Privy Council Appeal No. 2 of 1958

Percy Simons trading as Acme Credit Services - - - *Appellant*

v.

Anthony Eugene Middleton Gale - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JUNE, 1958

Present at the Hearing:

THE LORD CHANCELLOR
(VISCOUNT KILMUIR)
VISCOUNT SIMONDS
LORD MORTON OF HENRYTON
LORD TUCKER
LORD CLYDE

[*Delivered by* LORD TUCKER]

The appellant, who was the plaintiff in the action, appeals by leave of the Supreme Court of New South Wales from a judgment of Mr. Justice Walsh sitting as the Supreme Court in Commercial Causes in favour of the respondent (defendant) given on 10th December, 1957.

The action was brought by the appellant under two policies of insurance dated 25th April, 1956 for amounts of £A22,000 and £A7,000 respectively subscribed by Underwriting Members of Lloyds and Members of the Institute of London Underwriters. One of the policies was subscribed by the respondent to the extent of his proportion and in accordance with the usual custom he has been named by the respective underwriters as the person to be sued upon the policies.

The circumstances in which the policies were issued were as follows. One Salvador Brucelas of Manila and his partner Martinez were proposing to buy a vessel called the "Cap Tarifa" lying in the port of Noumea, New Caledonia for the purpose of transporting cattle from Townsville, Queensland, to Manila. For this purpose an irrevocable letter of credit for 160,000 dollars had been established by Brucelas in Sydney in favour of New Zealand Loan and Mercantile Agency Co. Ltd. who were to be the vendors of the cattle. Brucelas asked the appellant, through his secretary Trevis, to advance him the sum of £A23,000 to purchase the vessel. This sum would be repayable out of the proceeds of the letter of credit. The vessel would require to be converted for the carriage of cattle. It was anticipated that the vessel would sail from Noumea about 20th December, 1955, arrive in Brisbane about 27th December, 1955 for conversion, sail from Brisbane on completion of conversion about 11th January, 1956, arrive at Townsville about 14th January and after loading the cargo of cattle would sail for Manila about

18th January, 1956. The appellant accordingly got in touch with insurance brokers in Sydney with a view to obtaining insurance cover to enable him to finance the venture. The cover required was in the following terms:—

> "If in the event of the ship not completing loading of cattle at Townsville within 90 days from sailing from Noumea from any cause whatsoever that this company be paid an amount approximating £A27,000."

This was subsequently increased to £A29,000. Cables passed between brokers in Sydney and London as a result of which it was ascertained that the insurance could be effected subject to the following warranties:

> "Warranted animals available loading and all arrangements for conversion vessel made at inception of this insurance."

A certificate dated 13th December, 1955 was issued to the appellant by Edward Lumley and Sons (N.S.W.) Pty. Ltd., the appellant's brokers, certifying that he was insured with Lloyd's Underwriters "to pay a total loss of £A29,000 in the event of the vessel not completing loading Townsville within 90 days from sailing from Noumea from any cause whatsoever." Subject to the following condition:—"Warranted animals available for loading and all arrangements for conversion of vessel made at inception of this insurance." In the policies issued on 25th April, 1956 the warranties read as follows:—

> "Warranted animals available for loading.
>
> Warranted all arrangements for conversion made at inception of this insurance."

The "Cap Tarifa" did not sail from Noumea until 10th January, 1956, she berthed at Brisbane on 16th January, 1956, but owing to differences of opinion between Brucelas and his partner the vessel was never converted and never proceeded to Townsville.

It is common ground that the appellant was in no way responsible for the failure of the venture and that but for the alleged breach of warranty upon which the respondent relies and subject to proof of his insurable interest at the date of loss he would be entitled to recover the full amount of the insurance.

The respondent repudiates liability on the ground that all arrangements for conversion had not been made at the inception of the insurance.

This raises three questions—

> (1) To what point of time do the words "at inception of this insurance" refer.
>
> (2) What is the meaning of "all arrangements".
>
> (3) Upon the evidence was the learned trial Judge right in holding that the appellant was in breach at the material date.

At the trial a further question was debated, viz., on whom lay the onus with regard to breach. It is not now, however, disputed that the learned Judge was correct in holding that the onus was upon the respondent.

On the first point Mr. Justice Walsh held that the inception of the insurance meant the moment of time when insurance cover was obtained and not, as contended by the appellant, the date when the vessel sailed.

