[HIGH COURT OF AUSTRALIA.]

THE GUARDIAN ASSURANCE COMPANY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

CONDOGIANIS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 16, 26, 30; *June* 19.

Barton, Isaacs and Gavan Duffy JJ.

Fire Insurance—Policy—Validity—Misrepresentation—Proposal—Answers to questions—Previous fires—Materiality—Non-disclosure of material facts.

In a proposal for fire insurance in respect of machinery and goods in a building occupied by the plaintiff, the question was asked: "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed or any other property? If so, state when, and name of company." The plaintiff answered: "Yes, 1917," and stated the name of a fire insurance company. In addition to the claim so admitted to have been made, the plaintiff had also been a claimant on a fire insurance company in respect of the destruction by fire of an insured motor-car about six years before the proposal was made. It was stated in the proposal that it was to be the basis of the contract and that the particulars therein were to be deemed to be express and continuing warranties. The policy which was issued upon the proposal was therein stated to be subject to the proviso that the insurance was to be subject to the particulars in the proposal and that the proposal (*inter alia*) was to be the basis of the insurance. In an action upon the policy,

Held, by *Barton* and *Gavan Duffy* JJ. (*Isaacs* J. dissenting), that the answer made by the plaintiff to the question in the proposal was untrue, and that the policy was thereby avoided.

Decision of the Supreme Court of Victoria (*Hodges* J.): *Condogianis* v. *Guardian Assurance Co.*, (1919) V.L.R., 1, reversed.

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APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Nicholas Condogianis against the Guardian Assurance Co. Ltd. upon a policy of fire insurance issued by the defendant Company to the plaintiff on 1st March 1918 in respect of certain stock-in-trade, fixtures and fittings, machinery and goods contained in a certain building alleged to have been occupied by the plaintiff, and used as a steam laundry.

The material facts are stated in the judgments hereunder.

The action was heard by *Hodges* J., who gave a judgment declaring that the policy of insurance was good, valid and subsisting, and that the plaintiff was entitled to be indemnified by the defendant in pursuance of such policy in respect of the loss and damage occasioned by fire to the property mentioned in the policy and thereby insured: *Condogianis* v. *Guardian Assurance Co.* (1).

From that decision the defendant Company now appealed to the High Court.

Starke and *Cussen*, for the appellant. The answer to the question in the proposal is untrue, and amounts to a statement that the respondent had only once made a claim on a fire insurance company. The proper meaning of the question is: "Have you ever been a claimant at any time or times?" Otherwise the question is unmeaning and practically useless. [Counsel referred to *Stibbard* v. *Standard Fire and Marine Insurance Co. of New Zealand* (2); *Western Assurance Co.* v. *Harrison* (3).] The respondent has warranted the truth of the statements in the proposal, and, this answer being untrue, the policy is avoided (*Yorkshire Insurance Co.* v. *Campbell* (4)). Even if the answer is true, the previous fire which was not disclosed was a material fact for the respondent to know, and its non-disclosure avoided the policy. The omission to state that the premises were occupied by his partner and himself was also a material non-disclosure.

Mann (with him *Walker*), for the respondent. So far as the language of the question is concerned, the answer is literally true;

(1) (1919) V.L.R., 1.
(2) 5 S.R. (N.S.W.), 473.
(3) 33 Can. S.C.R., 473.
(4) (1917) A.C., 218.

and it is only by conjecturing what it was that the appellant probably wanted to know that any doubt can be cast on the truth of the answer. The question should be interpreted most strongly against its propounder (*In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.* (1); *Joel* v. *Law Union and Crown Insurance Co.* (2); *In re Bradley and Essex and Suffolk Accident Indemnity Society* (3)). It was the appellant's duty to make it quite clear that it was one of the bases of the contract that it should know how many previous fires the respondent had had. The Court should not impute to the respondent the knowledge that the appellant wished to know of all the fires he had had because of the suspicion they would arouse.

[ISAACS J. If the respondent had been prosecuted for perjury on his answer, could he have been properly convicted?]

No. *Stibbard* v. *Standard Fire and Marine Insurance Co. of New Zealand* (4) supports this view. [Counsel also referred to *London Assurance* v. *Mansel* (5); *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (6); *Golding* v. *Royal London Auxiliary Insurance Co.* (7).]

[ISAACS J. referred to *Scottish Provident Institution* v. *Boddam* (8); *Perrins* v. *Marine and General Travellers' Insurance Society* (9); *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (10); *Cazenove* v. *British Equitable Assurance Co.* (11).]

