approuva. Mais avant que l'intimée ou son courtier n'ait été avisé de cette vente le tracteur fut endommagé irréparablement. On apprit alors que certains clients de la compagnie appelante avaient fait financer leurs achats de matériel lourd par leur propre compagnie de finance. Lorsque les appelants ont demandé qu'un certificat d'assurance leur soit remis, l'intimée a nié toute responsabilité aux termes du contrat parce qu'elle n'avait pas été informée de toutes les ventes à paiements différés faites par la compagnie appelante. A son avis, ceci constituait un manquement à une condition essentielle du contrat. En Cour supérieure le juge de première instance a estimé que la clause qui fait l'objet du litige ne pouvait pas être interprétée comme une contrepartie des obligations de l'assureur imposant à la compagnie appelante le devoir de déclarer toutes ses ventes à paiements différés. Selon lui, cette interprétation était appuyée par une autre clause de la police aux termes de laquelle, au cas où il existerait d'autres polices d'assurance valides et recouvrables, la responsabilité de l'assureur ne s'étendrait qu'à la portion de la

perte qui n'aurait pas été couverte et après que toutes les autres indemnités auraient été perçues. La Cour d'appel a conclu que l'obligation de déclarer était une condition promissoire de la police et que l'intimée était en conséquence justifiée aux termes de l'art. 2490 du *Code Civil* d'en demander l'annulation en compte-courant en raison du défaut de la compagnie appelante de rapporter toutes ses ventes à paiements différés.

Arrêt: L'appel doit être rejeté, les Juges Spence et Pigeon étant dissidents.

Les Juges Fauteux, Judson et Ritchie: L'obligation de déclarer les ventes à paiement différé se ramène à une condition promissoire essentielle en ce sens que l'acceptation du risque et le taux des primes ont un rapport direct avec le volume des affaires. Le devoir de déclarer les ventes est, en conséquence, une véritable condition du contrat au sens donné à ce mot dans l'art. 2490 du *Code Civil* et le défaut de la compagnie appelante de se conformer à cette condition justifiait pleinement l'intimée de demander l'annulation du contrat.

Les Juges Spence et Pigeon, *dissidents:* L'existence de deux autres contrats semblables démontre que la police d'assurance qui fait l'objet du litige n'entendait pas couvrir toutes les ventes à paiements différés faites par la compagnie appelante. L'intimée, également, n'a pas prétendu, en guise de défense, que les trois polices d'assurance devaient être interprétées comme formant un tout, mais plutôt qu'une seule police devait être annulée. Quant au contrat en question il ne contient aucune stipulation expresse prévoyant son annulation au cas où les ventes ne seraient pas promptement déclarées. Il s'ensuit que, si le sens littéral du texte ne révèle pas l'intention des parties, on doit la rechercher par interprétation conformément à la règle énoncée dans l'art. 1013 du *Code Civil* de la province de Québec. Le problème véritable est donc de savoir si, à la lumière de toutes les circonstances qui se rapportent à cette cause, le contrat d'assurance est devenu nul du fait seulement que la compagnie appelante a négligé de déclarer toutes ses ventes à paiement différé. Étant donné que le contrat d'assurance ne contient aucune disposition prévoyant son annulation au cas où les ventes ne seraient pas déclarées, une telle exigence est simplement l'une des nombreuses stipulations du contrat qui, pour la plupart, ne constituent certainement pas des conditions résolutoires. Toute stipulation contenue dans une police d'assurance n'est pas nécessairement une garantie ou une condition au sens de l'art. 2490 du *Code Civil* avec les conséquences rigoureuses que cela implique. Nonobstant les dispositions contenues dans les art. 2490 et 2491 du *Code Civil,* la règle générale est toujours que le manquement à une obligation n'entraîne pas la dissolution du contrat à moins qu'il n'y ait une condition résolutoire. Ce manquement donne uniquement ouverture aux recours énoncés à l'art. 1075 du *Code Civil.* Autrement, tout défaut quelconque de se conformer à l'une des stipulations du contrat rendrait le contrat nul *ipso facto.* L'assureur pourrait alors se dégager de sa responsabilité même dans le cas où le défaut serait étranger à la perte et, de cette façon, rendre la protection illusoire.

