# HIGH COURT OF AUSTRALIA

Craine

Vs.

Colonial Mutual Fire Insurance Company Limited

(Knox C.J., Isaacs and Starke JJ.)

22 October 1920

Knox C.J.,

Isaacs and Starke JJ.

Two appeals are before us, but, as it is conceded that both must share the same fate, it is necessary only to consider the facts and law of the case of *Craine v. Colonial Mutual Fire Insurance Co. Ltd.*

The questions argued are of very general importance in various directions. The action was brought in the Supreme Court of Victoria for £525, the amount of a fire loss, in respect of motorcars. The trial took place in December 1919 before *Irvine* C.J. and a jury. The jury answered questions, and the learned Chief Justice on 16th December directed judgment to be entered for the defendant Company with costs. Many of the matters in contest were finally disposed of at the trial, and it will be necessary therefore to refer only to such of the points of law and matters of fact as are relevant to the contentions before us. The policy on which the action was brought contained several clauses which should be specially mentioned as of importance in this contest. They are clauses 11, 12, 13 and 19. The fire took place on 30th September 1917. It was common ground, and indeed admitted in the defence, that the time for complying with clause 11 was extended until twelve o'clock noon on 26th October 1917. It was also common ground that, in actual fact, clause 11 was not complied with by twelve o'clock noon on that day, nor before three o'clock in the afternoon. At three o'clock a claim and declaration were in fact delivered which, if delivered by twelve o'clock noon, would have been in compliance with the condition; but, said the Insurance Company, and it still says, the failure to deliver the claim by twelve o'clock is fatal, and the Company was thereby absolved, whatever otherwise might be the justice of the claim, from paying a single penny of the loss. The plaintiff, while admitting this as a *primâ facie* consequence, replied that the Company, by its conduct in investigating the claim and particularly in acting on the contract adversely to him, with full knowledge of the defect now relied on, waived the objection, or alternatively is estopped from relying on it, and he says that the jury so found in his favour. The learned primary Judge abstained from asking the jury to find a general verdict, and put specific questions to them. The first question, on which a great deal now depends, was in these terms: "Did the defendants represent to the plaintiff that they did not intend to rely upon the claims having been put in too late?" The jury replied: "Yes: they did waive their claim." The learned Judge, in giving judgment, disregarded all but "Yes," as not being an answer to his question as he conveyed it. The jury found the damages as against the defendant Company to be £363.

The defendant contends (1) that there was no evidence upon which the jury could reasonably find either waiver or estoppel; (2) that, if there was such evidence, two materials of estoppel, namely,

inducement and prejudice, were not put to the jury, and were not found by them; and (3) that in any event clause 19 is a bar to any claim of waiver or estoppel, unless either written on the policy or unless a distinct issue of estoppel as to clause 19 itself be raised and found, on proper evidence, against the Company. By these contentions the defendant supports the judgment of *Irvine* C.J. The plaintiff contends (1) that, in view of the findings of the jury, the Chief Justice was bound in law to direct judgment to be entered for the plaintiff, leaving the defendant to move the Full Court for a new trial if the findings were contested; (2) that, if the Chief Justice had power to consider whether the findings in favour of the plaintiff were sustainable, he ought to have held they were, and ought to have held them in the circumstances sufficient, and should have entered judgment for the plaintiff; (3) that, if by reason of any failure to determine necessary facts the findings actually given were insufficient to entitle the plaintiff to judgment, at least judgment should not have been entered for the defendant, but a retrial directed as for a mistrial.