If the answer was true, the non-disclosure as to the burning of the motor-car was not material. In order that it should be material, it must be material for an honest man to disclose such a fire. The mere fact that a motor-car was burnt six years before and that the claim in respect of it was paid is immaterial to this insurance. [Counsel referred to *London and Lancashire Insurance Co.* v. *Honey* (12); *Porter's Laws of Insurance*, 5th ed., p. 183; *Campbell* v. *Rickards* (13).] The only possible connection between the burning of the motor-car and the present policy is that the former in some

(1) (1909) 1 K.B., 591.
(2) (1908) 2 K.B., 863.
(3) (1912) 1 K.B., 415.
(4) 5 S.R. (N.S.W.), 473.
(5) 11 Ch. D., 363.
(6) (1891) A.C., 485.
(7) 30 T.L.R., 350.
(8) 9 T.L.R., 385.
(9) 2 E. & E., 317.
(10) 3 B. & S., 917.
(11) 6 C.B. (N.S.), 437.
(12) 2 V.L.R. (L.), 7.
(13) 5 B. & Ad., 840.

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way suggests dishonesty on the part of the respondent, but the question of materiality must be determined on the supposition of honesty. The appellant having put a specific question which refers to the matter which is said to be material and the plaintiff having answered it truthfully, the appellant cannot now say that the burning of the motor-car was material. Otherwise the question would be a trap. As to the question of occupation, the statement made that the respondent occupied the premises is substantially true. [Counsel also referred to *Welford and Otter-Barry on Fire Insurance*, pp. 146, 160, 165.]

Starke, in reply, referred to *Macgillivray on Insurance Law*, pp. 282, 317 ; *Thames and Mersey Marine Insurance Co.* v. "*Gunford*" *Ship Co.* (1) ; *Scottish Shire Line Ltd.* v. *London and Provincial Marine and General Insurance Co.* (2).

Cur. adv. vult.

June 19.

The following judgments were read :—

BARTON J. The respondent sued the appellant Company on a policy of insurance against fire, the goods insured being the stock-in-trade of a laundry proprietor, contained in a certain building, the fixtures and fittings, the machinery, two electric motors and other goods. The policy was issued on the acceptance of a proposal signed by the respondent. At the foot of the proposal were the following words :—" This proposal is the basis of the contract, and is to be taken as part of the policy, and (if accepted) the particulars are to be deemed express and continuing warranties furnished by or on behalf of the proponent ; and any questions remaining unanswered will be deemed to be replied to in the negative. The proposal is made subject to the Company's conditions as printed and/or written in the policy to be issued hereon, and which are hereby accepted by the proponent." The policy was subject to the following proviso : " Provided always that this insurance shall at all times and under all circumstances be subject to the particulars in the proposal of this insurance (which shall in all cases be deemed to be

(1) (1911) A.C., 529, at p. 538. (2) (1912) 3 K.B., 51.

inserted or furnished by the insured), and to the conditions and stipulations hereinbefore contained and to the conditions and stipulations printed on the back hereof, which proposal, conditions, and stipulations constitute the basis of this insurance and are to be considered as relevant to and incorporated in and forming part of this policy." A large proportion of the property insured was destroyed and damaged by fire. The policy was dated 1st March 1918, for the year 30th December 1917 to 30th December 1918. The fire took place about the 17th April in the same year.

The appellant Company resisted the claim on the policy, and of its grounds of defence the following were maintained before us :— (1) Misrepresentation by the respondent that he had only once previously been a claimant on a fire insurance company in respect of the property proposed or any other property. (2) Omission to state in the proposal that on or about October 1912 he made a claim on the Liverpool and London and Globe Insurance Co. in respect of damage by fire to a motor-car. The contention was that this amounted to non-disclosure of a material fact. (3) Omission to state in the proposal that the premises were occupied by himself and one Dina Rachor, carrying on business in partnership as the New Monarch Laundry. Taking these defences in order, the question of misrepresentation depends on the construction of a question in the body of the proposal, stated in the following terms :— "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed or any other property ? If so, state when, and name of company." To this the answer was : "Yes, 1917, Ocean."

Hodges J., on his construction of the question, considered the answer true. That view is correct if the question is satisfied by the statement of one claim when more than one had been made. As a fact, the respondent had insured a motor-car in 1912 with the Liverpool and London and Globe Co., and had claimed and received some £267 in respect of damage by fire thereto.