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

APPEL d'un jugement de la Cour du banc de la reine[1], province de Québec, infirmant un jugement du Juge St-Germain. Appel rejeté, les Juges Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of St-Germain J. Appeal dismissed, Spence and Pigeon JJ. dissenting.

Richard B. Holden, for the appellants.

L. P. de Grandpré, c.r., for the respondents.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

FAUTEUX J.:—This is an appeal from a unanimous judgment of the Court of Appeal[1], composed of Hyde, Brossard and Salvas, JJ.A., setting aside a judgment of the Superior Court which had maintained appellants' action and condemned respondent to pay $14,633.29 with interest and costs.

The facts leading to this litigation are recited at length in the reasons for judgment of Hyde, J.A.; for the determination of this appeal, only the following need be stated. Appellant, Automotive Products Co. Ltd., sells various payments, its sales, on such occurrence, were, during the types of heavy equipment. Frequently made on deferred period relevant to these proceedings, financed by one of three finance companies with which it had arrangements, namely the mise-en-cause Industrial Acceptance Corp. Ltd., Traders Finance Corporation Limited and Canadian Acceptance Corporation Limited. Through the agency of its brokers and representatives, Messrs. Rolland, Lyman, Burnett Ltd.,—subsequently succeeded by Dale & Company Limited,—appellant company negotiated with J. S. McDowell, agent for respondent insurer, three blanket or

[1] [1968] Que. Q.B. 140.

reporting insurance policies, one related to each of the three finance companies. These three blanket policies, similar in substance, envisage automatic cover, attaching at the time of the sale and lasting during the period of financing, on equipment sold on an instalment plan basis, and contemplate that, in each particular case, an individual certificate or policy would be issued, on request, in favour of the dealer Automotive Products Co. Ltd., the purchaser and the finance company concerned. The blanket policy designed to apply to sales financed by the mise-en-cause bears number 1BR 6775 of respondent's policies and is filed in the record as exhibit P-2.

On September 19, 1960, appellant company sold a tractor to appellant Gagnon. This sale, made on an instalment plan, was referred to the mise-en-cause to be financed. A few days later and before respondent or the broker for Automotive Products Co. Ltd. had been apprised of the sale, to wit on September 26, the tractor was irreparably damaged in an accident. Subsequent to this loss, appellants invoked the blanket policy filed as P-2 and requested respondent to issue an insurance certificate or individual policy, in their joint names, retroactive in effect to the date of the sale. Respondent refused to do so. It pointed out to appellants that the obligation assumed by the insurer in this respect no longer subsisted in view of the failure of Automotive Products Co. Ltd. to comply with the promissory condition, contained in P-2, according to which appellant company had undertaken to report and include in the cover *all its financed sales*. Appellants did not deny that many of these financed sales were insured with insurance companies other than respondent as indeed the evidence clearly shows. They contended, however, that nothing in the blanket policy prevented that to be done. Hence their action against respondent. In their declaration, they offer to respondent the amount of $360.00, alleged to be the premium payable under the terms of the blanket policy, and pray for judgment condemning respondent to pay them jointly and severally the amount of $21,229.64 with interest from the date of the loss or subsidiarily to pay these sums

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Fauteux J.

to them and the mise-en-cause as their respective interests may appear from the record or to the Court. The mise-en-cause did not appear.

As pointed out by appellants in their factum, the only issue, at this stage of the proceedings, is one of interpretation of contract P-2 of which the relevant parts may now be quoted:

INSURANCE COMPANY OF NORTH AMERICA
Philadelphia

No. 1BR 6775

LIMIT OF LIABILITY:	Rate: as per form	Premium $
Amount $200,000.00	attached.	as earned

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED

and of ..... AS EARNED ..... dollars, premium,
AUTOMOTIVE PRODUCTS CO. LTD.

