Privy Council Appeal No. 42 *of* 1933.

The Mount Royal Assurance Company and others - - - *Appellants*

v.

The Cameron Lumber Company, Limited - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD MERRIVALE.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal by the defendants from a judgment of the Court of Appeal of British Columbia affirming, by a majority, a judgment of the Supreme Court of the same Province whereby, following the verdict of a special jury, the sum of $24,679·07 was adjudged to the plaintiffs.

The action in which these judgments were pronounced was one resulting from the consolidation into one action against seven defendant insurance companies of seven suits which had been brought by the plaintiffs against each defendant company separately.

In that consolidated action the plaintiffs sought to recover from the defendants, the present appellants, the aggregate amount alleged to be due under seven policies of use and occupation insurance, each policy, except as to the sum assured, being in terms identical with the others and one policy having been issued to the plaintiffs by each appellant company.

On the 25th February, 1931, the saw mill, lathe mill, wharf and other buildings of the plaintiffs, who are a company carrying

on the business of lumber manufacture in the City of Victoria, British Columbia, were destroyed by fire. The properties so destroyed were insured under ordinary fire policies, and as to these no questions arise or have ever arisen. Liability under them has been duly acknowledged and discharged. The plaintiffs were, however, further insured by the policies of use and occupation insurance already referred to, and in the consolidated action aforesaid their claim under these was to recover the loss which they asserted they had sustained in respect of their fixed charges and expenses during the period of total suspension of business resulting from the fire. The maximum liability of the seven insurance companies collectively under the policies in question amounted to $120 for each day of suspension. As, however, the fixed charges and expenses of the respondents amounted to $124·62 a day, the plaintiffs were in fact uninsured in respect of these to the extent of $4·62 a day. The defendants' maximum liability in respect of each day of suspension was therefore $115·56 per day only. It has, however, been their contention before the Board that no liability whatever under the policies has been established against them or exists, and they claim that the above verdict and judgment in the plaintiffs' favour should be set aside: that in lieu thereof judgment should be entered for them, or, at least, that a new trial of the consolidated action should be directed.

As the case on both sides is based upon the terms of the policies themselves, it will not be inconvenient to refer at once to their relevant provisions. They are all, as has been said, in the same form, and each provides that in the event of the destruction of or damage to the respondents' premises by fire during the term of the policy "so as to necessitate a total or partial suspension of business," the insuring company is to be liable "for the actual loss sustained consisting of:—

"(I) Such fixed charges and expenses as must necessarily continue during a total or partial suspension of business *to the extent only that such fixed charges and expenses would have been earned had no fire occurred.*"

The liability during the time of total suspension of business is "to be limited to the 'actual loss sustained,' not exceeding 1/300th of the amount of the policy for each business day of such suspension . . . *due consideration . . . being given to the experience of the business before the fire and the probable experience thereafter.*"

In the course of the proceedings there has been much discussion on both sides as to the true result of this last italicised passage. Less attention has been directed to the first. To both their Lordships will return later.

There are matters affecting the quantum of loss alleged to have been insured against which were either never in dispute or which are now accepted by both parties. It has, for instance, been agreed throughout that the respondents' annual fixed charges and

expenses amounted to $31,157·05, or $124·62 a day. Again, while it was originally claimed by the respondents that the time required for the rebuilding of their mill was 250 days, the jury, in answer to a specific question, limited the period of total suspension of business to 221 days, and that figure is now accepted by both sides. The jury, again, placing upon the policies the construction to which reference will later be made, found in answer to a further question that the respondents during the period of suspension would have earned only a portion of their fixed charges and expenses, viz., $111·67 per day, so that their verdict for $24,679·07 represented $111·67 a day for 221 days. And this figure of $111·67 was reached by them after charging a sum at the rate of $13,120 per annum for depreciation of plant and machinery.

This question of depreciation has been strongly contested. Before the Board, however, allowance of depreciation at the rate fixed by the jury has been accepted by both sides. Their Lordships accordingly need not themselves deal with this question. It is no longer a subject of debate.