As to the duty of a Judge trying a civil case with a jury under the *Judicature Act and Rules*, we are not called upon to decide whether he is always bound to accept the verdict of the jury as entitling the party in whose favour it is given to the judgment of the Court. In the view we take of this case, it is not necessary now to determine that point. In the first place, from reading the transcript of the proceedings at the trial we are convinced of two things:—First, the jury gave no general verdict for the plaintiff; the learned Judge studiously refrained from asking them to do that, and he put specific questions as to what appeared to him to be controverted matters of fact in the case. Next, it appears that the learned Chief Justice was careful to put to the jury *all* the controverted issues of fact, and as to estoppel the only such issue was whether or not the Company made the representation that it did not intend to rely on the failure to comply with clause 11. The trial was a very protracted one, lasting seventeen days, beginning 26th November and ending 16th December. It is not easy to condense the facts that are essential to determine this appeal. There was, however, no possibility of any contested question of fact escaping observation. On 28th November the plaintiff's case closed, and defendant's counsel moved to withdraw at least part of the case from the jury. His Honor invited argument as to waiver of condition 11, and in the course of the discussion made specific reference to inducement and consequent conduct as part of estoppel. Plaintiff's counsel again referred to those elements; the effect of the defendant's conduct as bearing on the question of representation was discussed at length; the effect of possession was greatly relied on. Ultimately the learned Chief Justice says:—"There is no question whatever that in this case they" (the Company) "go on subjecting the other side to a great deal of inconvenience, delay, business trouble and loss, which one would have thought they ought to avoid if they intended to rely on the condition. However, it is not a question of merits at all: it is a question of dry law in this case." Mr. *Morley*, plaintiff's counsel, replied: "It is a question of law, but their intention must be taken from their acts and their statements." On the next sitting day, 1st December, Mr. *Morley* said: "There were three different positions I put to your Honor, first, the Company's claim that that condition stood and had not been waived, and, second, that the Company had so acted as to be estopped." This makes it clear beyond controversy that, just as waiver and estoppel had been separately pleaded in the plaintiff's reply, so the argument treated them as separate and distinct questions for ascertainment at the trial. No doubt at some points waiver and estoppel are sometimes treated as practically synonymous; no doubt the learned Judge and counsel to some extent referred to the defendants' conduct as applying to each of them convertibly, but it is beyond question plaintiff's counsel insisted on pressing them as separate legal conceptions, and stressed the possession by defendant of plaintiff's property, which had been pleaded, as an unequivocal act binding the defendants. Estoppel was most unmistakably urged, and plaintiff's counsel said, after referring to *Pickard v. Sears*[1], "I suggest, in conformity with the authority in that case, that all the circumstances in this case should be submitted to the jury for them

to decide whether in fact the Companies, by their conduct, caused a set of facts to be acquiesced in by the plaintiff which most seriously damaged his position." That had palpable reference to all the elements necessary for estoppel. His Honor, relieved the defendants' counsel of all necessity for argument except as to two points, one of which was the "representation" alleged. Learned counsel for the defendant said:—"Might I make my position clear? Since we discussed the matter, and since I applied for a direction, I have had an opportunity of consulting the managers of the companies whom I represent, and they are very anxious, while relying upon this point, and others which I have to raise, that the verdict of the jury should be had on the fact, and I desire to say a few words about this position. I would ask your Honor to reserve this point to me, allowing the jury to find on the fact unless your Honor holds a very strong view about the matter." It is clear (1) that no point was ever taken as to "inducement" or "prejudice," supposing the "representation" were made; (2) that the learned Judge, in the passage quoted, manifestly regarded "inducement" and "prejudice" as incontestable supposing "representation" to exist, and no objection was made to this statement; (3) that the suggestion of learned counsel for defendant, when he desired to make his "position clear," was confined to taking the Judge's opinion on "representation" only; (4) that no objection was raised to the limitation of the question to "representation"; (5) that the discussion after the Judge's findings indicates the same attitude.

Having regard to the well-known principles as to the conduct of a party at a trial laid down and acted on in *Browne v. Dunn*[2], in *Nevill v. Fine Art &c. Co.*[3] and *Seaton v. Burnand*[4], it must, we think, be taken as against the defendants that they did not really contest, or did not act as if they contested, the two elements of "inducement" and "prejudice," if once the element of "representation" was established, any more than they contested the fact of actual knowledge with reference to waiver. It must be taken, consequently, that they cannot be permitted to raise them now. But we must add that not only was their attitude at the trial on this point a tactically correct and advantageous one, but it was in point of law, having regard to the circumstances, the only possible attitude. A finding by the jury that—supposing the representation made—it was not meant to be acted on, and did not prejudice the plaintiff in face of his submitting to the Company's prolonged possession of his property, could not, in our opinion, be supported. We arrive therefore at this point, that, the only contested element of estoppel having been found against the defendant, the question is whether the evidence was sufficient in law to support the finding of the jury.