What, then, is the meaning of the question ? If it is ambiguous, the construction should be against the Company, on the doctrine that policies are to be construed *contra proferentes*. "It has been established by the authorities," says *Vaughan Williams* L.J. in

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In re Etherington (1), "that in dealing with the construction of policies, whether they be life, or fire, or marine policies, an ambiguous clause must be construed against rather than in favour of the company." This passage was referred to by *Farwell* L.J. in *In re Bradley* (2), and its adoption by him serves to show that his remarks refer only to ambiguities. *Cozens-Hardy* M.R., in the same case, laid down the same doctrine: See *Anderson* v. *Fitzgerald* (3) and *Joel* v. *Law Union &c. Insurance Co.* (4).

It was pressed upon us very strongly that the question was ambiguous; and if I were of that opinion I should have no alternative but to hold against this part of the defence. The respondent's counsel, indeed, went further. If there was no ambiguity, he submitted that the question merely invoked such an answer as was given. If that was not its meaning, it was ambiguous.

No decision was cited on either side upon a question in the precise form, but several cases were referred to, which to my mind throw light upon its construction. I do not propose to mention them all, but will presently refer to two or three. But first I would point out that when a proposal is made which is to be of the basis of the contract, the proponent cannot well keep out of his mind the importance to the proposed insurer of knowledge of his previous connection with fire insurance. It is upon the answers to the Company's inquiries that it has to decide whether to issue the policy or not. The matter being up to that stage in negotiation, the Company has to make up its mind whether the risk is a safe one to undertake. There may have been several previous claims, or only one, or no claim. The Company is obviously entitled to know what is the state of things. It is entitled to form its judgment with its eyes open. It is entitled to maintain an attitude of circumspection as to all proposals.

Now, if a reasonable man, proposing to insure, meets with a question of this kind, what is the reasonable view which will appeal to him? Is it not this: that a company asking whether he has *ever* been a claimant is asking him whether he has at any time been a claimant? And when he is asked to state *when*, can he fail to see

(1) (1909) 1 K.B., at p. 596.
(2) (1912) 1 K.B., 415.
(3) 4 H.L.C., 484.
(4) (1908) 2 K.B., 863.

that he is asked at what time or times he has been a claimant? I think that is the position; and, if it is, he is called upon to give each occasion when he has been a claimant and the time at which each claim has been made. That is my view of the meaning of this question, and I therefore think that an answer pointing to only one occasion and time is not a true answer. *Uberrima fides* is no doubt required on each side; there is no evidence of any lack of it on the part of the Company, but there may be on the part of the proponent a lack of that quality, and it need not amount to fraud.

In the case of *Cazenove* v. *British Equitable Assurance Co.* (1) *Pollock* C.B., delivering the judgment of the Exchequer Chamber, said this: "An answer may in one sense be said to be true, namely, if as much as it does state is not untrue, but it may nevertheless be substantially an untrue statement." That is, I think, a fair description of the respondent's answer. *Perrins* v. *Marine &c. Insurance Society* (2) is, I think, clearly distinguishable from the present case. It was a case of a merely imperfect statement, not untrue. But if the view I have expressed as to the meaning of the question is correct, the answer of the present proponent meant that he had only once been a claimant, and that is an untrue answer. This view was taken by the Supreme Court of Canada in the case of *Western Assurance Co.* v. *Harrison* (3). There two questions put to the proponent were:—"Have you . . . ever had any property destroyed by fire?"—Answer: "Yes." "Give date of fire and, if insured, name of company interested."—Answer: "1892, National and London and Lancashire." The evidence showed that there was a fire on the applicant's property in 1882, and that there were two fires in 1892, and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires. The Supreme Court held that the questions were material to the risk, and the answers untrue.

The case of *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (4) does not, in my opinion, affect the position of the appellant Company. It decides that, where payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is

(1) 6 Jur. (N.S.), 826.
(2) 2 E. & E., 317.
(3) 33 Can. S.C.R., 473.
(4) (1891) A.C., 485.

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on them to prove very clearly that the misrepresentation has been made. If I have correctly construed the question, it is beyond doubt that the statement made in the answer was not true.

I need not further indicate the opinion that the misrepresentation was on a question material to the risk. And the proposal in which it was embodied was the basis of the contract and became part of the policy.