The burden of establishing liability under the policies resting upon the respondents as plaintiffs, they, at the trial, put forward in evidence facts and figures which, in their submission, established the claim they made in the action. The defendants, the present appellants, not content with destructive criticism of the plaintiffs' case, put forward and sought to support in evidence alternative facts and figures. These in their final form were embodied in an exhibit numbered 25 and showed affirmatively, as the defendants contended, that there being placed upon the policies the construction already alluded to, the respondents would not during the period of suspension have earned, had there been no fire, their fixed charges and expenses or any part of them.

These rival views of the parties had little in common, but there was one essential difference between them, the proper adjustment of which has become the main, if not the only, existing issue on this appeal. On the question of the proper value to be placed upon the plaintiffs' stock-in-trade—upon their so-called valuations—at the beginning and at the end of the period of suspension, the plaintiffs adopted at both ends an arbitrary figure of $15 per thousand feet, while the defendants placed at each end a differing figure, representing, as they contended, the cost of production of the inventory in each case. And to a question left to them by the Judge, the jury replied that in arriving at the figure of $111·67 already mentioned, they had adopted at each end the plaintiffs' figure of $15 per thousand, rejecting the figures of the defendants in that instance.

It will thus be seen that the jury's verdict is based for its principal factor on their finding that the respondents would have earned during the period of suspension only $111·67 per day of their fixed charges. That figure, however, represents no exact

translation into money of the whole case made by either side, and in view of the course of the trial as above described it might have been, to say the least, difficult to ascertain from the jury's answers alone the exact extent to which the divergent views presented by one side or the other in evidence had been accepted by them, or the extent to which these had been rejected. More than one explanation of the figure of $111·67 was possible, and had the jury been content to leave their answers without any explanation, the result might well have been that every Court subsequently invited to review their verdict would have been compelled to guess from alternative conjectural sets of figures put forward by one side or the other what was its real basis, a process from which there might have been no definite outcome possible.

The jury, however, foreseeing, it may be, this difficulty, met it in advance by appending to their specific answers an explanatory memorandum, which in the light of the evidence led clearly shows the actual facts which they took into their consideration and accepted. The memorandum was, in fact, the exhibit 25 put in by the appellants as above stated, amended only in the two respects to which attention has already been called: the plaintiffs' figure of $15 per thousand feet being now taken to represent the value of each inventory: the figure at the rate of $13,120 per annum for depreciation being now inserted in place of the higher figure appearing in the exhibit.

In every other particular the jury accepted the appellants' figures. It becomes clear, too, from a consideration of the memorandum that in reaching their conclusion the jury, except with reference to the question of inventory valuation, in no way pronounced upon the alternative figures put forward and relied upon by the plaintiffs. The plaintiffs accordingly cannot uphold the verdict on the ground that their case as a whole, supported as it was by evidence, was the case accepted by the jury. It was by the appellants' memorandum and the appellants' evidence with reference thereto that, with their two amendments only, the jury reached the conclusion embodied in their formal verdict.

The regularity of their procedure in this regard was never seriously questioned. In their Lordships' view, the memorandum has been a valuable aid to each tribunal which has been called upon to consider and adjudicate upon the competence of the jury's verdict. And with reference to the detailed figures, disclosing the reasoning on which the verdict is rested, the result has been that a basis of computation well open to question by the respondents has not been canvassed by them, so that in what might have become a litigation of almost infinite complexity there remains only one question in effective issue between the parties, namely, the question on which, as above stated, the jury accepted the evidence and contentions of the respondents in preference to those of the appellants. The only real question

which remains for determination is whether the jury were entitled so to do.