On receipt of the claim with declaration, the Company acknowledged receipt, expressly stating it was "without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions." No doubt the Company was quite within its legal rights in doing this, and thereby insisting on complete absolution after twelve o'clock from all liability under the contract. But to have done that simply and baldly would have been not merely harsh and morally hard to defend, but would have been a bad advertisement. Such an attitude might have been thought, as other arbitrary acts have been said to be, not merely a crime but a blunder. So the same letter, though distinctly intimating that so far no prejudice and no waiver must result, proceeds to open up communication with the plaintiff on the subject of the damage he has sustained. It says: "In the meantime, I call upon Mr. Craine to forthwith give full answers to the questions and requisitions already made." Now, so long as the Company distinctly and unequivocally retained the attitude of total non-liability on its part, because such a breach of clause 11 by the plaintiff as occurred put an end to all obligation by the Company to pay a penny—in other words, that the contract according to its own terms had, by reason of the breach of clause 11, terminated the contractual obligations of the parties—it was safe. If, maintaining that attitude consistently, it further intimated that it was prepared to consider an *ad misericordiam* appeal by the plaintiff, supported by whatever proofs and testimony he might voluntarily submit, whether as suggested by the Company or not, we should

think the position of the Company would still be unassailable. But insurers are not at liberty to mislead. They are not at liberty, at least apart from special provision in their contract, to do what is forcibly termed in Scotch law "approbate and reprobate." They are not at liberty to deny to the insured rights given to him under the contract and at the same time insist on and exercise as against him *in adversum* correlative rights given to them by the contract, as a qualification or a safeguard, on the basis that the rights of the insured are in full operation.

The Company did not content itself with inviting or permitting *voluntary* action by the plaintiff *outside the contract*. It was equally at liberty to act in a manner consistent with acknowledging a subsisting obligation. As *Kekewich* J. said, in *Hemmings v. Sceptre Life Association Ltd.*[5], of two alternative courses:—"It was a pure matter of business for the directors to say which of these two courses they would adopt. They elected to adopt the latter." Here the Company followed a course of action which, having regard to the circumstances, it appears to us it was at least quite open to the jury to say bound the Company to disregard the original breach of clause 11. On 29th October the plaintiff wrote separately to the various companies, and on 30th October the managers of those companies handed the plaintiff's letters to Leslie, their assessor, to communicate with the plaintiff. Leslie wrote to plaintiff: "It will facilitate matters generally if you will kindly correspond direct with me instead of with the companies." That is very important, because henceforth Leslie's communications are the Company's own communications. The letter concludes thus:—"In regard to the settlements of claims, these are not yet adjusted, and no amounts are payable unless and until you comply with the policy conditions." Reading that, with the extract already quoted from Leslie's letter of 26th October, peremptorily calling upon Craine to give full answers, it forms a clear starting point from which to consider how far the Company was intending to rely on the failure at twelve o'clock on 26th October as a definite termination of its contractual obligation. Another letter of 30th October from Leslie to Craine is regarded as of importance by both sides. It contains two paragraphs, carefully segregated by numbers. The first, marked (1), recalls the acknowledgment of the 26th "without prejudice," and adds "still under cover of this I now notify you that"—and then follow what are indicated as defects in the claims, &c., actually delivered at three o'clock on the 26th. The second paragraph is marked (2), and certainly, so far as express connection with the "without prejudice" reference is concerned, is entirely free from that. It "calls upon" the plaintiff for further information. The next paragraph requires access to safes, &c. The next paragraph we regard as highly important. It is marked (4), and runs thus:—"It is my intention to make arrangements to sell or dispose of all salvage stock on account of whom it may concern. This refers to all stock, the subject of your general claim, but does not include the motor-cars which are specifically insured," &c. It concludes: "Failure on your part to give this information will involve the sale of such articles" (*i.e.*, articles not insured) "on account of whom it may concern in terms of condition 12 of the policy." In order to fully understand that letter, it is necessary to state that as early as 5th October it appears by a letter of Leslie to Craine that possession had been taken of the plaintiff's premises and all property in the building. Possession under clause 12 was retained in respect of all the plaintiff's property as well as his premises until 4th February 1918—motor-cars included. The proposed *sale* mentioned in the letter of 30th October, however, under clause 12, did not extend to the motor-cars. On 14th November the defendants' solicitors, in reply to a letter threatening proceedings, wrote to the plaintiff's solicitor stating:—"Mr. Leslie has handed us your letter of 13th instant. He is not prepared to advise the Companies to pay your client anything in settlement as he has not yet complied with the terms of the policies, and, as we have already informed you, nothing is payable until this is done." On 2nd February the defendants' solicitors wrote to plaintiff's solicitor a letter containing this passage: "Salvage.—Our clients propose to withdraw from possession of the premises and the salvage therein at four o'clock on Monday next 4th instant." On that day they gave

