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April 13

EMPLOYERS'
LIABILITY
ASSURANCE
CORPORATION
LTD. OF LONDON
THROUGH THEIR
AGENTS MESSRS.
CLEANTHIS
CHRISTOFIDES
LTD.
v.
DEMETRAKIS
KOZAKIS

[VASSILIADES, P., JOSEPHIDES, LOIZOU, JJ.]

EMPLOYERS' LIABILITY ASSURANCE COR-
PORATION LTD. OF LONDON THROUGH
THEIR AGENTS MESSRS. CLEANTHIS
CHRISTOFIDES LTD.,

Appellants-Defendants,

v.

DEMETRAKIS KOZAKIS,

Respondent-Plaintiff.

(Civil Appeal No. 4615).

Insurance—Fire Insurance—Policy—Construction—Condition to the effect that the insurance ceases to attach as regards property affected, inter alia, if the nature of occupation be changed as to increase the risk of loss or damage by fire—Breach of condition—Avoidance of the Policy—Irrespective of whether or not such change was brought about by the assured himself or by any other person who was not under the control of the assured—Increase of risk, question of fact to be decided in each case—But a condition against a change of risk does not apply to any act of ordinary user consistent with the nature of the premises and the description of the policy—Where the policy is avoided by the breach of condition (supra), it is immaterial to consider, in case of loss, whether the loss is attributable to the prohibited alteration or not—Since the policy had already been ceased to be operative.

Fire Insurance—Policy—Condition—Construction—Breach—Avoidance—Increase of risk by change of the nature of the occupation or of other circumstances affecting the property—See above.

Policy—Policy of Insurance—Construction—Avoidance —See above.

This is an appeal by the defendant insurance company against the Judgment of the District Court of Nicosia whereby the plaintiff (respondent) was awarded the sum of £1,170 for loss under a policy of fire insurance upon his house.

The insurance company's defence was, *inter alia*, that the policy had been avoided by breach of an express condition therein against change of occupation increasing the

risk. Condition 8 of the Policy provides:

“8. Under any of the following circumstances the insurance ceases to attach as regards the property affected.....

“(a) If.....or if the nature of the occupation of or other circumstances affecting the building insured.....be changed in such a way as to increase the risk of loss or damage by fire.

(b)

The respondent was not residing in the house in question. It was let to a certain Economides. The house, which is described in the policy as a private dwelling, is situate at Kaimakli at about 500 meters from the Turkish quarter; it is near Omorphita where inter-communal fighting took place beginning on the 21st December, 1963: As a result Economides with his family left the house on Christmas day 1963. On the 11th February, 1964, Economides received instructions on the telephone from the security forces of the Republic to deliver the keys of the house to them, and did so. He delivered the keys to a certain Gregoras who was a special constable in charge of the auxiliary police at Kaimakli. Gregoras handed the keys to a certain Anaxagoras, a member of the auxiliary force, who moved to the house and was residing therein in order to be close to his post. After some time, precisely on the 6th April, 1964, the house caught fire the person in actual occupation being the said Gregoras, while the aforementioned Economides was still the legal tenant.

The trial Court found that the fact that the house was occupied by Anaxagoras had not increased the risk of fire than if it was occupied by an ordinary householder. They added however “that if the occupation by Anaxagoras should be considered not an occupation by him but an occupation by the Security Forces in general, then in such a case we might have found that the change of occupation was an increase of risk”. The trial Court, further held that condition 8 of the Policy (it is quoted in full post in the Judgment) was intended to apply only to changes of occupation made under the control of the assured.

In allowing the appeal and setting aside the Judgment of the District Court appealed from, the Court:-

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Held, (1). Having regard to the evidence on record we have no hesitation in holding that the only conclusion is that the occupation of the house of the respondent by Anaxagoras was an occupation by the security forces of the Republic in general, and not by Anaxagoras personally.

(2)(a) The question whether the change in occupation increased the risk of loss or damage by fire is a question of fact to be decided by the Court in each case. The change of user from that of an ordinary private dwelling to that of an hotel has been held to be a breach of the condition (*Guerin v. Manchester* (1898) 29 Can. S.C. 139). Leaving the insured premises un-occupied has been held to be such a "change" (*Mckay v. Norwich Union* (1895) 27 Ont. R. 251; Cf. *Hervey v. Mutual Fire* (1861) 11 U.C. C.P. 394).

(c) A condition against change of risk does not apply to any act of ordinary user consistent with the nature of the premises, and the description of the policy. Thus, the taking of borders in a private dwelling-house was held not to be an increase of risk within the meaning of the condition (*Manley v. Insurance Co. of North America* (1869) 1 Lans. 20).

