Privy Council Appeal No. 109 *of* 1927.

The South British Insurance Company, Limited - - - *Appellants*

v.

Gauci Brothers and Company - - - - - *Respondents*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD BUCKMASTER.]

The appellants are an insurance company incorporated in New Zealand, but having an office in Alexandria where the respondents, who are British subjects, reside. On the 12th March, 1925, the respondents by a policy of that date insured certain pastels and paintings that were lying in their office against fire with the appellants. The total sum insured was £4,300, but as stated in the policy, " not exceeding in each case respectively the sum or sums hereinbefore severally specified and stated against each property." A list of the pictures which was attached to and formed part of the policy contained a series of sums set against each article which on the face of the paper was declared to be " valued at " the particular figure to which it was opposite. The policy also contained conditions that if any differences should arise as to the amount of any loss or damage, such difference should independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties, or if they could not agree upon a single arbitrator to the decision of two disinterested persons as arbitrators, with the further condition as to appointing an umpire, but it contained no provisions to meet the contingency of one arbitrator after appointment refusing to

act. The actual terms of the article need not be considered apart from the last sentence which is in these words :—

> "And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

On the 6th October, 1925, fire broke out in the respondents' premises and all the insured pictures were destroyed. The respondents gave due notice of the loss and thereupon the appellants in pursuance of their rights proceeded to make enquiries which appear to have been promptly and fully answered by the respondents. The appellants however, were not satisfied and declined to pay. From the first, the respondents took the view that the policy was a valued policy, a position which the appellants have throughout refused to accept. It was obvious that with this point of difference between the parties it was impossible profitably to proceed until the true construction of the policy had been determined and to secure this the respondents on the 8th March, 1926, took proceedings against the appellants in His Majesty's Supreme Court for Egypt claiming first the declaration that the policy was a valued policy, and secondly, payment of the amount. This action was defended upon the ground, that it was a condition precedent to such an action that there should be a reference to determine the amount of loss or damage and that until this had been done, no such action would lie. The real effect of such a defence was, of course, to suggest that the question of the construction of the policy was one of the matters which had to be dealt with by the arbitrators under the agreed terms of submission and the learned Judge appears to have taken this view, for he on the 4th May, 1926, dismissed the action with costs and declined to consider the question of construction. An attempt was then made to proceed with the arbitration. The respondents on the 5th August, 1926, nominated Mr. Irwin their arbitrator and called upon the appellants to nominate theirs. On the 13th September, 1926, the appellants accordingly appointed their arbitrator and on the 27th September the two arbitrators appointed an umpire. The respondents early in the proceedings pointed out that the arbitrators would be asked to decide whether or not the policy was a valued policy, and thereupon, after some discussion, the arbitrator appointed by the appellants declined to act, except upon the clear statement that he was only asked to determine the actual amount of the loss and damage. The respondents then requested the appellants to appoint another arbitrator and this not being done they appointed their arbitrator as sole arbitrator in accordance with the provisions of Section 6 of the Arbitration Act, 1889, and notified the appellants of the fact. Mr. Irwin accordingly proceeded to act alone and on the 20th December, 1926, published his award in which he found that the policy was a valued policy and that the sum of £4,300 should be paid by the

appellants. The appellants who had refused to recognise the arbitration declined to obey the award, and on the 11th April, 1927, proceedings were taken against them by the respondents, asking for payment of the amount awarded by the arbitrator. This action was heard by the same learned Judge, who had originally determined the action, who characterised in strong language the conduct of the appellants, declared that "nothing could express more clearly than the policy itself the actual terms of the contract and the valuation put upon the property by the assurers and the assured," and gave judgment on the award in favour of the respondents. From his judgment this appeal is brought.

Two matters have been argued in its support. The first, that according to the terms of the policy, the question of construction was not for the arbitrator, and secondly, that the proceedings taken in the arbitration were irregular and that in consequence the award was void and the action could not be maintained.