up possession. And from twelve o'clock on 26th October 1917 to 4th February 1918—practically four months—the Company, with full knowledge of the facts as to condition 11, had retained possession of the premises and cars, and all property in the premises, *in adversum*, and in right of clause 12 of the conditions of the contract. During that time the plaintiff had submitted, both under the express provisions of clause 12 and obviously under fear of the proviso in clause 13 that hindrance and obstruction in relation to clause 12 would be a cause of forfeiture; and it needs no evidence to establish either the plaintiff's "inducement" or his "prejudice" in relation to this conduct on the part of the Company. During that period, the Company was seeking, and the plaintiff was furnishing, proofs and information respecting his claim. Without introducing any evidence beyond what we have referred to, it appears to us ample to enable a jury as men of the world to say the plaintiff as a reasonable man was not only likely, but extremely likely, to infer and did in fact infer from the attitude and acts of the Company that, whatever its original intention to deny liability was, it ultimately made up its mind—and gave him to understand that it had made up its mind—that its acts and dealings with him were on the basis of an existing liability, unimpaired by the want of strict compliance with clause 11. We attach in this connection great importance as a matter of evidence to what was done under clause 12. Whether the word "appraisement" which limits the relevant part of clause 19 includes action under clause 12, we do not think it necessary to determine. (See *Perkins v. Potts*[6] and *Leeds v. Burrows*[7].) To some extent, doubtless, that clause aids in adjusting the loss. But whether "appraisement" is identical with or includes adjustment we are not prepared to decide. We find it unnecessary. Certainly clause 12 goes beyond adjustment and appraisement. It modifies the common law position of the parties as to salvage (see per *Blackburn* J. in *Rankin v. Potter*[8], citing *Randal v. Cockran*[9]), and it operates to give control of the salvage to the Company pending adjustment, and enables it to get rid of the salvage, and to take—as it did take—possession of the building or premises where the loss happened. The rights under that clause, according to the defendant's argument, might be exercised so as to get rid of all the salvage, and so as to obstruct the plaintiff's business for many months, and yet the Company, with full knowledge of the facts, might leave the plaintiff not merely with his fire loss, but also with his business loss, irrecoverable. The unfairness of keeping possession in that way as a contractual provision and then discarding the plaintiff's claim on the ground that all the time there was no contractual liability is so opposed to what any just person would expect, that it is a material circumstance in respect of evidence of estoppel. The plaintiff might, on that basis, have resisted the continued occupation of his property.

We do not propose to emphasize any of the statements in the correspondence beyond the italics we have used. But there is one exception to this as to the word "payable" in the letter of 14th November, which is the more significant as being a solicitor's letter. That letter is not susceptible of any reasonable construction other than that it was still open to the plaintiff by compliance with the requirements of the policies—which, of course, excluded the time stipulated in clause 11—to render his claim "payable." When it is recollected that the passage in clause 11 which is relied on by the Company is that "No amount shall be payable under this policy unless the terms of this condition have been complied with," it is placing the evidence on a very low ground for the plaintiff to say simply it is capable of the inference that the Company had made up its mind to treat the failure as to time as immaterial and to deal with the plaintiff on the basis of an existing liability, unimpaired by his want of strict compliance with clause 11. We say "strict compliance" as distinguished from "compliance," because all the necessary materials of claim and proof were furnished—substance was satisfied, though time was departed from. In some cases no doubt time may be substance too, but that does not so appear here. And so, though condition 11 by agreement made the time essential, yet its actual immateriality in this case helps as a probable factor in determining whether the Company was really passing by the question of time and proceeding on substance, such as proof of

loss, and salvage operations.

There being, apart from the several legal objections yet to be dealt with, evidence to support the finding, and the other elements of estoppel being uncontested, the rest is matter of pure law.