It has been suggested that the " particulars " warranted at the foot of the proposal are only " the particulars of property " indicated at the head thereof, and that the remainder of the particulars given by the proponent in answer to questions are not the subjects of warranty. I think that this is a narrow construction, and that it should not be adopted, as the document is not ambiguous. It is plain to my mind that the word " particulars " as it is used at the foot is used in the wide and general sense to cover everything in the proposal that is fitly described by that term, and that " particulars of property " at the head is visibly employed to denote one class of particulars only.

I am of opinion that the appellant Company is entitled to succeed on the first ground, and I need go no further.

ISAACS J. Ultimately the only point of importance left is the effect of omitting from the answer to a question any reference to the previous claim for the burnt motor-car. That omission is relied on by the Company as a defence in two ways, both of which concern not merely this case but other fire insurance policies, and are of immense importance to every one who thinks he has a reliable insurance on anything—life, accident or otherwise.

There is no charge of fraud or wilful deceit raised against the respondent. Suggestions were made during the argument of suspicious conduct relative to the motor-car fire, but no suggestion was made on the pleadings, nothing which would prepare a litigant to meet by evidence any charge of wrongdoing. We must take it that the respondent's honesty is not challenged.

The proposal, which, as usual, is on a printed form and prepared by the Company, contains, besides the " particulars of property," several questions. One question was this : " Has proponent ever

been a claimant on a fire insurance company in respect of the property now proposed or any other property? If so, state when, and name of company." It is one question split up into three sub-questions or sections. The Company's main reliance is on the second section, which consists of the words "state when," though the first section is the governing part and is supported by the third. The first section of the question contains the word "ever," the primary meaning of which is "at any time," and in a question in the sense of "on any occasion." It also contains the expression "on *a* fire insurance company," the primary meaning of "a" being "one" or, at all events, singular, and that of "company" being one company, not several companies. In the second section the word "when" is capable, according to context, of referring to one or many occasions; the word itself, therefore, is neutral. The third section is "name of company," not "names of companies" or "name or names of company or companies."

The defence urges that, inasmuch as the insured ought to know what the Company was after, he ought to read that question in the way most conducive to meet the Company's object. That is absolutely reversing the settled law on the subject. The law is distinct that, since the Company has the matter in its own hands, since it frames its own policy and words its own questions, makes its own stipulations, and, as in the present case, puts in a stipulation that mere inaccuracy, however honest, will deprive the insured of any benefit, it must be bound to the exact question as put. Otherwise no person is safe. If Courts were to stretch points in favour of insurance companies, and say "It is quite true that their question does not exactly express what they now insist on, but the insured ought to have seen what they intended to ask and he ought to have answered accordingly," no one would be secure. Insurance would itself be the greatest risk. It is quite a different matter insisting on good faith; that is essential for both sides, and will be referred to again presently. But when we come to the specific questions framed for the very purpose of destroying the insured's whole security in case there is merely inaccuracy, however unintentional and however immaterial, we have, as I have hitherto

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understood, to see that that extreme result does not occur unless it is strictly established.

Now, in this case, the respondent obviously in fact read the word "ever" as meaning "on any occasion"; he read the words "a fire insurance company" as "one fire insurance company" and not two companies; he read the word "when" as referring to the occasion already mentioned, and he read the final word "company" as meaning what it said, namely, "company" and not "companies." The Guardian Assurance Co., however, says: "You should have seen from the nature of the business that when we wrote 'company' we meant to include 'companies'—that is, 'company' meant 'company or companies,' however numerous—and when we wrote 'a company' 'a' meant possibly 'several,' and when we wrote 'when' we meant not once but possibly many times, and when we wrote 'name of company' we meant 'name or names of company or companies'." *Hodges* J. had no hesitation in rejecting their contention. I thoroughly agree with him.

Cases of great authority have stated the law on the subject. In *Anderson* v. *Fitzgerald* (1) Lord *St. Leonards* said:—"A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it; nothing ought to be wanting in it, the absence of which may lead to such results." I shall read other judicial expressions in a moment, but these words of Lord *St. Leonards* are so apposite to the present case that I think it better to apply them at once.

Assume now that the question was framed with the "deliberate care" he speaks of, why should not the Company be strictly held to its very words in the sense most favourable to the person who is to be bound by it? First, look at other parts of the proposal itself, including, of course, the conditions which it incorporates and which the proponent is required at once to read and accept. In those conditions we find that where the plural is intended as well as the singular it is stated:—In condition 4: "The insured shall

(1) 4 H.L.C., at p. 510.

give notice to the Company of any insurance or insurances"; in condition 8: "marine policy or policies"; in conditions 13 and 18: "arbitrator or arbitrators"; in condition 17: "insurance or insurances effected by the insured or any other person or persons."