IN CONSIDERATION OF THE PREMIUMS ACCRUING UNDER POLICIES TO BE ISSUED UNDER THIS CONTRACT
—THE—
INSURANCE COMPANY OF NORTH AMERICA
DOES INSURE
AUTOMOTIVE PRODUCTS CO. LTD.
(hereinafter called the "VENDOR")

in respect to *all sales* made to any person, firm, or corporation,
(hereinafter called the "OWNER")

of merchandise consisting principally of contractors' equipment, road making and heavy machinery, tractors, bulldozers and the like, assembled or not, their parts and equipment attached or otherwise, subject to the following stipulations:—

(A) that a correct description of *all such sales* be inscribed on a policy of insurance to be issued under this contract to the Vendor and Owner jointly, the terms and conditions of which shall be in conformity with Clauses I to XIV cited hereunder,

(B) that the Insurers liability shall be limited to the amount set opposite *each article sold* or the actual cash value at the time of loss whichever is the lesser,

(C) that the cover granted under this Contract and any policy issued hereunder shall apply only to such merchandise sold by the Vendor on a deferred payment, financed payment, or lease agreement plan, and *shall attach at the time of such sale,*

(D) that the cover provided herein shall apply as follows:—

(1) as to the Contract—until such time as cancellation is effected in accordance, and contemporaneously with Clause XIII hereinafter set forth,

(2) as to any Policy issued hereunder—for the period specified thereunder, unless cancelled in accordance with the terms of said Policy prior to such expiry date,

(E) that full details of *all such sales* be reported during the life of this policy to this Company and/or Messrs. Rolland, Lyman, Burnett Ltd. of Montreal, P.Q., as soon as practicable after consummation thereof,

(F) that the wording of Clauses I to XIV, both numbers inclusive, as hereunder set forth and which are embodied in each Policy issued hereunder, is hereby made, and does form part of the obligations of this Contract, anything to the contrary notwithstanding. The terms and conditions of this Contract shall commence from 12.01 A.M. Standard Time, December 9th, 1955, Montreal, P.Q. ...

CLAUSE IX. NOTICE OF LOSS

Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the INSURANCE COMPANY OF NORTH AMERICA, Montreal, P.Q., or to MESSRS. ROLLAND, LYMAN, BURNETT LTD. of Montreal, P.Q., issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said Agent within four (4) months of the date of the loss. Failure by the Insured to file either such claim or such proof shall invalidate the claim.

CLAUSE X. OTHER INSURANCE

This Company shall not be liable for loss, if at the time of loss or damage, there is other valid and collectible insurance which would attach if this insurance had not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted. ...

CLAUSE XIV. LOSS PAYABLE

It is hereby understood and agreed that loss, if any, is payable to THE INDUSTRIAL ACCEPTANCE CORPORATION, LIMITED and/or the Insureds as their respective interests may appear. ...

The italics and the underlines are mine.

In the Superior Court, Mr. Justice St-Germain found that respondent's obligation to ensure all equipment sold on the instalment plan, was not subordinated to a reciprocal undertaking by appellant company to submit to respondent for insurance all such sales. The basis of his finding is that, on a consideration of the blanket policy, he could find no express or implied covenant subordinating respondent's obligation to the undertaking of appellant company. He

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Fauteux J.

referred to what was said, at page 249 et seq., in *The Queen v. MacLean*[2] as to conditions governing the right to imply a covenant in a contract. The learned judge found support for his interpretation in Clause X of the blanket policy, the presence of which, he said, was a clear indication that respondent had foreseen the possibility of appellant company ensuring with other insurance companies. For these reasons, he accepted appellants' interpretation of the contract, granted *acte* of their tender and deposit and condemned respondent to pay them jointly and severally the sum of $14,633.29 with interest from the date of the loss of the tractor, namely from September 26, 1960.

In the Court of Appeal, the premises upon which the Trial Judge predicated his interpretation were rejected as ill-founded. The Court accepted as valid respondent's explanation that Clause X was a standard clause in all inland marine contracts which would operate, in this case, to modify the rights of the insured against the insurer,—but not his obligations towards the latter,—should the equipment sold be covered by a master policy issued in the United States by the factory itself, in which event, the insured would be entitled, under P-2, to excess insurance only. Appellants' interpretation of Clause X was found by the Court to lead to a conflict between its provisions and those of the introductory paragraph of P-2,—where the cause and consideration of the contract are set out,—and it was found to denude of their literal, true and clear meaning the unambiguous words *all sales, all such sales* and other expressions italicized in the other paragraphs quoted above. It was also considered that appellants' interpretation was furthermore offending the rule that all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act (1018 C.C.). The Court concluded that the stipulations in the contract were onerous, synallagmatic, clear, precise and expressing without ambiguity the mutual intent of the parties in that they oblige respondent to ensure and appellant company to report and submit for insurance with respondent all its financed sales.

