[PRIVY COUNCIL.]

CONDOGIANIS . . . . . APPELLANT;
PLAINTIFF,

AND

THE GUARDIAN ASSURANCE COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL.* 1921. May 2.

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, 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 High Court: *Guardian Assurance Co. Ltd.* v. *Condogianis*, 26 C.L.R., 231, affirmed.

APPEAL from the High Court.

This was an appeal to the Privy Council by Nicholas Condogianis from the decision of the High Court: *Guardian Insurance Co. Ltd.* v. *Condogianis* (1).

(1) 26 C.L.R., 231.

* Present—Viscount Haldane, Lord Buckmaster and Lord Shaw.

PRIVY COUNCIL. 1921. CONDOGIANIS v. GUARDIAN ASSURANCE CO. LTD.

The judgment of their Lordships, which was read by Lord SHAW, was as follows:—

This is an appeal by special leave from a judgment of the High Court of Australia dated 19th June 1919, allowing by a majority of two Judges to one an appeal from the judgment of his Honor Mr. Justice *Hodges*, in the Supreme Court of Victoria, dated 30th October 1918. *Isaacs* J. agreed with the Judge of first instance; *Barton* and *Gavan Duffy* JJ., from whom he dissented, decided to reverse.

The action, which was brought by the appellant as plaintiff, claimed a declaration that, under a policy of insurance of the defendant Company dated 1st March 1918, that Company was liable to pay to him the loss sustained in consequence of a fire which occurred on 17th April of that year and by reason of which a large part of the property insured was destroyed.

In the pleadings the defence was rested on a variety of grounds. At their Lordships' Bar the learned counsel for the respondent stated that it was sufficient to rely upon one of these grounds, and that all the others might be taken as discarded. This ground was that two statements made in the proposal were untrue. One of these statements stood opposite a request for the "name in full, residence and occupation, of the person in whose name the policy is to be made out." The appellant, Nicholas Condogianis, signed his name and gave his address. There was, however, a printed note attached and clearly made a condition of the policy, to the following effect: "If not the owner, the nature of interest must be stated." The truth was that the appellant, prior to the date of the policy, had entered into a contract of partnership with one Mrs. Rachor. The deed of partnership is produced, and it appears from it that the partners are equally entitled to the profits of the concern. It further appears, however, that Mrs. Rachor's contribution to the firm's capital was of a very slender amount, and on this and other grounds the appellant maintained that his representation, which amounted to an assertion of his own ownership, was substantially true. Whether such a contention could be successfully maintained or not, their Lordships do not propose to determine, as they have formed a clear conclusion upon

the other ground now to be mentioned, which formed the stable part of the argument before the Board, as also of the judgments of the learned Judges of the Court below.

That ground is this: Among the questions in the appellant's fire insurance proposal to the respondent was the following:—"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 given: "Yes, 1917, 'Ocean.'" This answer was in a literal sense true, that is to say, it was true that the proposer had in the year 1917 made a claim against the "Ocean" Company in respect of the burning of a motor-car. He omitted, however, to state what was also the fact, namely, that in the year 1912 he had made another claim against the Liverpool and London and Globe Co. in respect of the burning of a motor-car owned by him. He was paid the sum of £267 3s. in settlement of that claim.

It is unnecessary to state that the answer given by the appellant in the proposal falls clearly within the express declaration which is now to be quoted. The terms of that declaration are as follows:—"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 case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves—by making the fact the basis of the contract, and giving a warranty—that as between them their agreement on that subject precluded all inquiry into the issue of materiality. In the language of Lord *Eldon* in *Newcastle Fire Insurance Co.* v. *Macmorran & Co.* (1):—"It

(1) 3 Dow, 255, at p. 262.

PRIVY COUNCIL. 1921. CONDOGIANIS v. GUARDIAN ASSURANCE CO. LTD.

is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing." This rule has been repeated over and over again, and is too well settled to be questioned (*Anderson* v. *Fitzgerald* (1), and the judgments of Lord *Blackburn* and Lord *Watson* in particular in *Thomson* v. *Weems* (2)).

An argument was presented to the Board arising from the language used in the first condition of the policy. It is as follows: "If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the Company shall not be liable upon this policy so far as it relates to property affected by any such misdescription, misrepresentation or omission." It was pleaded that the materiality of the fact was thus introduced into the policy in the sense of making the materiality of every statement or answer part of the basis of the contract. It is no doubt true that a material misstatement inducing the contract would avoid it, but their Lordships see no reason to hold that the reference to materiality in the condition quoted is in any sense equivalent to a deletion of the warranty and declaration of the basis of the contract which the signed proposal contains. That argument is accordingly rejected.

The more serious proposition arose on the construction of the question and answer. In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against

(1) 4 H.L.C., 484. (2) 9 App. Cas., 671.

which the insured would be protected by Courts of law. Their Lordships accept that doctrine to the full, and no question is made of the soundness of it as set forth in many authorities, of which the judgments of *Farwell* L.J. in *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.* (1), and *Moulton* L.J. in *Joel* v. *Law Union and Crown Insurance Co.* (2), are recent examples.

