Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Davies and another v. *The National Fire and Marine Insurance Company of New Zealand and The National Fire and Marine Insurance Company of New Zealand* v. *Davies and another, from the Supreme Court of New South Wales; delivered 4th July* 1891.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD FIELD.
LORD HANNEN.
MR. SHAND (LORD SHAND).

[*Delivered by Lord Hobhouse.*]

The Appellants in the original Appeal are Plaintiffs in the Court below, and Respondents in the cross appeal; and the Appellants in the cross appeal are Defendants in the Court below, and Respondents in the original appeal. The Plaintiffs sued on two policies of insurance, one dated the 26th July 1887 against loss by fire on a butterine factory and its contents, the other dated the 24th August 1887, a marine policy on goods, but covering risks occurring to them when within the factory aforesaid. The fire occurred in October 1887.

The declaration, which was filed on the 7th March 1888, comprises three counts. The first is on the fire policy. The second is on the marine policy, alleging that the goods insured were destroyed by fire when in the factory. The

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third alleges a parol agreement for a policy to the same effect with the marine policy, but with a special term imported into it.

The pleas filed by the Defendants raise several defences. It will be convenient first to consider those which relate to the first count, or the fire policy. As to that, the Defendants allege that it was obtained upon a proposal of the Plaintiffs, which contained two untrue statements. One was that the risk then proposed had not been declined by any other insurance office; and the other, that the Plaintiffs had never, nor had either of them, been claimants on a Fire Insurance Company. They further allege that the Plaintiffs did not after the fire give such notice or accounts as by the policy they were required to do.

The written proposal for the policy was signed by the Plaintiff Davies, with the name of the firm Charles Davies & Co. It is on a printed form, with the necessary spaces for handwriting. Two questions were printed on the form, as follows: "Has risk been declined "by any other office?" "Has proponent ever "been a claimant on a Fire Insurance Com- "pany, if so, state when and name of office?" To each of these the answer "No" was written. The writing of these answers, as of all the other particulars, was that of an insurance agent named Robey, who however was acting on the information and instruction of Davies. In answer to special questions the jury found that Davies did not state the two negatives which the proposal contains, and they gave the Plaintiffs a verdict for the sum of 887*l.* 3*s.* 2*d.* On a motion for new trial, the Court gave judgment on the footing that the answers were those of Davies; as indeed it is clear on the evidence that they were. But the question still remains whether the answers were untrue.

It appears from the evidence that about the end of July or the beginning of August 1887 Davies called at the office of the Commercial Union Company and asked Irwin, a clerk of the Company, to fill up a proposal for insurance of the factory in question against fire. Davies signed the proposal, and Irwin handed it to Sheridan, an inspector employed by the Commercial Company. Sheridan tells us that he gave it to Wandsey, another clerk. He then says, "I considered the matter with Mr. Welch, "the manager. We declined it." He then handed back the proposal to Wandsey. Wandsey says that he was head clerk in August. He remembers receiving the proposal from Sheridan, and says it was put by some one in the proposal drawer, and when searched for it could not be found. Davies says that he initiated a treaty with the Commercial Company, and gave them authority to view the building, "But the matter "went no further, so far as I know; I never "followed it up." Nobody suggests that any communication was made by the Company to Davies to show they had declined the risk.

The learned Judges below thought that this evidence showed that the risk had been in fact declined by the Commercial Company; and then they differed in opinion, two holding that the answer was not untrue, because Davies had not been informed that the risk had been declined; and the third holding that it was untrue in fact, and that the ignorance of Davies made no difference. But as regards the fire policy, it is clear that when it was effected, Davies's proposal to the Commercial Company had not been made. Irwin puts it at the end of July or beginning of August, and Wandsey puts it in August. The date of the fire policy is the 26th July. It was not necessary for the Court below, nor is it for their Lordships, to decide this question of fact as to the marine policy.

But 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, and that it is not clear that a proposal, of which all that the witnesses show is that it was made probably in August and that it was declined, was declined before the 24th August.

With regard to the second answer, the Defendants relied on certain claims made by Phillips against other Companies at a time anterior to his partnership with Davies. The jury found that he did not make those claims in his own interest. That finding is difficult to support; and the Court, on the motion for new trial, proceeded on the assumption that it was wrong. But they held that the "proponent" was Charles Davies & Co., and that the claims made by Phillips, when not a member of that firm, were not covered by the question, and therefore the answer was not untrue. Their Lordships concur in this view.