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[2] (1882), 8 S.C.R. 210.

The Court then noted that, some time in 1959, McDowell complained to Dale & Company that the respondent insurer was not getting the volume of business which had been anticipated when the blanket policy was written and that the following explanation was given by Dale & Company in a letter addressed, on October 15, 1959, to respondent insurer, for attention of McDowell:

> Dear Sirs:
>
> Further to our conversation of a fortnight ago, the captioned coverage has been discussed with both our Sub-Agent and Automotive Products Limited.
>
> It has now been established that the bulk of Sales made by Automotive have been the type that does not require financing. They cite considerable government business and sales to very large companies.
>
> We can assure you, however, that it is their feeling that this is a passing phase and that considerable sales of a financing nature will be made. The Assured is most interested in retaining the type of coverage offered by your Company and will make every endeavour to make it more attractive to you.

The Court also noted that McDowell, who had then accepted that explanation, did not learn of the breach of the promissory condition until this particular loss was being investigated and that when respondent complained of this breach, Dale & Company wrote respondent a letter on behalf of its client, Automotive Products Co. Ltd., which, in part, reads as follows:

> In our discussions with the Automotive Products Co. concerning this loss, they have been most emphatic in stating that it has been the intention that the insurance on all financed equipment was to be reported under your Policy, and this has only been deviated from where the buyers have requested that they be allowed to insure under their own existing Policies, or where, in error, their Offices outside of Montreal have not been aware of the arrangements and have allowed the insurance to go to Merit.

Having found that there had been a breach of the promissory condition contained in the blanket policy, the Court of Appeal concluded that respondent was justified to invoke the provisions of art. 2490 C.C. and to ask that the policy be declared null and void. Hence the appeal to this Court.

I am clearly of opinion that, under contract P-2, Automotive Products Co. Ltd. undertook to report to respondent insurer and include in the cover *all sales*

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Fauteux J.

financed by Industrial Acceptance Corp. Ltd. and that Automotive Products Co. Ltd. assumed a like obligation under the blanket policies respectively related to sales financed by Traders Finance Corporation Limited and by Canadian Acceptance Corporation Limited. I am also of opinion that the undertaking of appellant company, of which respondent's obligation to ensure is the counterpart, amounts to a promissory condition which, related to the volume of insurance business, accruing premiums and spreading of the risk, is, as shown in the evidence and found by the Court of Appeal, of the essence, in the consideration of the acceptance of the risk and the determination of the rate of premiums. In view of the breach of the promissory condition, art. 2490 C.C. receives its application in this case, there being nothing in the contract indicating an intent to derogate from the provisions of that article. In their note under 2490 C.C., the codifiers indicate that they have adopted *la doctrine reçue et fixée depuis longtemps du droit anglais telle qu'on la trouve dans les auteurs.* In *Aero Insurance Company v. Obalski Chibougamau Mining Company*[3], Chief Justice Lafontaine of the Court of Appeal referred to this note of the codifiers and said, at page 156, *la règle universellement suivie dans tout contrat d'assurance et qui doit s'appliquer par analogie à l'assurance des aéroplanes est énoncée dans Halsbury, Laws of England, Vo. Marine Insurance, p. 417:*

> The essential characteristic of a warranty is that it must be exactly complied with, whether it be material to the risk or not. If it be not complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach, but without prejudice to any liability incurred by him before that date.
>
> Any inquiry into the materiality or immateriality to the risk is entirely precluded, and so are all questions, whether there has or has not been a substantial compliance with the warranty; and, where a warranty has been broken, although the loss may not have been in the remotest degree connected with the breach, the underwriter is none the less discharged of that account from all liability for the loss ...

