

KYRILLIS MASOURI & BRO.,

*Appellants-Plaintiffs,*

v.

THE EMPLOYERS' LIABILITY ASSURANCE  
CORPORATION LTD.,

*Respondents-Defendants.*

KYRILLIS  
MASOURI & BRO.  
v.  
THE EMPLOYERS'  
LIABILITY  
ASSURANCE  
CORPORATION  
LTD.

(Civil Appeal No. 4764).

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*Insurance—Building contract—Damage to property—Collapse of wall—Exemption clause in policy of insurance—Excluding liability of Insurance Company in respect of damage caused, inter alia, by “weakening of support”—Finding of trial Court that said collapse was due to such “weakening of support” within the meaning of the said exemption clause, open to them on the evidence adduced—See, also, herebelow.*

*Insurance—Insurance policy—Exemption clause—Construction of—Burden of proof—Exemption clauses in insurance policies should be construed with the utmost strictness—Burden of proof in such cases lies on the insurance company.*

*Exemption clause—In insurance policy—Construction of such clause—Principles applicable—See hereabove.*

*Construction of documents—Construction of exemption clause in an insurance policy—Such clause should be construed strictly—See, also, hereabove.*

*Findings of fact—Made by trial Courts—Appeal—Reasonably open to them on the evidence to make such finding—Court of appeal will therefore abstain from disturbing such finding.*

*Building contract—Insurance—See above.*

This is an appeal by the plaintiffs, building contractors against the dismissal of their action by the District Court of Nicosia for a declaration that the insurance policy issued by the defendant company covers the damage caused by the collapse of an adjoining wall on the site of work which was carried by the plaintiffs-appellants as building contractors.

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The insurance policy provided that the defendant insurance company would indemnify the insured against all sums which the insured (appellants-plaintiffs) would become legally liable to pay as damages consequent upon the happening of the following accidents:

“Accidents happening in the course of the business and causing injury or damage upon or about the site of work being carried out at Hippocrates Street Nicosia, under a contract between the insured and a Mr. C.S.”

The defendant company repudiated liability alleging that the aforesaid accident (collapse of the wall etc. *supra*) was covered by the exemption clause in the policy which reads as follows:

“ The Company will not indemnify the Insured in respect of liability consequent upon..... (4) damage to any property or land or building caused by subsidence, vibration or by the removal or weakening of support. ”

The trial Court on the evidence found that the collapse of the wall (*supra*) was due to “weakening of support” within the four corners of the exemption on which the defendant company relied; and dismissed accordingly the plaintiffs claim. It is against this decision that the plaintiffs took the present appeal. It was argued on their behalf that the finding of the trial Court was not supported by the evidence adduced. Dismissing the appeal, the Supreme Court:

*Held*, (1). We are in agreement with counsel’s for the appellants submission that exceptions in an insurance policy should be construed with the utmost strictness. Undoubtedly the burden of proof in such cases is on the defendant insurance company.

(2) But going through the evidence on record we must reach the conclusion that on the evidence which was accepted by the trial Court, it was open to them to make the finding which they did make in the circumstances of this case, that is to say that the damage (*viz.* collapse of the wall *supra*) was caused by the “weakening of support” within the meaning of the exemption clause. In these circumstances we would not be justified in disturbing the finding of the trial Court and the appeal fails.

*Appeal dismissed with costs.*

**Appeal.**

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Ioannides Ag.P.D.C. & Santamas Ag.D.J.) dated the 14th September, 1968 (Action No. 672/66) dismissing their action for a declaration that the insurance policy issued by the defendant company is valid and enforceable and that it covers the damage caused by the collapse of an adjoining wall on the site of work which was carried out by the plaintiffs – as building contractors.

*G. Tornaritis*, for the appellants.

*L. Demetriades*, for the respondents.

The judgment of the Court was delivered by:

JOSEPHIDES, J.: This is an appeal by the plaintiffs against the dismissal of their action by the District Court of Nicosia for a declaration that the insurance policy issued by the defendant company is valid and enforceable and that it covers the damage caused by the collapse of an adjoining wall on the site of work which was carried out by the plaintiffs-appellants as building contractors.