But, upon the other hand, the principle of a fair and reasonable construction of the question must also be applied in the other direction, that is to say, there must also be a fair and reasonable construction of the answer given; and if on such a construction the answer is not true, although upon extreme literalism it may be correct, then the contract is equally avoided. These principles seem to be entirely in accord with Lord *Watson's* view in *Thomson* v. *Weems* (3), which was thus expressed:—"Notwithstanding that the warranty is express there still remains for consideration what must be held to be the subject matter of the warranty. That is a point to be determined in each case, according to the just construction of the question and answer taken *per se* and without reference to the warranty given."

With these matters in view, what is a just and reasonable construction of the words in the question "Has proponent ever been a claimant on a fire insurance company?—If so, state when, and name of company"?

It is not to be wondered at that this was made the basis of the contract, because insurance companies might hesitate long before entering into a contract with an insurer who had been formerly a claimant upon companies, and they would have been put upon their inquiry as to what these claims were and how they had been settled and what were the circumstances of these former transactions. The importance of the question might be increased by the number of times in which such transactions had taken place. The argument of the appellant, however, was that it was sufficient to answer the question "Has proponent ever been a claimant . . . ?—If so, state when and name of company," by answering in the singular and giving one occasion and one occasion alone. Accordingly, if

(1) (1909) 1 K.B., 591. (2) (1908) 2 K.B., 863.
(3) 9 App. Cas., at p. 687.

PRIVY COUNCIL. 1921. CONDOGIANIS v. GUARDIAN ASSURANCE CO. LTD.

(say) several years ago a proponent had been a claimant under an insurance policy, it would be sufficient for him to mention that fact and to exclude from mention the further fact that every year since that occasion he had also been a claimant upon insurance companies for fire losses. It appears to their Lordships quite plain that this would be no good answer to the question "Has proponent ever been a claimant? If so, state when." In short, when that question is reasonably construed, it points to the insurer getting the benefit of what has been the record of the insured with regard to insurance claims. This was distinctly its intention, and in their Lordships' opinion is plainly its meaning. To exclude, however, from that record what might in the easily supposed case be all its most important items, however numerous these might be, and to answer the question in the singular, which again in the easily supposed case might be a colourless instance favourable to the claimant, would be to answer the question so as to misrepresent the true facts and situation and to be of the nature of a trap.

On this simple ground, which is in accord with the spirit and principle of insurance law as frequently laid down, their Lordships see no occasion for interfering with the judgment of the majority of the Court below. They agree with the result arrived at by the learned *Barton* J. and *Gavan Duffy* J. They note with satisfaction that the learned Judge, *Isaacs* J., although dissenting on the point of the construction of the particular question and answer above reviewed, is in substantial agreement with those principles of insurance law to which reference has been made. When he observes (1) "All a Court can do, in my opinion, is to determine the limits of reasonable interpretation," that may be at once assented to; but when he proceeds, "and, if the proponent has *bonâ fide* understood the question within the limits and answered it accurately, that is sufficient," their Lordships feel that dangerous ground has been reached. However great the *bona fides* of the proponent may be, if he has been led to impose limits upon the question to which it should not reasonably be subject, then the answer so restricted cannot be held to be a true answer. The present affords a good illustration of a case in which the question should be stated so as

(1) 26 C.L.R., at p. 244.

to raise the issue in a broader and, in their Lordships' opinion, a just and sound form. That question would be: "Could a man making a proposal for insurance fairly read the question as applying only to a single previous claim?" Their Lordships, as stated, are clearly of opinion that such a limitation would result, not in the disclosure which was truly required, but in a failure to reveal essential elements important to be known.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Rev Broken Hill Proprietary Co Ltd v Warnock (1922) 30 CLR 362

[HIGH COURT OF AUSTRALIA.]

IN RE THE AUSTRALIAN METAL COMPANY LIMITED.

Trading with the Enemy—Enemy company—Winding up business in Australia—Controller—Application to High Court to determine questions—Jurisdiction of High Court—Questions as to claims arising out of contract—Discretion—Right of company to be heard—Questions of fact—Trading with the Enemy Act 1914-1916 (*No.* 9 *of* 1914—*No.* 20 *of* 1916), *sec.* 9H.

Under sec. 9H of the *Trading with the Enemy Act* 1914-1916 the Minister for Trade and Customs can confer on the Controller such powers as are exercisable by a liquidator in a voluntary winding up of a company, including power to apply, with the consent of the Minister, to the High Court to determine any question arising in the carrying out of the order for winding up.

The Controller of company A, with the consent of the Minister, applied to the Court to determine (1) the right of company B to payment by company A on a certain basis for the spelter contents of certain concentrates delivered in the first half of 1914, (2) the right of company B to payment by company A on a certain basis for the spelter contents of certain other concentrates delivered in the whole year 1914, (3) the right of company C to payment by company A on a certain basis for the lead contents of certain other concentrates delivered during 1914; and to determine (4) what procedure should be followed for trying a claim made by the Sydney Corporation against company A for defects in a machine sold by the company to the corporation.