(3) Where the policy is avoided by the breach, it is immaterial to consider, in case of loss, whether the loss is attributable to the prohibited alteration or not, since the policy has ceased to be operative (see Welford and Otter-Barry on Fire Insurance (1932), 3rd edition, page 205, and the cases cited in support of that proposition in footnote (z)).

(4) Applying these principles to the facts of this case and considering that the house in question was described as a private dwelling in the policy, we hold that the change in the nature of the occupation of, or other circumstances affecting, the building due to the occupation of the house by the security forces, was such as to increase the risk of loss or damage by fire.

(5) Referring to condition 8 of the policy (*supra* and *infra*), which we have to construe, we are of the view that the condition is intended to apply to every change increasing the risk, irrespective of whether such change has been brought about by the assured himself or by any other per-

son who was not under the control of the assured (*Kuntz v. Niagara Fire Insurance Co.* (1886) 16 U.C.C.P. 573, *Rhodes v. Union Insurance Co.* (1883) 2 N.Z.L.R. 106 followed).

Appeal allowed with costs against the respondent-plaintiff here and in the Court below.

Cases referred to:

- Guerin v. Manchester* (1898) 29 Can. S.C. 139;
Mckay v. Norwich Union (1895) 27 Ont. R. 251;
Hervey v. Mutual Fire (1861) 11 U.C.C.P. 394;
Manley v. Insurance Co. of North America (1869) 1 Lans. 20;
Abrahams v. Agricultural Mutual (1876) 40 U.C.Q.B. 175;
Murdock v. Chenango County Mutual (1849) 2 N.Y. 210;
Heneker v. British-American (1864) 14 U.C.C.P. 57;
Kuntz v. Niagara Fire Insurance Co. (1886) 16 U.C.C.P. 573;
Rhodes v. Union Insurance Co. (1883) 2 N.Z.L.R. 106.

Appeal:

Appeal by defendants against the judgment of the District Court of Nicosia (Evangelides Ag.D.J. & Demetriades D.J.) dated the 13th February, 1967 (Action No. 74/65) whereby the plaintiff was awarded the sum of £1,170.- for loss under a policy of fire insurance upon his house.

L. Demetriades, for the appellants.

A.C. Hadjoannou, for the respondent.

Cur. adv. vult.

VASSILIADES, P.: The judgment of the Court will be delivered by Josephides. J.

JOSEPHIDES, J.: This is an appeal by the defendant insurance company against the judgment of the District Court of Nicosia whereby the plaintiff (respondent) was awarded the sum of £1,170.- for loss under a policy of fire insurance upon his house.

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The insurance company's defence, *inter alia*, was that the policy had been avoided by breach of an express condition against change of occupation increasing the risk.

The facts as found by the trial Court were that the respondent is the owner of a dwelling house situate at No. 2, Paul the First Street, Kaimakli. In December, 1959, he insured this house against loss or damage by fire or lightning with the appellant insurance company. The property insured is described in the policy as a "private dwelling". The policy was for one year but it was renewed from year to year and at the material time, that is, in April, 1964, the policy was still in force.

On the 6th April, 1964 at about 5.30 p.m. the respondent's house caught fire and it suffered damage which was assessed at £1,170 by an assessor. Both parties accepted this assessment.

The respondent was not residing in the house in question. It was let to a certain Artemis Economides, a retired police inspector. The house is situate at Kaimakli, about 500 metres from the Turkish quarter; it is near Omorphita where inter-communal fighting took place beginning on the 21st December, 1963. Many of the families who had been residing in that area left their houses, after the commencement of the troubles, and respondent's tenant, Economides with his family, left the house in question on Christmas Day 1963, and he resided elsewhere with his family. They did not take all their furniture with them, and the trial Court found that Economides was visiting the house from time to time but, in fact, this finding is not supported by the evidence. Economides himself stated that he thinks that he visited the house once to get his bicycle between the 25th December, 1963 and the 6th April, 1964 when the fire occurred (page 19G of the record). He further stated that his wife and sons used to go into the house and take away things they required (page 19A).

On the 11th February, 1964, Economides received instructions on the telephone from the security forces of the Republic to deliver the keys of the house to them, and he did so, with the exception of one key which he kept. He delivered the keys to a certain Gregoris Gregoras, who was a special constable in charge of the auxiliary police at Kaimakli. Gregoras handed the keys to a certain Demos Anaxagoras

who was a member of the auxiliary force. The purpose for which the keys were handed to Anaxagoras was for the latter to reside in the house in order to be close to his post. The trial Court found as a fact that "at the time of the fire the person who was residing in the house was Anaxagoras. Economides was still the legal tenant and he was paying rent to the plaintiff (respondent) but he was not the person in actual occupation".

It should, however, be stated that Economides effected payment of the arrears of rent one or two months after the day of the fire; and he stated in evidence that he did not go to pay any rent to the respondent from the beginning of the troubles in December, 1963, until the day of the fire.