In September, 1965, the plaintiffs had undertaken the building of a house of a certain Chariton Stamatiou, at the corner of Hippocrates-Aeschylus Street, Nicosia, and in fact they started on some demolition work. After they began work cracks appeared on the wall of the adjoining building and on the 14th October, 1965, they approached the defendant insurance company and signed a proposal form. The insurance policy was signed on the 20th October, 1965 and it was on that day that the adjoining wall collapsed, which is the subject-matter of this case.

The insurance policy provided that, subject to certain exceptions, the defendant insurance company would indemnify the insured against all sums which the insured would become legally liable to pay as damages consequent upon the happening of the following accidents:

“Accidents happening in the course of the business and causing injury or damage upon or about the site of work being carried out at Hippocrates Street, Nicosia, under a contract between the Insured and Mr. Chariton Stamatiou”.

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The limits of indemnity were for any one accident £25,000; and for any one period of indemnity again £25,000. The exception with which we are concerned in this case, as stated in the policy, reads as follows:—

“The Company will not indemnify the Insured in respect of liability consequent upon.....  
(4) damage to any property or land or building caused by subsidence, vibration or by the removal or weakening of support”.

In this case we are not concerned either with subsidence or vibration. The only issue is whether the damage to the adjoining wall was caused by the removal or weakening of support.

The insurance company repudiated liability contending that the damage and/or loss came within the aforesaid exception. Thereupon the plaintiffs instituted the present action and, after the close of the pleadings, the following matters were referred to two “arbitrators”, namely, Mr. P. Stavrinides, architect, and Mr. S. HjiMinas, civil engineer, of Nicosia:

“All questions and matters in difference between the parties hereto with regard to the following issue only, viz. ‘the causes of the falling down of part of the house, the subject matter of the above action’, are referred to the award and final determination of Messrs.....etc.”

The other relevant clause in the agreement of reference is clause 7 which reads as follows: “The award of the arbitrators, or, if arbitrators fail to agree, the award of the umpire, will be produced in Court as evidence binding both parties in the above action”. The arbitrators filed their award in Court dated the 26th February, 1968. That award reads as follows:—

“1. ‘Ο καταρρεῦσας τοῖχος ἦτο ἀνέκαθεν ἐλαττωματικῆς κατασκευῆς διὰ τοὺς ἀκολουθοῦς λόγους:

(α) Ἀνεπαρκῆς καὶ λανθασμένη θεμελίωσις ἣτις ἐγένετο ἐπὶ ξένων χωμάτων ἄνευ συνοχῆς καὶ ἀκαταλλήλων διὰ ὑποβάσταξιν θεμελίων.

(β) Παράλειψις οἰασδήποτε συνδέσεως τοῦ καταρρεῦσαντος τοίχου μετὰ τῶν καθέτων προσκειμένων τοίχων προσόψεως καὶ μεσοχωρίσματος.

(γ) Πτωχοτάτης ποιοτικῆς κατασκευῆς τόσον τοῦ ὑπ’ ὄψιν

τοίχου ὅσον καὶ ὀλοκλήρου τῆς οἰκοδομῆς. Πρόκειται περὶ παλαιᾶς οἰκοδομῆς (70) περίπου ἐτῶν ἀνεγερθείσης μὲ πλινθᾶρι καὶ μὲ ἐμφανεῖς ἐνδείξεις κοπῶσεως τῶν χρησιμοποιοθέντων ὑλικῶν καὶ τρόπου κατασκευῆς.