At page 155, Chief Justice Lafontaine said:

> La police devient nulle et l'intimée ne peut en conséquence réclamer les indemnités stipulées, suivant la règle qu'une partie contractante ne

[3] (1931), 51 Que. K.B. 145.

peut réclamer l'exécution des obligations de son cocontractant à moins d'avoir commencé par remplir les siennes. Dans l'espèce, le paiement de la prime n'était pas la seule obligation de l'intimée, il y avait de plus l'obligation importante, essentielle, on pourrait dire, d'obtenir les certificats nécessaires et d'enregistrement requis pour pouvoir opérer un avion. Aussi longtemps que les certificats n'étaient pas obtenus, l'intimée ne pouvait en aucune façon se servir de l'avion assuré sans manquer à son contrat et à la bonne foi envers l'assureur. En sorte que le débat est clos et il faut dire que l'action est irrecevable.

The decision of the Court of Appeal in that case was appealed to this Court and the appeal was dismissed with costs.[4]

With deference to those who have a contrary view and being of opinion that the Court of Appeal rightly dismissed the action taken by appellants against respondent, I would dismiss the appeal with costs.

The judgment of Spence and Pigeon JJ. was delivered by

PIGEON J. (*dissenting*):—Appellant, Automotive Products Co. Ltd. (hereinafter called Automotive), is a dealer in tractors and other contractors' equipment. In 1955, Rolland, Lyman, Burnett Ltd., acting as its brokers, applied to respondent Insurance Company of North America for what might be called blanket insurance coverage for goods sold on finance.

On November 17, respondent issued a contract for such coverage. This contract provides for the issue of policies describing "all such sales" to the vendor and purchaser jointly and stipulates that "the cover shall attach at the time of such sale". Full details of "all such sales" are to be promptly reported to the respondent or to the above-named brokers. Clauses to be inserted in each policy to be issued are attached. In one of these notice of any loss is required to be given to the respondent or to "its said agent" and in another it is agreed that any loss "is payable to the Canadian Acceptance Corporation, Limited and/or the insureds as their respective interests may appear".

On December 7, 1955, another contract was issued by respondent with identical wording except that in the

[4] [1932] S.C.R. 540.

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Pigeon J.

clause concerning the payment of losses, the Industrial Acceptance Corporation, Limited (hereinafter called I.A.C.) is named instead of the other finance company.

Finally, on August 2, 1956, a third similar contract was issued in which the name of the finance company is Traders Finance Corporation Limited.

From time to time, policies (also called "certificates") were issued under each of the three contracts or master policies. It also appears that although no change was made in the clauses providing for the reporting of the sales and of the losses, Dale & Company Limited were authorized to act as brokers for the purpose of Automotive's contracts with respondent.

Early in October 1959, its manager in Montreal complained to them of the small volume of premiums from Automotive business. By a letter dated October 15, he was advised "that the bulk of sales made by Automotive have been of the type that do not require financing". In fact, many sales that did require financing were not being reported to the respondent or Dale & Company because Automotive allowed purchasers on the instalment plan to obtain insurance from other sources if they preferred and did not report such sales. Also, the reporting and the payment of the premiums were not being done by Automotive itself but by the finance companies and the company financing each purchase reported the sale and paid the premium to the brokers only when no other insurance coverage was obtained.

On September 19, 1960, Automotive sold to appellant Maurice Gagnon through its Quebec branch a tractor with angledozer for a total price, including sales tax, of $18,000. The terms were $2,000. cash, the balance to be financed by I.A.C. over a term of thirty months. The purchaser does not appear to have requested insurance coverage by a company other than the respondent and the contract provided for an insurance premium to be added to the unpaid balance in addition to finance charges. The amount that was entered for this premium was $405. instead of $450. as required under respondent's policies in which clause XV requires premiums at the rate of $1. per $100. per annum.

On September 22, the conditional sale contract was received by I.A.C. in Montreal. It immediately enquired from its Victoriaville branch the same day and, on the following day, received a telegram recommending favourable action. On September 26, which was a Monday, cheques were issued to Automotive in the amount of $16,000. for the balance of the purchase price, and in favour of Dale & Company in the amount of $405. for the insurance premium. This cheque was received by them and cashed the following day.

