1959
May 14,
July 7

ANDREAS S. KAPATAIS
v.
THE LONDON & LANCASHIRE INSURANCE CO. LTD.

[ZEKIA, J. and ZANNETIDES J.]

ANDREAS SAVVIDES KAPATAIS,
Appellant (Plaintiff),

v.

THE LONDON & LANCASHIRE INSURANCE CO. LTD.,
Respondent (Defendant).

(*Civil Appeal No.* 4280).

Practice—Pleadings—Particulars—Order for—Stay of proceedings pending delivery of—Striking out st. of claim on failure to deliver the particulars ordered—Civil Procedure Rules, 0.19, r.r. 6, 7 *and* 8. 0.27, *r.* 3.

Practice—Action on a fire policy of insurance—Clause in policy exempting the insurers from liability for loss or damage due to certain occurrences—And casting the onus of proof on the insured that loss etc. did not arise out of the causes so excepted—Statement of claim—Facts with particulars as to the cause and circumstances of the fire should be disclosed therein—Joinder of issues or mere denial by the plaintiff to the effect that the fire was not due to the excepted causes not sufficient—Civil Proc. Rules, 0.39, *r.* 4.

The appellant brought an action against the respondent Insurance Company on a fire policy claiming five thousand pounds for loss occasioned by fire to their goods. In his statement of claim nothing was stated as to how the fire emanated, the appellant confining himself to plead by paragraph 2 thereof that "On the 20th—21st January 1957, the said goods and merchandise were destroyed by fire".

By a clause in the policy the insurers' liability was exempted where the loss or damage was due to certain occurrences and the onus was cast on the insured to establish positively that such loss or damage was not due to any of those occurrences so excluded. (This clause is set out in full in the judgment of the Court, *post*). The respondent-defendant company alleged in their defence that by reason of the aforesaid clause the damage or loss was not covered by the policy and applied, in due course, for further and better particulars as to paragraph 2 of the st. of claim, inviting the plaintiff to state with full particulars what it was alleged as having caused the fire, as well as all facts and matters relied upon as having taken the claim out of the excepted perils. They, further, asked that, failing delivery of the particulars within 15 days, paragraph 2 of the st. of claim be struck out and proceedings be stayed until delivery of the particulars applied for. The learned trial Judge ordered that the particulars applied for should be delivered within 21 days but refused to make any order with regard to striking out paragraph 2 of the St. of Claim or stay of proceedings.

The plaintiff appealed against this order and the defendant cross-appealed seeking the variation of the order in the terms originally applied for.

Held, affirming the order of the Court below:-

(1) In view of the clause under consideration in the policy (Note: The clause is set out in the judgment of the Court, *post*), the insured must prove positively what was the cause of fire, or that the abnormal conditions referred to in that clause could not in any reasonable probability have caused the fire, and not rely on a mere denial or joinder of issues to the effect that his case does not fall within the excepted perils.

Levy v. Assicurazioni Generali (1940) 3 All E.R. 427, P. C. at pp. 429 and 430, *followed.*

(2) Consequently, the insured must plead sufficient facts which, if proved, would entitle him to succeed. The opponent is entitled to know what is to be proved, as distinct from how it is to be proved, which would support a claim or counterclaim.

See: The Annual Practice, 1959, p. 447 under the heading "Material Facts" and the cases quoted (*post*), and Odgers, *On Pleading and Practice*, 16th ed. p. 86 and the cases quoted (*post*).

(3) Therefore the learned Judge did not err in principle in exercising his discretion by ordering better and further particulars.

G. W. Young and Co Ltd. v. Scottish Union and National Insurance Company (1907) 24 T.L.R. 73, *distinguished.*

Held: varying the order of the lower Court and allowing to this extent the cross-appeal:

(4) The appellant-plaintiff must deliver the particulars ordered by the lower Court within three weeks and all proceedings in the action to be stayed until he does so.

Appeal dismissed. Cross-Appeal allowed to the extent as aforesaid.

Cases referred to:

G. W. Young and Co. Ltd. v. Scottish Union and National Insurance Company 24 T.L.R.73;

Levy v. Assicurazioni Generali (1940) 3 All E.R. 427, P.C.

And the cases quoted in:

(a) The Annual Practice, 1959, p. 447 (*post*);

(b) Odgers, On Pleading and Practice, 16th Ed.p.86 (*post*).

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ANDREAS S. KAPATAIS
v.
THE LONDON & LANCASHIRE INSURANCE CO. LTD.

Interlocutory appeal and cross-appeal.

Appeal (and cross-appeal) against the order of the District Court of Nicosia (Feridoun, D.J.) dated the 6th October 1958 in Action No. 1710/57 whereby the plaintiff was ordered to deliver particulars with regard to certain parts of his St. of claim.

Chr. Mitsides with
G. Constantinides for the appellant.
M. Houry for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court read by:—

ZEKIA, J. : The appellant-plaintiff brought an action against the respondent-defendant company claiming £5,000 for loss occasioned by fire to his goods and merchandise, on the strength of a policy of fire insurance executed between the parties in October, 1956. In his statement of claim appellant stated nothing as to how the fire emanated and in this respect followed the laconic conventional form of statement. Paragraph 2 of the statement of claim reads:

> "On the 20th - 21st January, 1957, the said goods and merchandise were destroyed by fire".