- (δ) Ροπή τμήματος καὶ πιθανῶς ὀλοκλήρου τοῦ καταρρέυσαντος τοίχου πρὸ τῆς καταρρέυσεως προκληθεῖσα ἐκ τῶν προαναφερθέντων τριῶν λόγων (α)(β) καὶ (γ).
2. Ἡ κατεδάφισις τῆς παρακειμένης οἰκοδομῆς ὡς καὶ ἡ ἐκσκαφή τοῦ παρακειμένου χώρου ἐπηρέασαν τὴν ἤδη ἐλαττωματικὴν κατάστασιν τοῦ ὑπ' ὄψιν καταρρέυσαντος τοίχου διὰ τοὺς ἀκολουθοῦσους λόγους.
- (α) Ἡ ἐκσκαφή κάτωθεν τοῦ πυθμένος τοῦ θεμελίου εἰς βάθος 4'-5'-0" κατὰ μῆκος τοῦ ὑπ' ὄψιν καταρρέυσαντος τοίχου ἐξέθεσε τὸ ὑποβαστάζον τὸν τοῖχον ἕδαφος τὸ ὁποῖον ὡς ἐκ τῆς ἀκαταλληλότητός του καὶ τῆς μῆ συνοχῆς του ὠλίσθησεν πρὸς τὰ ἔξω καὶ οὕτω ἐπεδειώσθη τὴν ἤδη ἐλαττωματικὴν σταθερότητα τοῦ τοίχου.
- (β) Ἡ ἐκθεσις τοῦ ὑπ' ὄψιν τοίχου ἐκ τῆς κατεδαφίσεως τῆς παρακειμένης οἰκοδομῆς τὸν ἠνάγκασεν νὰ ἐπωμισθῇ ἐπὶ πλέον βάρη ἢτοι τὴν ἀντιστήριξιν τοῦ φορτίου τοῦ ὄπισθεν δαπέδου τῆς οἰκοδομῆς ἐπὶ τοῦ ὑπ' ὄψιν τμήματος. Ἐὰν ὁ ὑπ' ὄψιν τοῖχος ἦτο καταλλήλως κατασκευασμένος ὥφειλε νὰ εἶναι εἰς θέσιν νὰ ἀνθέξη τὸ ἐπιπρόσθετον φορτίον ἐκ τοῦ δαπέδου τὸ ὁποῖον εἰς τὴν προκειμένην περίπτωσιν θεωρεῖται ὡς σύνθηες.
- (γ) Τὰ ληφθέντα ὑπὸ τοῦ Ἐργολάβου μέτρα ἀντιστηρίξεως τοῦ ὑπ' ὄψιν τοίχου ὑπὸ ὀμαλᾶς συνθήκας ἢτοι ἐὰν ἡ κατάστασις τοῦ τοίχου ἦτο λογικῶς σταθερὰ ὥφειλον νὰ εἶναι κατάλληλα καὶ ἱκανοποιητικά.
3. Ἐκ τῶν ἀνωτέρω συνάγομεν ὅτι ἡ κατάρρευσις τοῦ ὑπ' ὄψιν τοίχου προεκλήθη συνθέτως λόγῳ τῆς ταυτοχρόνου ἐπενεργείας τῶν ἀναφερομένων εἰς τὰς παραγράφους (1) καὶ (2) παραγόντων."

Briefly put, paragraph 1 states that the wall which collapsed was of defective construction for the reasons given. Paragraph 2 states that the demolition of the adjoining building and the excavation of the adjoining ground affected the defective condition of such wall and caused it to collapse for the reasons given in paragraph 2. Finally, in paragraph 3 the two

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arbitrators state that from the above they concluded that the collapse of the wall in question was due to the combined effect of the aforesaid factors. This is a very free translation of the Greek original which must be taken as the binding context.

This was the position when the case went to trial before the Full District Court of Nicosia which heard three witnesses on behalf of the plaintiffs (contractors) and one witness on behalf of the defendant insurance company. The three witnesses on behalf of the plaintiff were (a) a member of the plaintiff firm, (b) the supervising architect, and (c) Mr. Solon HjiMinas, one of the two arbitrators. The witness called on behalf of the defendant was Mr. P. Stavrinides, the other arbitrator.