Unfortunately, it also happened that on the 26th, the tractor was damaged beyond repair by accident, a fact that became known to Automotive the following day. Thus, Dale & Company had to report the sale and the accident to respondent at the same time. The respondent denied liability on two grounds:

1° that the tractor had not been intended to be covered by an insurance policy to be issued under its contract with Automotive;

2° that this contract was void because all sales made under finance had not been reported.

The trial judge came to the conclusion on the first point that the amount of $405. appearing in the conditional sale contract as insurance premium instead of $450. was not necessarily an indication that the risk was intended to be placed with Merit Insurance Company (I.A.C.'s subsidiary). He added that the uncontradicted evidence was to the effect that the incorrect amount was the result of an error made by an employee in Automotive's Quebec office. This finding was upheld in the Court of Appeal and was not challenged before us.

On the second point, the trial judge considered that there was no express undertaking by Automotive to insure all merchandise sold under financed sales. He quoted an excerpt from the reasons of Gwynne J. in *The Queen v. MacLean*[5] and then clause X of the policy conditions re-

[5] (1882), 8 S.C.R. 210 at p. 249.

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Pigeon J.

specting other insurance, and held that it would not have been inserted if respondent had in mind that Automotive could not insure some financed sales elsewhere under pain of nullity of the contract.

In the Court of Appeal, it was considered on the contrary that the contract did require Automotive to report all financed sales and it was said that this obligation was not watered down by the clause respecting other insurance. Article 2490 C.C. was quoted and it was held that this justified Automotive in asking that the policy be declared null and void.

At this point, it appears necessary to quote at length the wording of the policy down to par.(F) as well as clauses IX, X and XIV of the policy conditions incorporated in it.

IN CONSIDERATION OF THE PREMIUMS ACCRUING UNDER POLICIES TO BE ISSUED UNDER THIS CONTRACT

—THE—

INSURANCE COMPANY OF NORTH AMERICA

DOES INSURE

AUTOMOTIVE PRODUCTS CO. LTD.

(hereinafter called the "VENDOR")

in respect to all sales made to any person, firm, or corporation, (hereinafter called the "OWNER")

of merchandise consisting principally of contractors' equipment, road making and heavy machinery, tractors, bulldozers and the like, assembled or not, their parts and equipment attached or otherwise, subject to the following stipulations:—

(A) that a correct description of all such sales be inscribed on a policy of insurance to be issued under this contract to the Vendor and Owner jointly, the terms and conditions of which shall be in conformity with Clauses I to XIV cited hereunder,

(B) that the Insurers liability shall be limited to the amount set opposite each article sold or the actual cash value at the time of loss whichever is the lesser,

(C) that the cover granted under this Contract and any policy issued hereunder shall apply only to such merchandise sold by the Vendor on a deferred payment, financed payment, or lease agreement plan, and shall attach at the time of such sale,

(D) that the cover provided herein shall apply as follows:—

(1) as to the Contract—until such time as cancellation is effected in accordance, and contemporaneously with Clause XIII hereinafter set forth,

(2) as to any Policy issued hereunder—for the period specified thereunder, unless cancelled in accordance with the terms of said Policy prior to such expiry date,

(E) that full details of all such sales be reported during the life of this policy to this Company and/or Messrs. Rolland, Lyman, Burnett Ltd. of Montreal, P.Q., as soon as practicable after consummation thereof,

(F) that the wording of Clauses I to XIV, both numbers inclusive, as hereunder set forth and which are embodied in each Policy issued hereunder, is hereby made, and does form part of the obligations of this Contract, anything to the contrary notwithstanding. The terms and conditions of this Contract shall commence from 12.01 A.M. Standard Time, December 9th, 1955, Montreal, P.Q. ...

Clause IX. NOTICE OF LOSS

Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the INSURANCE COMPANY OF NORTH AMERICA, Montreal, P.Q., or to MESSRS. ROLLAND, LYMAN, BURNETT LTD. of Montreal, P.Q., issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said Agent within four (4) months of the date of the loss. Failure by the Insured to file either such claim or such proof shall invalidate the claim.

CLAUSE X. OTHER INSURANCE

This Company shall not be liable for loss, if at the time of loss or damage, there is other valid and collectible insurance which would attach if this insurance had not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted. ...