Reading the question we have to consider as framed with assumed "deliberate care" (and we may be sure it was), and reading it along with such conditions as I have referred to, I would apply to the case the words of Lord *St. Leonards* above quoted, and also his immediately succeeding words, namely, "When you consider that such contracts as this are often entered into with men in humble conditions of life, who can but ill understand them, it is clear they ought not to be framed in a manner to perplex the judgment of the first Judges in the land, and to lead to such serious differences of opinion between them."

I am aware, and during the argument drew attention to the fact, that in *Harrison's Case* (1) the Supreme Court of Canada determined in favour of the company in a somewhat similar question. But, apart from the summary nature of the judgment, in which no reasons are given, these being simply wrapped in the words "The answer is therefore untruthful," it must be remembered that five Judges of the Supreme Court of Nova Scotia thought the opposite, and gave their reasons, including this observation: "If any further information was required the question should have been differently framed, and the inquiries more definite." There is one circumstance, however, that reconciles the final decision with the relevant principles laid down by authority. It is this: there were three fires; the answer referred to two. Referring to two, it might well be said the proponent clearly did not understand the question as limited to one occasion, and, by stating two as the limit of plurality, he on the face of the answer impliedly denied any more, and so misled the company. If that were the basis of the decision, as I think it was, it is not against the present respondent. It would mean that the answer was "untruthful" in the sense of morally false as contrasted with mere inaccuracy, a distinction expressed by *Fletcher Moulton* L.J. in *Joel's Case* (2).

(1) 33 Can. S.C.R., 473.

(2) (1908) 2 K.B., at p. 886.

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Another case is *Boddam's Case* (1). But that, as to the answer being untrue, was a mere dictum, the actual decision being against the company on another ground. The case is not elsewhere reported, as far as I can find, and the precise form of the question is not given. The case most relied on was *Stibbard's Case* (2). That case is professedly based on *Mansel's Case* (3), but so far as concerns this point the essential difference between the two cases is that in *Mansel's Case* the question said "office" or "offices," so that the difficulty we are now considering could not arise. In *Mansel's Case* the proponent showed that he answered the question in plurality, and thereby inferentially negatived any more than the two proposals he mentioned. That cannot be said of *Stibbard's Case*, and I think *Hodges* J. was right in declining to follow it. Apart from these three cases, the principle is undoubted.

In *Davies* v. *National Fire &c. Insurance Co. of New Zealand* (4) the Privy Council, in dealing with the answer to a question, says: "They think it right to say that when the payment of a risk is resisted on the ground of misrepresentation, it ought to be made *very clear* that there has been such misrepresentation." The allegation in the present case of misrepresentation depends entirely on the argument that inferentially the answer to the question means "only once," though it does not say so. That depends on the construction of the question itself; and that, in turn, depends on the accepted principles of construction as applied to such documents. In *Etherington's Case* (5) *Farwell* L.J. says: "I agree that the insurance company which prepares these documents is bound to make their meaning as clear as possible." The same learned Judge, in *Bradley's Case* (6), said what in my opinion should not be weakened in the least degree:—"Contracts of insurance are contracts in which *uberrima fides* is required, not only from the assured, but also from the company assuring. It is the universal practice for the companies to prepare both the form of proposal and the form of policy: both are issued by them on printed forms kept ready for use; it is their duty to make the policy accord with and not exceed the

(1) 9 T.L.R., 385.
(2) 5 S.R. (N.S.W.), 473.
(3) 11 Ch. D., 363.
(4) (1891) A.C., at p. 489.
(5) (1909) 1 K.B., at p. 600.
(6) (1912) 1 K.B., at p. 430.

proposal, and *to express both in clear and unambiguous terms*, lest (as *Fletcher Moulton* L.J., quoting Lord *St. Leonards*, says in *Joel* v. *Law Union and Crown Insurance Co.* (1)) provisions should be introduced into policies which 'unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.' *It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses*, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed *contra proferentes* applies strongly against the company."