Their Lordships feel no doubt as a matter of construction that this is correct. The language is in their view quite inappropriate to describe "the date of sailing" which could and no doubt would have been the words used if this had been the date intended. In so deciding it is not necessary to express any opinion on the submission made by Counsel for the respondent that on the language of these policies and having regard to the nature of the insured venture the risk attached from the moment the contract was made and not from the date of sailing.

With regard to the ascertainment of the precise date on which a contract of insurance was concluded the learned Judge said, after considering the documentary evidence upon which the parties were content that this commercial case should be decided:—

> "In my opinion what the plaintiff warranted was that all arrangement for conversion had been made at the time when the certificate was issued. I think it is arguable that the reference was to an earlier time, namely, the time when application for the insurance was first made. This would be on or about 7th December. However, having regard to the views I have formed upon other questions yet to be discussed it makes no practical difference whether the critical date is 7th or 14th December; and it is sufficient for me to hold that the policy required that at the latest the arrangements should have been made by 14th December."

The material upon which the learned Judge arrived at this conclusion consisted of the certificate given to the appellant by his brokers dated 13th December together with copies of cables passing between the brokers in Sydney and London. Counsel for the appellant criticised the Judge's conclusion on the ground that the certificate given by the brokers was not binding on the respondent and was not a cover note or equivalent thereto, and that the cables annexed thereto together with the dates appearing in the schedules to the policies showing the different proportions of the risk taken by the different underwriters were insufficient to warrant an inference that there was a concluded contract by the 13th or 14th December, 1955. It is clear from the judgment that the learned Judge fully appreciated the nature of the certificate and merely regarded it as part of the material available to him from which he was entitled to draw an inference as to the date upon which insurance cover had been obtained. Looking at this material and referring in particular to the last cable from London which is dated 14th December, 1955 and reads "Captarifa arranged without additional exclusion advise sailing date Noumea" and to the letter of the same date written by the appellant to the secretary of the Exchange Control in which he says "We have insured against loss from any cause whatsoever should the cattle not be loaded within 90 days from date of purchase of the boat" justifies the inference that cover had been secured by 13th December, 1955 and that this was the material date for the purpose of ascertaining whether there had been a breach of the warranty.

Turning now to the meaning of the words "all arrangements for conversion of vessel" their Lordships find great difficulty in envisaging what would be the minimum requirements to comply with this warranty short of a contractual arrangement. The word "all" is important and precludes a construction which would be satisfied by "some arrangement." This is the conclusion reached by the trial Judge who said "The conclusion to which this evidence brings me is that what took place on 14th December was no more than exploratory of an arrangement later intended to be made for the carrying out of the work. I think it is clear that at that time neither party became contractually bound to proceed with the transaction. It has been submitted that the warranty does not require that there should have been a binding contract for the doing of the work. Even if this be so, in my opinion the warranty as to making 'all arrangements' for conversion required something more definite and precise than the tentative undertaking given by Brown and Broad Ltd. on 14th December."

In arriving at this decision the learned Judge had given careful consideration to the contemporary correspondence and certain statutory declarations which had been supplied to the respondent by the appellant before the trial and which were put in evidence by the respondent. These documents showed that by 13th December no arrangement of any kind had been made for the conversion of the ship, but that on 14th December Mr. Boal on behalf of Brown and Broad Ltd., ship repairers of Brisbane, in answer to a telephone enquiry from Mr. Trevis on behalf of the

appellant whether his company would fit the ship to carry cattle said " We can fit the ship if it arrives about that time (i.e. the first week in January)." Mr. Trevis said " Can we have a quotation? " To which Mr. Boal replied " Brown and Broad do not give firm quotations as materials, wages, etc. vary."

There the matter rested until 23rd December.