With respect to the insufficiency of notice and other information after the fire, the Defendants have not shown or alleged that, in point of fact, anything material has been withheld from them. But the communications to them were made by Charles Davies writing for the firm Charles Davies & Co., and because the policy requires that they should be made by "the "insured," the Defendants contend that notice and other information given by only one of the insured is insufficient. Their Lordships think with the Court below that there is no ground for such a contention. They are indeed not clear that notice by the insured was not given according to the most strict and literal construction of the words. But whether it was so or not, they hold that notice on behalf of the insured by their agent is notice by the insured within the meaning of the contract.

The Court below refused to disturb the verdict of the jury on the fire policy, and as their Lordships agree with them, the cross appeal which relates to that policy must be dismissed.

The foregoing defences to the claim on the fire policy were also put forward against the marine policy, and no more need be said about them. To understand the further defences on the marine policy, it is necessary to look at the precise terms of the document. The risk insured against is thus described:—

"Whether lost or not, at and from Melbourne to Sydney per W. Howard Smith & Co.'s steamers, thence to London *viâ* all ports per P. and O. or Orient mail steamers, in the sum of *l.* open amount, but not exceeding 3,000*l.* in any one bottom upon merchandise, covering risk while in Messrs. Charles Davies & Co.'s factory, Sydney. Declarations to be made within 48 hours after departure of steamer from Sydney. To cover all declarations made up to 28th February 1888, valued for the purpose of this assurance at *l.* as above, say , in the good ship or vessel called the , as above, whereof is master (or whoever else, with the approval of the said Company when practicable, shall or may be master), beginning the adventure upon the aforesaid interest from the loading thereof on board the said vessel at as aforesaid, and continuing during the time or voyage as aforesaid until landed, including risk of craft to and from the ship."

The premium to be paid is 20*s.* per cent. net.

Some of these expressions are applicable only to a valued policy, probably because a common form was carelessly used; but it is clear that the document forms what is called an open policy, and that some further act is to be done by the insured before the policy can apply to any particular risk. Their Lordships take a passage from the judgment of Lord Blackburn in Ionides *v.* the Pacific Insurance Company (6 L. R., Q. B., 682), as stating well the nature of that necessary act:—

"The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the

policy, on the voyage specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this, for he has no option to reject any vessel which the assured may select, nor is it necessary that the declaration should do more than identify the adventure, and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he should come on them if there was a loss; and then when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks."

Their Lordships adopt these views as applicable to the facts of this case, which they proceed to examine.

It is first material to ascertain the nature of the Plaintiffs' business. It has a very short history, at least so far as the partnership is concerned, for it only commenced in June 1887; it was practically destroyed by the fire in October, and the partnership was dissolved in March 1888. At the date of the insurance however the Plaintiffs had a factory at Drummoyne, near Sydney, where the Plaintiff Davies resided and superintended the business. At that factory the Plaintiffs made butterine for sale in Sydney where they had a retail shop, and for exportation to London. They had also a factory in Melbourne, where the Plaintiff Phillips resided and superintended the business. From the Melbourne factory they carried butterine by sea to Sydney, where, at least if intended for exportation to London, it was reworked at the Drummoyne factory.

It was stated at the bar that the bulk of the Plaintiffs' business consisted of export to London, and that in fact the sales in Sydney were quite insignificant, so much so as to be left out of account in considering the contract of insurance. But there is nothing in the evidence to show in what proportions the product was sold from the factory, or was made up into pats

and sold from the retail shop, or was shipped for London. The only tangible evidence on this point relates to three shipments from Melbourne to Sydney, one of five kegs by the "Gambier," another of ten kegs by the "Cheviot," and the third of 80 kegs by the "Gambier." Of these 95 kegs 35 were sold by retail in pats, 57 were shipped for London, and three were lost in the reworking. It is not stated whether the 95 kegs were, when shipped at Melbourne, destined for exportation or for sale in Sydney. But Kemp, the Sydney manager, states that, in calculating the amount of duty paid in Sydney, he did not include the lots of 5 and 15 kegs, adding, "I "have only calculated the larger ones that were "intended for export." From which it is to be inferred that he considered the 80 kegs as intended for export, though only 57 were in fact exported.

All the other shipments from Melbourne, about 560 kegs, were in the factory at the time of the fire and were capable of export to London. But they were also capable of sale in Sydney. No declaration about them had been made to the Defendants, no premium had been paid, no act had been done to earmark or identify any portion of them as goods to which the insured had elected to apply the policy; even now the Plaintiffs cannot show that they had done anything in their own business to appropriate any part of the destroyed goods to the London market.