In *Royal Insurance Co.* v. *Coleman* (2) the Supreme Court of New Zealand stated the principle as to the questions by an insurance company in words which I think are very well chosen. *Denniston* J. said (3): "If there is anything in it calculated to mislead the person making the declaration, the question must be construed against the party propounding it." *Edwards* J. said (4): "This question is not addressed to a Court accustomed to dealing with fine distinctions in the application of words, but to plain and in many instances unlettered men." *Chapman* J. said (5):—"I am quite satisfied that an untrue answer is not shown to have been made, and that may be best made clear by considering the way in which the case was argued before us. Really, in order to make out a case and to make out that an untrue answer had been given, learned counsel who have addressed us here had, so to speak, to translate the question into other phraseology than that used in the question itself. . . . We must read the question in the proposal as we

(1) (1908) 2 K.B., 863.
(2) 26 N.Z.L.R., 526.
(3) 26 N.Z.L.R., at p. 530.
(4) 26 N.Z.L.R., at p. 531.
(5) 26 N.Z.L.R., at p. 535.

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find it, and the necessity for recasting it in another form shows there is in its actual phraseology—I will not say ambiguity—but room for an answer such as has been given here without a conscious or unconscious untruth being told."

The principle to be applied to such a case may, in my opinion, be thus stated: When an insurance company presents a question to a proponent it takes the risk of his understanding the question in any sense within the bounds of reason, having regard to the subject matter. If he so understands it, the company cannot complain when the loss has occurred and ask a Court of law to bind the proponent down to the average man's understanding of it or what a Judge would understand by it. All a Court can do, in my opinion, is to determine the limits of reasonable interpretation, and, if the proponent has *bonâ fide* understood the question within the limits and answered it accurately, that is sufficient. In other words, the Court construes the question against the company, after interpreting it so as to determine the limits of reasonableness. That is, as I understand, the rule laid down by the Privy Council in *National Protector Fire Insurance Co. v. Nivert* (1).

In the present case, in order that the defence should succeed, the phraseology must be altered in the vital word "company," which must be altered to "company or companies" in two limbs of the question, and the particle "a" in the first limb must be altered from the exclusively singular form to some form applicable both to singular and plural. The words "state when"—which, when read in connection with the first limb of the question, primarily mean "state on what date"—must be read by the appellant as "state on what date or dates," and then this is followed by the third limb, "and name of company," so that the appellant reads the last two limbs thus: "State on what date or dates and name of company," as if the one company applied to one date or many dates. If, however, the final word "company" is altered to "company or companies," the language is greatly altered to the advantage of the Company, notwithstanding its assumed "deliberate care." And to do all this, the Company's object has to be divined by the proponent and the Court, and the question moulded accordingly.

(1) (1913) A.C., 507.

I am utterly at a loss to understand how all this can be done and yet that it can be said there is no ambiguity. If, as in the Canadian case of *Western Assurance Co.* v. *Harrison* (1), a proponent shows that he understood the question as referring to plurality, and answers as to two instead of three or more, he would fail. He cannot, so understanding it, be permitted to choose any number of instances he pleases. He must answer truly as he reasonably understands it. Condogianis has, in my opinion, done this, and therefore the conclusion arrived at on this point by *Hodges* J. was right, and should be upheld.

The second ground of defence is based on the same transaction said to be omitted from the answer, and is thus stated in pars. 17 and 18 of the defence :—" 17. The plaintiff omitted to state in the said proposal that in or about the month of October 1912 he made a claim upon the Liverpool and London and Globe Insurance Co. Ltd. in respect of damage by fire to a motor-car and received the sum of £267 3s. or thereabouts in respect thereof." Par. 18 says that the defendant was induced to make the policy by the respondent concealing that fact, *inter alia*. The sole point taken about it in the evidence is that, as it is the practice of fire insurance companies to consider whether a proposal should be accepted, this motor fire, which took place five years before the proposal, was a material fact, and that its concealment was fatal to the respondent's claim. It is to be noted that no charge of wilful concealment is made, and, more than that, no witness is called from the Guardian Assurance Co. to say either that they had no actual knowledge of the fact, or that it was the practice of that Company to attach importance to such fires, or that the Company was induced, as alleged, to issue the policy by its ignorance of the fact. No doubt it is not incumbent on the Company as a matter of law to prove it was so induced, but in the circumstances the defendant's complete absence from the witness-box weighs with me on the question of what a reasonable assurance company might have done in the circumstances of the case. It was stated on the face of the proposal that it replaced a prior one in 1916 with the same company, which was for a smaller amount in fact, which itself replaced a still prior one in

(1) 33 Can. S.C.R., 473.