The trial Court, after hearing the evidence and considering the award, came to the conclusion that the collapse of the wall was mainly due to the excavations which left exposed the soil supporting the wall and thus weakening the foundation of the wall. In reaching this conclusion, they relied on the evidence (as they say in their judgment) of Mr. P. Stavrinides; and they found that this amounted to "weakening of support" within the four corners of the exemption on which the insurance company relied. The plaintiffs claim was accordingly dismissed.

The main argument heard today on behalf of the appellants was that the finding of the trial Court was not supported either by the award of the arbitrators or the evidence adduced in this case. Learned counsel submitted that exceptions in an insurance policy should be construed with the utmost strictness. Pausing there, we should say that we are in agreement with that general statement of principle.

Undoubtedly the burden of proof in such cases is on the defendant insurance company. Appellants' counsel argued forcibly that, as stated in the award, the wall was originally of defective construction, that it was clear that the wall was of bad workmanship and material and that the cause preexisted the excavation by the plaintiffs and the cause of the collapse. In other words learned counsel submitted that, had not the wall been of defective construction, the excavations carried out by the plaintiffs would not have caused its collapse.

Another complaint put forward by appellants' counsel was that the expression used in the exception "removal or weakening of support" was ambiguous and that it should be construed strictly against the insurance. In the course of his argument

he referred to the evidence of HjiMinas, civil engineer, which supported the submission that the wall was not safe or sound and that that was the cause of the collapse; that is to say, that this wall could or might have collapsed at any moment even without any digging or excavation near or under it.

Finally, counsel submitted that the evidence on which the trial Court relied, or was supposed to rely, was not to be found in the record; and that, in any event, the weakening of the foundation as put by one or two witnesses, did not mean "weakening of support" as required by the exemption clause in the insurance policy.

Counsel for the respondent submitted that the proximate cause was the digging of the soil near the wall which collapsed and that this was the cause of collapse referred to by the arbitrators.

The trial Court, as we have already said, in reaching their conclusion, stated that they relied on the evidence of the arbitrator Stavrinides, who is an architect, and we think that it is necessary for us to consider that evidence to see whether the finding of the trial Court is warranted by the evidence. This is what Stavrinides says, at page 34 of the record:—

"What happened was this: This part of the soil, that is the soil under the foundations was left exposed and due to its bad quality gave way and ran out and rendered the foundations less safe. Certain signs on it were visible when I visited the site, two months later.

Q. So you say that the foundations were not sound?

A. They were not resting on sound ground.

Q. If the foundations were resting on sound ground, then this excavation might not have caused the collapse?

A. It might not.

Q. What do you mean by what is said in the award, paragraph 2(c) 'under normal circumstances'?

A. If the condition of the wall was reasonably sound."

And then in re-examination:

"A. The direct effect was the excavation but had the ground

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“itself been of a better quality as foundation ground, then the collapse would not have been brought about.

Q. In paragraph 2(a) of the award you say that the excavations made worse the stability which was already bad, of the wall, that is what you say?

A. Yes.

Q. All I am asking you is this: How the excavations made worse the stability of the wall?

A. The answer to your question is in the award, in paragraph 2(a).”

So we go back to the award, paragraph 2(a), which, as already stated, is evidence binding both parties in the action; and paragraph 2(a) says that the excavation of the soil near the collapsed wall left exposed the soil which supported the wall in question and so weakened the foundation of the wall.

Now, there is no doubt that, even if we accept, as it is accepted by the two arbitrators, that the wall was originally of defective construction, the fact remains that, had the plaintiffs not done the excavation which they did near the wall, that wall would not have collapsed; and I think that, once we accept that this is the gist of the evidence of Stavrinides (which was accepted by the trial Court), we must reach the conclusion that on the evidence which was accepted by the trial Court, it was open to them to make the finding which they did make in the circumstances of this case, that is to say, that the damage was caused by the “weakening of support” within the meaning of the exemption clause.

In these circumstances we would not be justified in disturbing the finding of the trial Court and the appeal accordingly fails.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*