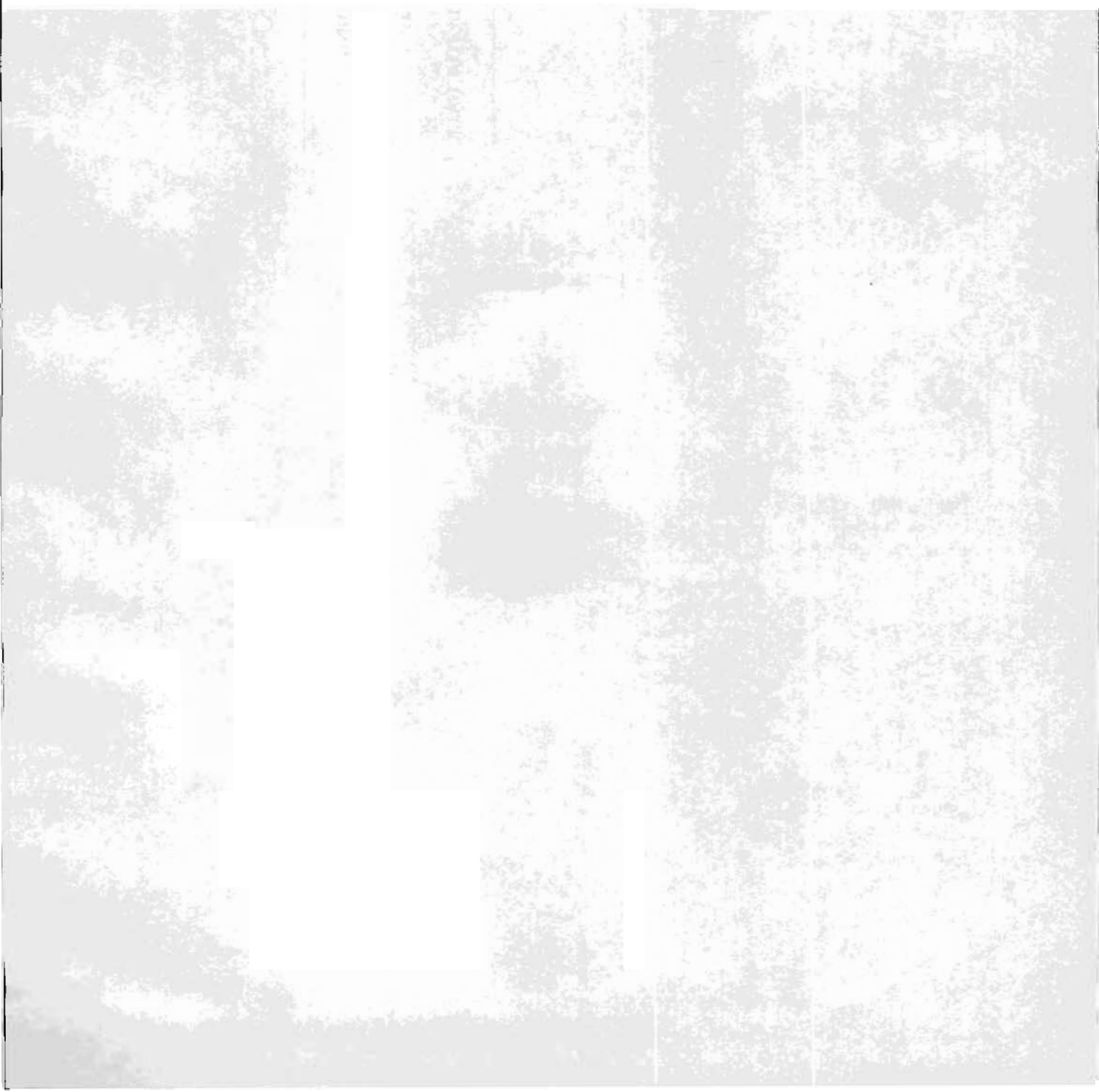
It is clear therefore that if as their Lordships think the decisive date was 13th December there can be no question but that the warranty had not at that date been complied with. If however the time be extended to 14th December it is equally clear that by then no contractual obligation had been incurred by either party. If something less than a contractual arrangement would suffice their Lordships would agree with the trial Judge that something more definite and precise than the tentative undertaking given by Brown and Broad Ltd. would be required.

Their Lordships are accordingly in agreement with the conclusions reached by the trial Judge on these issues.

It is in these circumstances unnecessary to express any opinion as to whether the appellant had discharged the burden of proving an insurable interest at the date of loss or whether in view of the course of the trial this was ever a live issue.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

(39388) Wt. 8021—25 100 6/58 D.L.



In the Privy Council

PERCY SIMONS TRADING AS
ACME CREDIT SERVICES

v.

ANTHONY EUGENE MIDDLETON GALE

DELIVERED BY LORD TUCKER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1958