Before entering upon its consideration their Lordships desire to refer to a construction, already mentioned, which the jury were invited to place upon the policies, and which has so far, without objection from any quarter, been taken to be correct. It has been assumed that the limitation of the insurer's liability in respect of fixed charges and expenses " to the extent only that such fixed charges and expenses would have been earned had no fire occurred," prevents any liability from attaching under the policy until it has been shown by the assured not only that some part of these charges and expenses would have been earned had there been no fire, but also that all other revenue charges for the proper conduct of the business would have been earned as well. That may be the true effect of the words used, but the question has not been argued, and in view of its possible importance in future cases arising under such policies, their Lordships, while in this case accepting the assumption on which all parties have so far proceeded, desire to intimate that upon its correctness or otherwise they express no opinion of their own. It may in some future case have to be considered whether the words used fairly import a condition which is not in terms expressed, whether they require an assured to apply all moneys earned in discharge, in the first instance, of revenue liabilities other than fixed charges and expenses, and whether within the meaning of the policies, liability on the insurer does not attach without more so soon as it is shown that moneys would have been earned available to meet his fixed charges and expenses had the assured thought fit so to apply them. It is fixed charges and expenses that must have been earned. Not profits. The importance of this point is obvious. If in the present case this alternative construction of the policy had been put forward and upheld, the respondents would, on the appellants' own exhibit 25, unamended, have been entitled to judgment at the full insured rate of $115·56 a day and the question of difficulty contested on this appeal would not have arisen.

Their Lordships now come to the consideration of that question the one remaining issue between the parties. They may phrase it as follows, Was there evidence fit for the consideration of the jury which entitled them, if they thought fit, to place upon the inventories the values put forward by the plaintiffs and to reject those put forward by the defendants ? Ought they to have been directed, as a matter of law, that the principle of the defendants' valuations was correct, and that their only duty was to determine whether in the figures put forward by them it had been correctly applied ?

In answering these questions it is convenient to ascertain the reason for the adoption by the respondents of the arbitrary figure of $15 per thousand feet. This very clearly appears in the evidence. It is admitted that the valuation of lumber

inventories for accounting purposes involves a difficult problem, and for many years in concert with practically every other lumber company in British Columbia, and with the approval of the Income Tax Authorities, the plaintiffs have adopted an arbitrary figure for valuation, so adjusted, however, as not to exceed what may be taken to be the market value of the inventory at the time. It was admitted by the appellants' principal witness that in the presentation of a lumber company's accounts over a period of years this method might be fairly adopted.

There was, however, evidence fit for the consideration of the jury—although on this point there was undoubted conflict—that even over a short period the method was not open to objection. And it was not contested that an actual valuation of the inventory piece by piece or even the ascertainment of its cost of production piece by piece was impracticable and was never in practice attempted. The question, it must be remembered, is not whether their Lordships on this point would adopt the view of the jury if the decision rested with them. The question is whether there was evidence before the jury upon which, not improperly, they could reach the conclusion at which they arrived. It was contended before the Board that the words of the policy requiring due regard to be had to the experience of the business before the fire justified the jury in accepting as permissible the respondents' long-continued practice in this matter. Their Lordships, however, are unable to place upon these words a construction wide enough to justify that contention. All that can perhaps be said in this connection is that a method of valuation so widely recognised in the industry and adopted by the assured in their business may find its justification in the absence of evidence that its application in the particular case would be either unjust or unreasonable.

And here there was a complete absence of any such evidence. On the contrary, there was evidence that the method of valuation put forward by the appellants when properly examined was in its essence at least as arbitrary as the figure of the respondents. Moreover, their method really treated the business assumed to have been carried on during the period of suspension as one which began and ended with that period instead of being a business in unbroken succession to the respondents' business and one to be continued after the period of suspension had come to an end. It is not necessary for their Lordships to go into further detail in this matter. They are quite satisfied that there was ample evidence before the jury to justify them in preferring the respondents' figures of valuation to those of the appellants: there was evidence on which they might conclude that the appellants' method furnished no picture of the true position and, while being no less arbitrary than the respondents', was, in its result, unjust to them.

In these circumstances the view of the jury in this matter must be accepted. That they should have been directed, as matter

of law, to give effect to the appellants' principles of valuation is, in the view their Lordships take of the matter, hardly susceptible of argument. The whole question was one for the jury, and there is no legitimate ground shown for any interference with their conclusion.

Their Lordships accordingly will humbly advise His Majesty that this appeal be dismissed, and with costs.

In the Privy Council.

THE MOUNT ROYAL ASSURANCE COMPANY
AND OTHERS

v.

THE CAMERON LUMBER COMPANY, LIMITED.

DELIVERED BY LORD BLANESBURGH.

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