The trial Court further found that no inflammable substance existed in the house at the time of the fire and that the cause of the fire was not some inflammable material in the house. According to the evidence of the Assistant Superintendent of the Fire Brigade, the fire started in the space between the ceiling and the roof, it spread slowly, and it was smouldering for some time. The trial Court was unable to make a finding as to "the real cause of the fire".

Having regard to condition 8 of the policy (which we shall quote later in this judgment), on which the insurance company relied to avoid the policy, the trial Court found that the fact that the property was occupied by Anaxagoras had not increased the risk of fire than if it was occupied by an ordinary householder, and they added "if, however, the occupation of Demos Anaxagoras should be considered not an occupation by him but an occupation by the Security Forces in general, then in such a case we might have found that the change of occupation was an increase of a risk".

Condition 8 of the policy reads as follows:-

"8. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Assured, before the occurrence of any loss or damage, obtains the sanction of the Corporation signified by endorsement upon the Policy, by or on behalf of the Corporation.

"(a) If the trade or manufacture carried on be altered or if the nature of the occupation of or other circumstances affecting the building insured or con-

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taining the insured property be changed in such a way as to increase the risk of loss or damage by fire.

“(b) If the building insured or containing the insured property become unoccupied and so remain for a period of more than 30 days.
.....”.

In construing this condition the trial Court held that it was intended to apply only to changes under the control of the assured. We shall revert to this question at a later stage of this judgment.

The appeal on behalf of the insurance company was argued before us on the following grounds:

(1) The trial Court erred in finding against the weight of evidence that:

(a) the occupation of the house of the plaintiff (respondent) by D. Anaxagoras was not an occupation by the Security Forces in general;

(b) the occupation of the said house of the plaintiff (respondent) by Anaxagoras did not increase the risk of loss or damage by fire; and

(2) The trial Court in interpreting condition 8 of the policy erred in deciding that the changes envisaged by such condition should only be changes “under the control of the assured”.

With regard to ground 1(a), we have to consider the evidence on this point to ascertain whether the occupation of the house by Anaxagoras was or was not an occupation by the security forces. All the evidence on this point comes from the witnesses called by the respondent and is really unchallenged. It should be stated at the outset that there is no evidence at all whether this house was legally requisitioned under the provisions of any enactment in force in Cyprus.

Gregoras, on his own evidence, was a special constable in charge of the auxiliary police at Kaimakli from December 1963 to November 1964. He stated that he took possession of the house from Economides for “security purposes”, or “security reasons”, and he explained that what he meant by these expressions was “for placing there refugees, for using

the house as a post or for accommodating persons who were on duty in the neighbourhood" (page 18C). Special constable Anaxagoras was directed by his superior Gregoras to occupy the house so that he could be near his duties. Anaxagoras was a special constable and a member of the auxiliary police posted at Kaimakli. Economides delivered the keys (except one key to the front door) to Gregoras who, in his turn, delivered them to Anaxagoras. The latter slept in the house from the beginning of February, for about two months, until the day of the fire on the 6th April, 1964. The fire occurred on the afternoon of that day some 45 minutes after Anaxagoras had left the house.

The circumstances under which the occupation of the house was delivered to Gregoras by the tenant Economides appear in the latter's evidence who was called by the respondent. Economides in cross-examination said (at page 19C-G):-

"I met Gregoras at Achilleas Club at Kaimakli and there I delivered to him the keys of my house. On the same day, I think, I was asked by a Police Officer to go to Achilleas Club at Kaimakli and to meet there Gregoras and deliver to him the keys of the house. Up to that day I used to pay the rent of the house. When the police officer told me that they wanted the keys of the house he said nothing more than that. He only gave me a certain telephone number and he told me to get more information from them, I then rang up the telephone number given to me by the police officer. The person to whom I phoned said that he had instructions to ask me to deliver the keys of the house not later than 4 p.m. of that day. I was told that the instructions were given to me either by the Police or military authorities. The person who replied to my call did not say why they wanted my house. The person who answered my call said that there were certain movements near the house and the police wanted to keep a watch. Because of this I went in the-afternoon and delivered the keys to Gregoras. I understood that there was nothing to do about it. When I met Gregoras I mentioned nothing about the rent I was paying. I did not ask Gregoras to tell me why they wanted the house. I paid the rent of the house up to the 6th April, 1964. I did not recover the rent I paid to plaintiff. I did not ask anybody to compensate me".

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Having regard to this evidence we have no hesitation in holding that the finding of the trial Court was wrong on this point, and that the only conclusion is that the occupation of the house of the respondent by Anaxagoras was an occupation by the security forces of the Republic in general, and not by Anaxagoras personally.