Their first answer to this difficulty is, that by the express terms of their written contract they were to make no declarations until 48 hours after the departure of each steamer from Sydney. But it is obvious that such declarations would not meet the requirements of the case. The risk insured against is from Melbourne to London, *viâ* Sydney, by certain ships, and including de-

tention and transhipment at Sydney. But, as we have seen, any part of the goods might be detained in Sydney. If then no declaration is to be made of the election of the insured to apply the policy to goods shipped at Melbourne, and if loss occurs on the voyage to Sydney or in Sydney itself, what security have the insurers that they may not be charged with the value of goods never intended for London at all? It can hardly be doubted that if the lot of 80 kegs, of which mention has been made, had been destroyed in the factory, the Plaintiffs would have claimed for its value, and yet there were only 57 kegs which, according to the actual dealings of the Plaintiffs, could properly fall within the policy.

The declaration expressed in the policy could not by any possibility be made if a loss happened between the shipment at Melbourne and that at Sydney, probably the most perilous part of the whole risk. It seems an absurd thing to stipulate only for such declarations as in half the cases of loss or more could not be made. On the other hand, in such a case as this, it is quite reasonable to require two declarations. One, far the most important one, would earmark the shipments at Melbourne to which the policy was to attach, and would be accompanied by payment of a premium. This is the ordinary declaration incident to the ordinary contract of an open policy, and necessary to make it operative. The other would enable the insurers to know how much of the goods was actually shipped for London, that they travelled by the stipulated class of ship, with the names of the ships and other particulars which, for the purpose of re-insurance or otherwise, would be valuable to them. Such a declaration would not be required by law as the ordinary incident of the contract, and would be the proper subject of an express stipulation. Such a stipulation,

their Lordships think, is made; in very curt and imperfect terms it is true, but such as are not uncommon in mercantile contracts. They find nothing in the letter of the contract to dispense with declarations on the Melbourne shipments; and the spirit of the contract, in their judgment, requires that such declarations should be made to support a claim under the policy. The further declarations after the departure of steamers from Sydney are to be made in the cases where they can be made, viz., where goods already brought within the policy are actually shipped for London.

It will now be convenient to examine the case made by the Plaintiffs on their third count. That count runs as follows:—

"3. And the Plaintiffs also sue the Defendants for that the Plaintiffs were desirous of insuring from time to time different parcels of merchandise of the Plaintiffs against perils of the seas whilst in transit from Melbourne to Sydney, and against loss by fire whilst in the Plaintiffs' factory in Sydney, and further against perils of the seas whilst in transit from Sydney to London; and the Defendants knowing the premises proposed to become insurers to the Plaintiffs of the said merchandise against the said risks by an open policy in the terms in the second count set forth, and it was thereupon agreed by and between the Plaintiffs and the Defendants that, in consideration that the Plaintiffs would accept the said open policy in the form as set forth in the said second count, the Defendants should make good to the Plaintiffs any loss sustained through any of the said risks so intended to be insured against during the currency of the said policy, although such loss should happen before the time appointed fer making declarations under the said policy, and although by reason of the loss or destruction of the said merchandise before shipment for London it might be impossible to declare as required thereunder. And the Plaintiffs say that they accordingly accepted the said open policy in the said form, and from time to time declared thereunder, in respect of certain portions of the said merchandise after shipment in Sydney for London."

The Plaintiffs then allege the destruction of the goods, and the other circumstances necessary to support their claim.

The Defendants deny the contract so

alleged, and they contend that it is nothing but written contract over again, only with the Plaintiffs' construction imported into it. The Plaintiffs, however, do not show in this count what declarations they contracted to make, and though they allege that they did from time to time declare under the parol contract, they have proved no declaration at all. It is remarkable indeed, that in the one case in which, according to their theory, they would be bound to make a declaration, viz., the shipment of 57 kegs to London by the "Lusitania," they made none, but effected a separate policy with some other insurer.

The evidence by which the Plaintiffs seek to establish the parol contract is that of the Plaintiff Phillips, who relates a conversation which he says took place on the 22nd or 23rd of August between himself, Robey the insurance agent, and Mr. Gibb the manager of the Defendant's office. His account is as follows :—

"Robey took me to the office of Mr. Gibb. Robey says to Gibb, 'Mr. Phillips does not understand this open policy. He 'does not understand how it is he does not pay us the premium 'now.' Robey had with him a proposal form. Mr. Gibb said, 'Oh, that's all right; you pay us the premium when the 'goods leave for London, and then you pay us the one per 'cent., which covers the whole risk. We are charging you '7*s.* 6*d.* per cent. from Melbourne to Sydney, 2*s.* 6*d.* while in 'Company's (Davies & Co.'s) store, and 10*s.* thence to London." I said, 'I suppose you're right, but I can't understand the 'whole thing.' He said, 'Never mind, if you have any loss 'while the goods are in transition, my Company will make it 'all right.'