The first argument for the defendant at this juncture was that the finding was not a representation of fact but of future intention, which could not raise estoppel. The principle that a representation to raise estoppel must be of an existing fact is firmly established (*Jorden v. Money*[10]; *George Whitechurch Ltd. v. Cavanagh*[11]). But a presently existing intention may be an existing fact. Actually doing a present act, such as demanding information and holding possession of another man's property, with a present stated intention, is very different from merely stating an intention to do something in the future. The intention in the first case is a quality attaching to the act presently in course of progress, and, if it exists, it at once determines the character of the act, no subsequent change of intention can alter the nature of the act already done. The existence of intention coupled with the act is what is described in *Pickard v. Sears*[12] as "the existence of a certain state of things," in a passage adopted in *Jorden v. Money*[13]. If *Edgington v. Fitzmaurice*[14] is right—and we conceive it to be right—and to be supported by the Privy Council case of *Sarat Chunder Dey v. Gopal Chunder Laha*[15], the defendant's contention as to this point fails. This brings us face to face with the respondent's contention that clause 19 is a bar to the appellant's claim. In saying that, we do not lose sight of the fact that the learned Chief Justice of Victoria rested his judgment on two grounds, and that the first was independent of clause 19. His Honor considered that, inasmuch as Leslie's letters of 26th and 30th October "made a distinct statement that the Company proceeded without prejudice," and none of the other letters in his Honor's opinion weakened that reservation, that ended the question of waiver. As already stated, we do not agree with the view taken that the jury could not come to the conclusion it did. But, apart from that, we do not agree with the position in point of law. A man is bound by what he does, and he cannot alter what he does by saying he is doing it "without prejudice." The case of *Davenport v. The Queen*[16], to which counsel's attention was drawn during the argument, is a decisive authority in point. There is a later case where Lord *Parker* (then *Parker* J.) summarized the law to the same effect, the case of *Matthews v. Smallwood*[17]. His Lordship said:—"It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve. That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything."

Similarly here—since the Company, with full knowledge of the breach of condition, retained possession of the premises containing the goods for about three months after knowledge, and exerted rights which they could only exercise on the assumption that their obligation still existed—supposing clause 19 were not in the contract, it follows that the first ground of the Chief Justice's judgment cannot be sustained. It is necessary therefore to consider clause 19.

Clause 19, in the relevant portion, says: "nor shall the Company be deemed to have waived any provision or condition of this policy, or any forfeiture thereunder, by any requirement, act, or proceeding on its part relating to the appraisement of any alleged loss, unless such provision, condition, or forfeiture be expressly stated in writing to be waived by the Company." The clause is headed "Waiver." It deals solely with waiver, and makes no mention of estoppel. Notwithstanding

what was urged as to their practical identity, there are essential distinctions between "waiver" and "estoppel" which we shall presently indicate.

We apprehend the well-established rule of construction applies here that "the insurance company which prepares these documents is bound to make their meaning as clear as possible" (*In re Etherington and Lancashire and Yorkshire Accident and Insurance Co.*[18]). Since estoppel is not mentioned and "waiver" is, and since it would, from the very nature of estoppel, have been absurd, even if legally possible (as to which we offer no opinion), to agree in advance that estoppel should not arise, under any circumstances, except where admitted in writing, we are bound here to limit the word "waiver" to its own strict legal connotation. "A waiver must be an intentional act with knowledge" (per Lord *Chelmsford* L.C. in *Earl of Darnley v. Proprietors &c. of London, Chatham and Dover Railway*[19]). First, "some distinct act ought to be done to constitute a waiver" (per *Parke* B. in *Doe d. Nash v. Birch*[20] and per *Williams* J. in *Perry v. Davis*[21]); next, it must be "intentional," that is, such as either expressly or by imputation of law indicates intention to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred; and, lastly, it must be "with knowledge," an essential supported by many authorities, from *Pennant's Case*[22] and down to *Matthews v. Smallwood*[23]. "Waiver" is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions (see per *James* L.J. in *Pilcher v. Rawlins*[24]). It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has "approbated" so as to prevent him from "reprobating"—in English terms, whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny to him a later election to the contrary (see per Lord *Shaw* in *Pitman v. Crum Ewing*[25]). His knowledge is necessary, or he cannot be said to have approbated or elected.

These observations are necessary in order to bring into contrast the inherent nature of estoppel by conduct. The facts of a given case are so often open to the application of either doctrine, and so often enable estoppel to come in aid of waiver, that it is unnecessary to discern accurately the distinction.

Estoppel by conduct is of comparatively recent development. Commencing with *Pickard v. Sears*[26], the doctrine has gradually been elucidated until its true principles have been placed on a distinct footing by the Privy Council in 1892 in the case of *Sarat Chunder Dey v. Gopal Chunder Laha*[27]; Lord *Shand* (who spoke for Lord *Watson*, Lord *Morris* and Sir *Richard Couch*, as well as himself) stated the fundamental groundwork of estoppel in terms that entirely relieve this case of any doubt. When its true foundations are stated, it will be seen that estoppel is separated from waiver in point of principle by a very broad line of demarcation. First of all, the law of estoppel looks chiefly at the situation of the person relying on the estoppel; next, as a consequence of the first, the knowledge of the person sought to be estopped is immaterial; thirdly, as a further consequence, it is not essential that the person sought to be estopped should have acted with any intention to deceive; fourthly, conduct, short of positive acts, is sufficient. Lord *Shand* said[28]:—"The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be

allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, sibi imputet. It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do." The learned Lord then quotes from *Cairncross v. Lorimer*[29], where Lord *Campbell* L.C. states the doctrine. And after citing various cases, including *Carr v. London and North-Western Railway Co.*[30], Lord *Shand* quotes from Lord *Esher's* judgment in *Seton, Laing & Co. v. Lafone*[31] a passage stating that "estoppel ... prevents a person from denying a certain state of facts" and referring to "misrepresentations." Then says Lord *Shand*[32]: "To this statement it appears to their Lordships it may be added that there may be statements made, which have induced another party to do that from which otherwise he would have abstained, and which cannot properly be characterized as misrepresentations, as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of Ahmed was either that the hiba" (conveyance) "in favour of Arju Bibi was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid." We might stop there, for a moment, to observe that that last observation is exactly similar to what the jury found here. Their finding that the defendant Company "represented that they did not intend to rely on the claim having been put in too late" means that the jury inferred that the Company, in the words of the judgment just quoted, "as the party having an interest to challenge it, had elected to consent to its being treated as valid." It is quite plain that estoppel may be established where waiver cannot, and conversely waiver may be found where estoppel does not exist.

These considerations lead us to hold that clause 19 does not on its true construction include estoppel.

The clause may very well be considered in relation to estoppel in this way: acts that without that clause might be capable of no reasonable interpretation except as an intimation of consent to treat the past proceedings as valid might have to be weighed in connection with clause 19 as being a mere attempted use of power, free from the imputation of such consent. But that is immaterial here, because there is no question of direction or misdirection. It is simply a question of whether there was sufficient evidentiary material—even admitting clause 19 as legitimately influencing that material—upon which the jury as reasonable men could arrive at their conclusion of fact.

For the reasons we have stated, we should observe that if the respondent's argument is right the most glaring misrepresentation may be made, utterly misleading and prejudicing the insured and with impunity to the Company, so long as the Company abstains from writing it on the policy. That is unthinkable.

We are of opinion that the appeal in both cases should be allowed, and judgment entered in the terms to be stated by the Chief Justice.

The order, as varied on 22nd October, was as follows:—

Appeals allowed. Judgments appealed from set aside. In the action against the Colonial Mutual Fire Insurance Co. judgment entered for the plaintiff for £363. In the action against the Yorkshire Insurance Co. judgment entered for the plaintiff for £210. The defendants to pay to the plaintiff his general costs of the actions. The plaintiff to pay the defendants' costs exclusively occasioned by the issues on which the plaintiff failed. The respondents to pay costs of appeals to High Court.

Solicitor for the appellant, W. S. Doria.

Solicitors for the respondents, Hodgson & Finlayson.

[1] 6 A. & E., 469, at p. 474.

[2] (1894) 6 R., 67, particularly at pp. 75-76, 80.

[3] (1897) A.C., at p. 76.

[4] (1900) A.C., at p. 145.

[5] (1905) 1 Ch., 365, at p. 369.

[6] 2 Chitty, 399.

[7] 12 East, 1.

[8] L.R. 6 H.L., 83, at p. 118.

[9] 1 Ves., 98.

[10] 5 H.L.C., 185.

[11] (1902) A.C., see p. 130.

[12] 6 A. & E., at p. 474.

[13] 5 H.L.C., at p. 213.

[14] 29 Ch. D., 459.

[15] L.R. 19 I.A., 203.

[16] 3 App. Cas., at p. 131.

[17] (1910) 1 Ch., 777, at pp. 786 et seq.

[18] (1909) 1 K.B., 591, at p. 600.

[19] L.R. 2 H.L., 43, at p. 57.

[20] 1 M. & W., 402, at p. 406.

[21] [1858] EngR 187; 3 C.B. (N.S.), 769, at p. 777.

[22] 2 Co., 171, at p. 173.

[23] (1910) 1 Ch., 777.

[24] 7 Ch. App., 259, at pp. 268 et seqq.

[25] (1911) A.C., 217, at p. 239.

[26] 6 A. & E., 469.

[27] L.R. 19 I.A., 203.

[28] L.R. 19 I.A., at p. 215.

[29] 3 Macq., 827, at p. 829.

[30] L.R. 10 C.P., 307.

[31] 19 Q.B.D., 68, at p. 70.

[32] L.R. 19 I.A., at p. 217.



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