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1915 for a still smaller amount in fact, and it was on the face of the present proposal that a previous fire had occurred and a claim made on the Ocean Company, and the respondent in evidence said that that previous fire had occurred about two years ago at his business premises in Elizabeth Street.

Now, what must the Company show in order to escape on this second point? It relies on the evidence of two witnesses, called from other companies, who testify that it is the practice of insurance companies to attach importance to motor fires. But that must be considered with reference to circumstances, before a jury or a Court sitting to decide facts can apply it to a given case. The mere fact of a motor fire fifteen years before when £50 damage (say) was claimed could hardly be said to be material to a proposed insurance of stored wheat. And in the present case the proponent, having stated the latest fire and given the name of the company, and so offered full opportunity for examination and investigation, it is a small matter, as it seems to me, that, five years before, a motor-car insured for £400 was burned, and that, after investigation by Colonel Freeman, that gentleman recommended payment of £267 3s. in addition to £36 salvage—in all, £303 3s. I say it seems a small matter, because the property here insured was of a totally different character. It was machinery in a laundry and goods belonging to others for which the proponent was responsible and would have to hand over the value to the owners if any were burnt. And it must be remembered that unless the matter itself is directly material it is not open to the Company to say that it might have been indirectly material as leading to discovery of other matters (*Joel's Case* (1)). The onus resting on the appellant, I would not be prepared to find in its favour on this point even if the matter rested here. But it does not. The Company has to show more than materiality of the fact omitted. It has to show a duty to disclose it. Now, that is clearly with by *Fletcher Moulton* L.J. in a case cited by Mr. *Mann* (*Joel's Case* (2)). It is, of course, no answer for Condogianis to say that he *bonâ fide* thought the previous fire was not material, if in fact it was. But that does not settle his duty to disclose it. His duty was to disclose such material facts as a reasonable man in his position would

(1) (1908) 2 K.B., at p. 897.

(2) (1908) 2 K.B., at pp. 884-885.

have considered material. If the hypothetical reasonable man in his position would have considered the previous fire five years before material, in the sense of influencing the Guardian Assurance Co. in accepting or rejecting the risk or in fixing its premium, then Condogianis must be assumed to so consider it, and so had the duty of disclosing the fact. But so far as the materiality is rested on the fact of the practice of insurance offices to so consider it, knowledge of that practice cannot be imputed to Condogianis. If so much importance is attached to motor fires, why is not a special question or a special note inserted calling attention to them? Apart from that practice, the class of property is so different, the lapse of time so great, the intermediate statement of the London Café fire so much more important, and the absence from the witness-box of any representative of the Guardian Assurance Co. to state the effect of the omission on that Company so significant, that I decline to hold the Company has sufficiently sustained the onus of proving the second defence.

On the whole I am of opinion that the appeal should be dismissed, with costs.

GAVAN DUFFY J. In a proposal addressed to the appellant Company the respondent was asked the following question: "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed or any other property? If so, state when, and name of company." To this question he answered: "Yes, 1917, Ocean." It is conceded that if this is an untrue answer the appellant Company must succeed, and it is said to be untrue because the respondent in the year 1912 had been a claimant on the Liverpool and London and Globe Insurance Co. in respect of a motor-car destroyed by fire. The answer is true only if the question means "Were you once or oftener a claimant on &c. If once, when was that claim made and on what company; if oftener, when and on what company was such one of the claims as you choose to select made?" If it were not that my brother *Isaacs* and *Hodges* J. take a different view, I should have thought it impossible to so construe the question. The precept "if so, state when, and name of company," to my mind, means "if so state every occasion on

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which you were a claimant, with the name of the company on which you claimed." If the respondent had never been a claimant he would have been bound to answer No; if he had been a claimant only once he would have been bound to answer Yes, and to state the time when and the company on which he had made the claim. As he had been a claimant more than once, he was bound to state when he had made each claim and the name of the company on which it was made. He has not done so, and his answer is therefore untrue.

I think the appeal should be allowed.

Appeal allowed. Judgment appealed from set aside and judgment entered for the defendant with costs including costs of pleadings and discovery and shorthand notes taken at the trial. Respondent to pay costs of appeal.

Solicitors for the appellant, *D. H. Herald & Son.*

Solicitors for the respondent, *Pavey, Wilson & Cohen.*

B. L.