With regard to the first point, their Lordships think it unnecessary, in the circumstances, to express any opinion. Even if upon the true construction of the contract the arbitrators never had power to determine its construction, but merely to assess the amount of damage and loss, the conduct of the appellants on the hearing of the first action prevents them being able to raise this point. The question of construction was then before the Court; there would be nothing on the appellants' own contention upon which the arbitration could take place if it were once held that the policy was a valued policy. But they caused the action to be dismissed and left the respondents to their remedy by arbitration with the necessarily implied result that they cannot now dispute the authority of the judgment they themselves invoked. The second point is more difficult. Had the proceedings been regulated by the English Arbitration Act, 1889, the procedure adopted would have been in order. But an Order in Council called The Ottoman Order in Council of 1910, made by His Majesty in Council, laid down the code with regard to arbitration proceedings which was not obeyed. Article 90 of the Order is in the following words:—

> "Subject to the provisions of this Order, the civil jurisdiction of every Court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English Law for the time being in force."

The provisions of the said Order as to arbitration are as follows:—

> "(1) Any agreement in writing between any British subjects, or between British subjects and foreigners or Ottoman subjects, to submit present or future differences to arbitration, whether an arbitrator is named therein or not, may be filed in the Court by any party thereto, and, unless a contrary intention is expressed therein, shall be irrevocable, and shall have the same effect as an Order of the Court.
>
> "(2) Every such agreement is in this Order referred to as a submission."

Article 129 of the said Order, empowered the Judge to make rules of Court, a power which has been exercised and the relevant

rule 218 sub-section 3 provides that where an arbitrator refuses to act and the other parties decline to make an appointment to fill the vacancy, the Court may appoint an arbitrator. This is in marked distinction to the English rules which provide that in such event the arbitrator who has not refused to act can act alone. If therefore, these rules are binding, the proceedings were irregular and the real question for determination therefore, is whether they apply or no. The respondents' argument is that Article 99, which gives power to file in court an agreement in writing, governs the subsequent sub-section so that the phrase "such agreement" in sub-section 2 means an agreement which has been filed and that the rules are only applicable to such an agreement. Apart from the confusion that would arise from having two sets of rules applicable to a submission to arbitration depending upon whether it has been filed by one party or not, a fact that might not even be within the knowledge of the party who had not filed it, their Lordships think that the clear words of the Order contradict the respondents' contention. "Every such agreement" is the agreement in writing "to submit present or future differences to arbitration, whether an arbitrator is named therein or not," and what is subsequently done with the agreement does not affect its description in the following sub-section. The English Arbitration Act therefore does not apply. The conditions of the rules applicable were not obeyed and it follows that no award was ever made since Mr. Irwin could not act alone, and the proceedings must be begun again.

It is with extreme reluctance that their Lordships have come to this conclusion. The respondents have not been responsible for the delay that has taken place in settling their claim except so far as they blundered in the arbitration proceedings. The trouble has really been due to the appellants first resisting the decision of the Court on the question of the construction of the policy and then when it was attempted to raise it again before the arbitrators, the only tribunal open to the respondents, refusing to consent to that jurisdiction. It is in consequence of that action that the proceedings out of which this appeal arose, became necessary, and though their Lordships think that the appeal must be allowed they do not think it would be right to decree costs against the respondents or to allow the appellants costs in the Supreme Court. In order that there may be no more delay, their Lordships think it right to add that without considering what may be the true meaning of the contract, the question of its construction has become by the act of the appellants the subject matter of arbitration, and it must now go back to be so decided, the arbitration taking place in accordance with the terms of the contract as controlled by the Rules of the Court to which reference has been made.

The order of the Supreme Court must therefore be reversed. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE SOUTH BRITISH INSURANCE COMPANY, LIMITED,

v.

GAUCI BROTHERS AND COMPANY.

DELIVERED BY LORD BUCKMASTER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1928.