"(Mr. Salomons, Q.C., objects to any statement made by Gibb. Evidence proceeds, the power of attorney to be produced.)

"I said, 'How about the declarations,—shall I post them over from Melbourne?' He said, 'No, you need not make the declarations until the goods leave Sydney for London.'"

The jury gave the Plaintiffs a verdict on the third count as well as on the second; but leave was reserved to enter a non-suit, or a verdict

for the Defendants, on those counts. That has been done by the Court below. The learned Judges considered that, though there is no positive law in New South Wales requiring contracts of marine insurance to be in writing, the general authority given to the agent of an Insurance Corporation must be to make contracts in the ordinary way, and that is by writing. Their Lordships do not dissent from this view, but they consider that the Plaintiffs' theory of an entirely separate parol contract fails because of the fact that the parol contract alleged is prior in date to the written contract actually made; and they prefer to rest their judgment on the ground that the parties intended only one contract, which was written.

Their Lordships would not have thought it necessary to enter into this matter with so much particularity if it had not been for the use which the Plaintiffs now seek to make of the conversation with Gibb. They contend that though they may not be able to maintain the separate contract alleged in the third count, yet the conversation with Gibb amounts to an indulgence by him in point of time, or a relaxation or waiver of the strict requirements of the written contract, which must fall within the authority of a manager, and which makes it unjust for the Defendants now to insist on the rigidity of the written contract. They point out that Gibb was not called in answer to Phillips, and infer that it was because he could not materially qualify what Phillips said. Without examining closely what power a manager for an Insurance Corporation may have to dispense with particular obligations arising under a written contract, their Lordships think that the Plaintiffs' contention ought not to prevail, for the following reasons.

First, there is the same difficulty about dates. After the conversation, the written con-

tract is made. The difficulty does not come in quite so stringent and conclusive a shape as when it is applied to the theory of two wholly separate contracts. And it is true that the term dispensed with is not an express term, but an unexpressed incident of the written contract. But it is an incident of extreme importance, because it is necessary to connect the policy with the goods insured, and without it the insurer is left at the mercy of the insured. And it is very difficult to hold that when the parties came on the following day to make their written contract, they should not have inserted an express dispensation to the insured from the obligation of earmarking their goods at Melbourne, if that was what they really intended.

That difficulty invites a close examination of what was actually said. It is to be observed that what Phillips did not understand was why the premium was not paid "now." Of course it could not be, because at the moment of making the policy no goods were specified. So Gibb explains that the premium is to be paid "when the goods leave for London." Leave what place? The subsequent expressions both of Gibb and of Phillips show that the place spoken of was Melbourne, where the risk was to begin. Phillips then asks about the declarations. Are they to be posted from Melbourne? And the answer is that they need not be made till the goods leave Sydney. Therefore, as the conversation stands in evidence, the result is that the premiums are to be paid on shipment of goods at Melbourne, and that declarations need not be made till they leave Sydney. There is a certain obscurity about this. But the Plaintiffs are contending that they were not bound to do any act whatever for the purpose of bringing goods under the policy during the whole time of their voyage to Sydney, and of their detention and re-working in Sydney.

Unless they can prove that, they prove nothing that can benefit them. And the conversation with Gibb is far from proving that.

To these considerations must be added the danger of allowing evidence to be used here for a purpose for which it was not used at the trial, or on the motion for a new trial. Gibb was not called; but he might have been if it had been alleged that he had waived a term of the written contract. Why he was not called is plain from the position taken by the Defendants' Counsel. It was because the conversation with him was put in to prove the third count. Mr. Salomons objected to any evidence of a separate parol contract. It might have been more prudent to call Gibb; it also might have been more prudent to decline to embarrass the case with wrangles about conversations which the Counsel was confident he could get rid of on legal grounds. Of that their Lordships do not affect to judge. But they think that an entirely new use here of evidence which, if used in the same way at the trial, or on the motion for new trial, might have called for further explanation and evidence, is more likely to lead to a wrong judgment than a right one.

The result is that the order of the Court below will stand affirmed, and the original appeal be dismissed. As both appeals are dismissed, each party must bear their own costs. Their Lordships will humbly advise Her Majesty accordingly.