
BRITISH TRADERS INSURANCE }
 COMPANY LIMITED (DEFENDANT) } APPELLANT; 1927
*May 3, 4.

AND

QUEEN INSURANCE COMPANY }
 OF AMERICA (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
COLUMBIA

*Insurance—Oral contract of insurance—Alleged contract of re-insurance—
Correspondence—Ambiguity—Construction—Offer to re-insure as to
risks to be assumed—Contract of re-insurance arising on assumption of
risk.*

The judgment of the Court of Appeal of British Columbia, 38 B.C. Rep. 161, holding the defendant liable to the plaintiff under a contract of re-insurance, was affirmed.

It was held that there had been a binding agreement of the plaintiff to insure, constituted by an oral arrangement by its agent with the insured prior to the fire; and that, on the construction of the communications between plaintiff and defendant prior to said agreement, the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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defendant had undertaken to re-insure the plaintiff, to an extent stipulated, in respect of risks to be assumed; and that, under the circumstances, the nature of the defendant's undertaking implied that its obligation was to arise immediately upon plaintiff becoming committed to liability; *Carlill v. Carbolio Smoke Ball Co.* [1893] 1 Q.B. 256, applied.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of D. A. McDonald J. (2) holding that the plaintiff was entitled to recover against the defendant on an alleged contract of re-insurance.

Among the facts found in the courts below, were the following:

The plaintiff and the defendant each carried on a fire insurance business in British Columbia. The plaintiff's general agent for the province was Rithet Consolidated Limited. The latter was also the defendant's agent at Victoria. Burrard Agencies Limited was an agent of the plaintiff at Vancouver, with authority to take risks and issue policies, although the practice had been that the policies in Vancouver were actually filled out by Horne, Taylor & Co., another agent of the plaintiff at Vancouver, and countersigned and issued by Burrard Agencies Limited. The National Cannery Limited had its insurance placed through Burrard Agencies Limited with the plaintiff, which had re-insured with another company the excess over \$37,500, which sum was the limit which the plaintiff wished itself to carry on the risk in question. About 6.15 o'clock on the evening of July 31, 1925, the secretary of the National Cannery Limited, over the telephone, arranged with Burrard Agencies Limited, through its manager, Mr. Irving, to place an additional amount of \$20,000 of insurance upon its stock in trade. Owing to the lateness of the hour, Mr. Irving made a note of the arrangement, leaving it until the following day to have the policy issued. That night the premises of the National Cannery Limited were destroyed by fire. On the following day, Mr. Barnes, the manager of Rithet Consolidated Limited, came to Vancouver, made a full investigation, and decided that the plaintiff was liable and

(1) 38 B.C. Rep. 161; [1927] 1 (2) (1926) 37 B.C. Rep. 202.

W.W.R. 508.

must pay the loss. Rithet Consolidated Limited, accordingly, on August 3, issued a policy dated July 31, covering the risk of \$20,000. After adjustment, the loss under this policy was paid and of the amount so paid by the plaintiff it sought in this action to recover \$12,812.87 from the defendant under an alleged contract of re-insurance.

On July 16, 1925, Mr. Barnes, manager of Rithet Consolidated Limited, spoke to Mr. Elderton, who conducted the defendant's head office for British Columbia at Vancouver, about giving the plaintiff "a line of re-insurance" as to the National Canners Limited, who, it was anticipated, might make applications for further insurance. On July 17, Rithet Consolidated Limited wrote the defendant as follows:

National Canners, Limited * * * The writer spoke to Mr. Elderton about this line yesterday and he intimated that he would be quite willing to accept a reinsurance of the Queen on this risk and we should be glad if you would kindly look into the matter and let us know how much reinsurance you would accept on behalf of the Queen, which has at present \$35,000 on the line.

This was replied to in a letter of July 20, as follows:

Re National Canners * * * I duly received your letter of the 17th inst. in reference to the plant of the above firm, and shall be glad to accept a line of \$15,000 as reinsurance of the "Queen." Will you kindly advise me when the Company is bound on the risk.

And the last mentioned letter was replied to by a letter of July 23, as follows:

National Canners, Ltd.; We thank you for yours of the 20th inst. advising that you are in a position to accept a line of \$15,000 as re-insurance of the Queen on the above risk.

We hope to be able to forward some commitments in the course of the next week or so.

Mr. Barnes then showed the correspondence to his insurance clerk, and instructed him that, as to any further insurance taken by the plaintiff from National Canners Limited, the first \$15,000 so taken should be re-insured in the defendant company. The insurance clerk made a note in his block sheet to this effect and put a note upon his file.

The questions on the appeal before this Court were: (1) Whether there was a binding contract of insurance between the plaintiff and the National Canners Limited; and (2) If so, was there a binding contract of re-insurance between the plaintiff and the defendant.

A. C. Heighington for the appellant.

E. P. Davis K.C. and *E. F. Newcombe* for the respondent.

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At the conclusion of argument of counsel, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that the appeal cannot succeed.

As to the first branch of the appeal—whether the Queen Insurance Company was committed to insure the National Canners—there is really no room for argument against the proposition that there was a binding agreement. In the absence of fraud, which is now out of the case, it is perfectly clear there was a binding agreement.

No doubt there is more room for argument as to whether there was an effective contract of re-insurance. This depends largely on the construction of the letters. Putting it, as Mr. Heighington put it a few moments ago, that the letter of the British Traders Insurance Company's manager, Elderton, is of doubtful construction, the ambiguity must be resolved against him, because, if the letter was of such doubtful construction that Barnes might fairly infer from it that it gave him authority to re-insure, then the letter must be so construed against the Company. The case of *Ireland v. Livingston* (1), referred to by my brother Duff in the course of the argument, makes this clear. Barnes swears he did put that construction upon it, that he did consider himself thereby specially authorized to issue a policy of re-insurance or to enter into a contract of re-insurance; and his credibility is not now impugned. Having taken that stand, having had authority for it, the Elderton letter being reasonably susceptible of that construction, the company is undoubtedly bound by his act.

Upon the question of re-insurance, we are of the opinion that there was a contract of re-insurance from the moment that the Queen Insurance Company placed the insurance on the National Canners' property.

Viewing the letters as amounting only to an offer by the appellants Company to undertake re-insurance, to the extent stipulated, of further risks to be assumed by the respondent Company, the principle of *Carlill v. Carbolic*

(1) (1872) L.R. 5 H.L. 395.

Smoke Ball Company (1), cited by Mr. Davis, applies; performance of the condition completes the contract and notification of acceptance is, in such cases, dispensed with. Under the circumstances, the nature of the appellant's undertaking implies that its obligation was to arise immediately upon the respondent becoming committed to liability.

Upon these grounds we would affirm the judgment below, and dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mayers, Lane & Thomson.*

Solicitors for the respondent: *E. P. Davis & Company.*

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