CLAUSE XIV. LOSS PAYABLE

It is hereby understood and agreed that loss, if any, is payable to THE INDUSTRIAL ACCEPTANCE CORPORATION, LIMITED and/or the Insureds as their respective interests may appear. ...

Concerning clause X, there is uncontradicted evidence that this is a usual clause in such contracts. It is apt to have effect even on the assumption that all financed sales are to be reported and covered by policies issued under the contract. There may be insurance taken by other parties and uncontradicted evidence shows how this may occur. Therefore the judges in appeal were right in holding that clause X did not show that the contract was not intended to

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Pigeon J.

cover all financed sales. This conclusion on the effect of that clause does not dispose of the case because there are other formidable difficulties in respondent's way.

In the first place it should be noted that respondent issued to Automotive not only the contract sued upon but a total of three such contracts. Mention of this fact is made in the reasons of Hyde J. but he does not appear to give it any consideration when dealing with the crucial point, namely whether the contract sued upon is intended to cover all financed sales. With respect, I feel that this is essential because the existence of two other contracts makes it impossible to conclude that this particular contract was intended to cover all such sales. As a matter of fact, respondent's manager, when heard as a witness, said:

> My intention was that all financed sales would be insured through this policy or the other two.

It should be noted that respondent does not contend that the three documents or policies are evidence of one contract, not three. In its plea it asked that one only be declared void. This is not an oversight on its part. The record shows that on December 9, it sent a letter to the brokers suggesting that the other two policies be "picked up for cancellation and returned to us". On December 15, the brokers answered that the insureds have no desire at the present time to cancel any of the policies presently held by them. Respondent having taken no step to have the other two policies cancelled or declared void cannot now be heard to say that the three made up one contract. If they did, it would not be entitled to have it cancelled in part only. As a matter of fact, respondent's prayer by its plea is that the insurance policy filed as P-2 be declared void. This implies a judicial admission that it is a distinct contract.

Such being the case, it is impossible to hold that the contract sued upon must be read literally as covering all financed sales by Automotive. In fact, respondent's contention, as we have seen, is not that this is the intention of the contract. Also there is no express stipulation that the contract shall become void if all financed sales are not promptly reported. Under those circumstances, it is impossible in

the present case to seek the intention of the parties in a literal reading; it must be sought by interpretation in accordance with article 1013 of the *Quebec Civil Code*. On that basis, the question becomes: Does the contract, read in the light of all relevant circumstances, provide, as respondent contends, that it will become *ipso facto* void if Automotive fails at any time to report as soon as practicable full details of any financed sale for the issue of a policy under that contract or another similar contract with respondent?

A major difficulty in reaching that conclusion is the fact that no reference whatsoever is made to the other contracts. If the intention had been to subject the coverage to such a drastic condition, operating as of right, would this have been overlooked? If we assume that when the first contract was issued the intention was, as respondent's Montreal manager contends, are we also to assume that when a second and a third contract were issued the first was simply copied and the necessity of any reference simply overlooked? On what basis is it reasonably certain that Automotive would understand in the absence of any such reference that the meaning of the document was as respondent contends its intention was? It must also be borne in mind that the second contract was for the benefit of I.A.C., the mise-en-cause. On what basis could the latter be expected to read into the document all that which respondent contends should be read?

As we have seen, I.A.C. took charge of the reporting of the sales covered by insurance and of the payment of the premiums. Its course of action in reporting only the sales financed by it which were not otherwise covered by insurance undoubtedly indicates that this was not considered a breach of the conditions invalidating the contract. The same must be said of Automotive's decision to treat the contract as not compelling it to report financed sales otherwise insured. Of course, the construction thus put upon the contract by some parties is not decisive, especially because there is no evidence that it was brought to the knowledge of the respondent. On the contrary, the letter written by the brokers in 1959 was apt to put them under the erroneous

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Pigeon J.

impression that Automotive was reporting all financed sales. It must be noted that the brokers were in this instance agents of both parties, being expressly described as agents of the respondent in clause IX and treated as such in clause (E). The concluding sentence of their letter indicates that the worry appeared to be over a possible cancellation by notice: "The Assured is most interested in retaining the type of coverage offered by your Company and will make every endeavour to make it more attractive to you".