With regard to ground 1(b), the question whether the change in the occupation increased the risk of loss or damage by fire is a question of fact to be decided by the court in each case. The change of user from that of an ordinary private dwelling house to that of an hotel has been held to be a breach of the condition (*Guerin v. Manchester* (1898) 29 Can.S.C. 139). Leaving the insured premises unoccupied has been held to be such a "change" (*McKay v. Norwich Union* (1895) 27 Ont. R. 251); and it has been left to the jury to say whether the non-occupation increased the risk (*Hervy v. Mutual Fire* (1861) 11 U.C.C.P. 394). A condition against change of risk does not apply to any act of ordinary user consistent with the nature of the premises, and the description of the policy. Thus, the taking of boarders in a private dwelling-house was held not to be an increase of risk within the meaning of the condition (*Manley v. Insurance Co. of North America* (1869) 1 Lans. 20). Where the policy is avoided by the breach, it is immaterial to consider, in case of loss, whether the loss is attributable to the prohibited alteration or not, since the policy has ceased to be operative (see Welford and Otter-Barry on Fire Insurance (1932), 3rd edition, page 205, and the cases cited in support of that proposition in footnote (z)). The condition may prohibit or restrict any such alteration in the use of a building in the same way as in the case of any other alteration; and the question as to what acts amount to a breach of this condition, so as to avoid the policy, is determined by reference to the same principles (Welford and Otter-Barry, at page 213).

Applying these principles to the facts of this case and considering that the house in question was described as a private dwelling in the policy, we hold that the change in the nature of the occupation of, or other circumstances affecting, the building, due to the occupation of the house by the security forces, was such as to increase the risk of loss or damage by fire.

The *second ground* of appeal concerns the construction of

condition 8 of the policy (quoted earlier in this judgment). The trial Court held that this condition was intended to apply only to changes under the control of the assured. In doing so they referred to Welford & Otter-Barry's Fire Insurance (1948), 8th edition, page 214, note (f), where it is stated, "but the condition may apply only to alterations within the control of the Assured" (American cases cited by the authors in support). The trial Court relied also on the following statement from MacGillivray on Insurance Law, 5th edition, volume 1, page 499, paragraph 1017: "if the assured is not in possession or control of the premises insured, alterations increasing the risk may be made without his consent". But this is only the first sentence of paragraph 1017 and, with great respect to the trial Court, they have read it out of context. That paragraph read as a whole, supports exactly the opposite view. Paragraph 1017 reads as follows:

"1017. *Assured not in control of premises.* If the assured is not in possession or control of the premises insured, alterations increasing the risk may be made without his consent. If there is an absolute warranty or condition in the policy against increase of risk, the insurer is discharged, and the assured cannot plead that the act of his tenant was beyond his control. (*Abrahams v. Agricultural Mutual* (1876) 40 U.C.Q.B. 175; etc.). It is common therefore to provide against increase of risk in 'any manner within the control of the assured,' thus practically limiting the warranty to the acts of the assured and his servants or agents (*Murdock v. Chenango County Mutual* (1849) 2 N.Y. 210). Alterations made by a tenant were held not to be 'within the control' of the landlord, although they constituted a breach of the covenants in the lease upon which the landlord might have entered and determined the tenancy (*Heneker v. British-American* (1864) 14 U.C.C.P.57)".

Where, the alteration is in fact a breach of the condition, the purpose for which it was made, or the fact that it was made without the assent or even the knowledge of the assured, cannot be taken into consideration (see *Kuntz v. Niagara District Fire Insurance Co.* (1866) 16 U.C.C.P. 573; *Rhodes v. Union Insurance Co.* (1883) 2 N.Z.L.R. 106, in both of which cases the policy was held to have been avoided by breach of condition against alteration, although the plaintiff, who was mortgagee of the premises insured and assignee of

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the policy, had no knowledge of the alteration (see Welford and Otter-Barry's Fire Insurance, 3rd edition, 206, note (e)). Leaving a building unoccupied does not avoid the policy unless there is a special condition : *Abrahams v. Agricultural Mutual* (1876) 40 U.C.Q.B. 175, where it was held to be immaterial that the assured did not know that the tenant had left.

Referring now to condition 8, which we have to construe in this case, we are of the view that the wording is clear that the condition is intended to apply to every change increasing the risk, irrespective of whether such change has been brought about by the assured himself or by any other person who was not under the control of the assured. If it was the intention to limit this condition only to changes under the control of the assured, this should have been expressly provided for by inserting the words "in any manner within the control of the assured", or words to the like effect, in order to limit the warranty to the acts of the assured and his servants or agents.

For these reasons we allow the appeal, set aside the judgment of the District Court and dismiss the plaintiff's claim, with costs here and the court below.

Appeal allowed.
Order, and order as to costs,
in terms.