It must also be stressed that the contract between the parties does not expressly provide that it shall *ipso facto* become void if any financed sale is not reported as required. The reporting requirement is simply a stipulation of the contract. Of course, there are no sacrosanct words for expressing a resolutive condition that effects of right the dissolution of a contract when accomplished (1088 C.C.). However, such a condition is a departure from the usual effect of a stipulation in a contract. As a general rule, the breach of an obligation gives rise to the remedies enumerated in art. 1065 C.C., not to dissolution of the contract as of right. Therefore, it is safe to say that, as a rule, a stipulation is not to be construed as a resolutive condition unless the intention to do so is expressed. In the present case, the clause relied upon is merely one among many stipulations most of which are certainly not resolutive conditions. There is nothing in its wording indicating that it is of a different nature such as the word "warranted" commonly used in insurance contracts to indicate that a resolutive condition is being stipulated.

Hyde J. appears to rely exclusively on art. 2490 C.C. quoted at length in his reasons and following which he says that in his opinion it was a condition of the blanket policy in question that Automotive would report all financed sales. On the assumption that the contract is to be read as so requiring, I fail to see how art. 2490 can be read together with 2491 as enacting that every stipulation in an insurance policy is a warranty or condition with the drastic consequences that this implies. In my view, those articles do not alter the general principles under which the breach of an

obligation does not of itself effect the dissolution of the contract unless a resolutive condition is stipulated. If it was otherwise, it would mean that any breach whatsoever of any stipulation in an insurance policy would *ipso facto* make the contract void so that the insurer could disclaim liability even if the breach is completely immaterial to the loss. This would, of course, make the protection illusory in cases such as this. Human nature being what it is, it is simply impossible that no error or omission in reporting sales be made in a large business with many branches over many years. Upon a loss occurring, all the underwriter would have to do to avoid liability would be to make a careful check. Of course, such a contract could validly be made and, in that case, it would be the duty of the courts to give effect to it, but it would have to appear from the language used that such a contract was in fact made. Otherwise the general principles governing contracts should be applied as this Court applied them in the case of *The Employers' Liability Assurance Company v. Lefaivre*[6] where the question was the effect of the non-payment of premiums due to bankruptcy.

I must also point out that, assuming the contract should be construed as embodying a resolutive condition which was breached, I doubt seriously that respondent would be entitled to have it declared null as prayed for without any refund of premiums. The record shows that a number of policies were issued under that contract and substantial premiums paid. These policies were in favour of a number of purchasers. Some of them had no doubt expired but several were recent. In its plea, respondent alleged that it had no premium refund to make. It is obvious that respondent so denied being obliged to return any premium because it considered the policies issued as remaining in force and unaffected by the dissolution of the master contract effected *ipso facto* by the omission to report all sales. It cannot be so unless the insurance coverage under the policies issued to Automotive and the purchasers jointly is considered as subsisting independently of the main contract. That it is so is far from clear. The policies or certifi-

[6] [1930] S.C.R. 1, [1930] 1 D.L.R. 689, 11 C.B.R. 290.

1969

AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

Pigeon J.

cates as they were sometimes called, are clearly nothing but instruments evidencing a contract. Is there not a single contract, does not the word "contemporaneously" in clause (D), par. 1 bear out that it is so? Of course, if there is a single contract, it cannot be declared null in part only. I do not find it necessary to express a conclusion on this point but it may be one more reason why clause (F) should not be read as a resolutive condition.

The amount allowed to appellants in capital and interest by the trial judge was not challenged before us and for the above reasons, I would allow the appeal with costs, reverse the judgment of the Court of Appeal and dismiss the appeal to that Court with costs and re-establish the judgment of the Superior Court.

Appeal dismissed with costs, SPENCE *and* PIGEON JJ. *dissenting.*

Solicitors for the appellants: Paré, Ferland, Mackay, Barbeau, Holden & Steinberg, Montreal.

Solicitors for the respondent: Tansey, de Grandpré, Bergeron & Monet, Montreal.

Solicitors for the mis-en-cause: O'Brien, Howe, Hall, Nolan, Saunders, O'Brien & Smyth, Montreal.