In the policy of insurance under consideration a number of specific occurrences were enumerated and expressly excluded from the operation of the policy. The relevant part reads :

> "This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurrences, or which, either in origin or extent directly or indirectly, proximately or remotely, arises out of or in connection with any of such occurrences, namely :— ....riot, civil commotion, insurrection, rebellion, revolution, conspiracy,.... or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
>
> Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise), directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions. In any action, suit or other proceeding, where the company alleges that by

reason of the provisions of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured".

The respondents by paragraph 3 of their defence made the allegation that by reason of the provisions of the conditions set out in the policy just quoted, the damage was not covered by this insurance. They applied for further and better particulars regarding paragraph 2 of the statement of claim, and invited plaintiff to state what it is alleged as having caused the fire, and all facts and matters relied upon as having taken the claim out of the excepted perils of the policy.

Appellant refused to deliver particulars and respondent applied under Order 19, rules 6, 7, 8 of the Civil Procedure Rules for an order of particulars and failing the delivery of such particulars within 15 days, for a direction of the Court that : (a) para. 2 of the statement of claim be struck out ; (b) proceedings be stayed until such delivery ; (c) plaintiff be precluded from giving evidence in support of his claim.

The learned trial Judge heard this application which was opposed and made an order in the following terms:—

"Accordingly there will be an order that particulars should be delivered within 21 days from to-day. As regards the other part of the application in case of default: Taking into consideration the special circumstances of this case I do not think I can properly strike out the said paragraph (2) or stay the proceedings, since it is only after the defence was filed that these particulars became rather more essential to the case. Moreover, I cannot see on what grounds and on what rules this part of the application is based because this may be done either under Order 19, r. 6 or 0. 27, r. 3 of which no mention is made in the application and mere non-delivery of particulars does not in my opinion justify such a course to be taken. Neither do I think it is necessary and proper to embody in an order of this Court a legal principle from now as to what will happen at the trial as a result of non-compliance to deliver particulars ordered by Court".

Plaintiff appealed against this order and defendant counter-appealed seeking the variation of the order in the way it was applied in the original application for better and further particulars.

Appellant's case virtually rests on the authority of *G.W. Young and Co. (Limited)* v. *Scottish Union and National Insurance Company* 24 T.L.R. 73. The respondent on the other hand relies on the general principles regulating pleadings and on *Levy* v. *Assicurazioni Generali* (1940) 3 All E.R. 427 P.C.

The learned trial Judge went carefully into the said cases and to a number of other cases cited and found that the *Young's* case is distinguishable from the present one, and *Levy's* case was more relevant for the consideration of the points involved.

In the *Young's* case where an application for particulars was granted in the lower Court and the order for particulars was set aside by the Court of Appeal, it was ruled that the way to obtain the necessary information regarding the cause of fire in an action between the insured and insurers on a policy of fire insurance, was to obtain such necessary information by way of interrogatories.

The relevant rules in our Civil Procedure Rules are order 19, rules 4 and 6 which read:

> "4. Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. The pleadings shall be signed by the advocate, or by the party, if he sues or defends in person".

> "6. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just".

Under the heading "All Material Facts" in the Annual Practice, 1959, p. 447, the following is stated:

> "The general rule is thus stated by Cotton, L.J., in Philipps v. P., 4 Q.B.D. p. 139 :— 'In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial. Each party must plead all the material facts on which he means to rely at the trial ; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (West Rand Co. v. Rex, (1905) 2 K.B. 399 ; see Ayers v. Hanson, (1912) W.N. 193)".

Again in Odgers, On Pleading and Practice, 16th Edition, p. 86, under the question "What facts are material" the following appears:—

"The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad". (Per Scott, L.J., in Bruce v. Odhams Press, Ltd., (1936) 1 K.B. at p. 712). The same principle applies to defences."

The facts pleaded by the appellant in his statement of claim after the allegation made at para. 3 of the statement of defence could not be said that they constitute a complete cause of action. After the said allegation in the defence can the appellant succeed, even if we assume that defendant company will adduce no evidence, by proving only the facts pleaded by him and by merely denying the allegations of the defendant by joinder of issues or otherwise?

Appellant, owing to the excepted specific occurrences and the condition as to the onus of proof provided in the insurance in question, is bound to fail if he confines material facts to those he has pleaded. This is not a case where by mere denial of the allegations in the defence, a plaintiff can argue that he complied with the requirement of order 19, rule 4.

In the Young case there were no similar provisions as to the onus of proof in the policy of insurance and the statement of claim as it stood in that case by mere joinder of issues could disclose a cause of action on the facts pleaded. In the Young's case, unlike the present one, unless the insurance company proved the cause of fire to be one in the excepted perils, the insured was entitled to succeed.

The Privy Council in *Levy* v. *Assicurazioni Generali*, (*supra*) quoted with approval certain parts from the judgment of the Supreme Court of Palestine which is worth citing. In *Levy's* case the policy of insurance contained provisions almost identical with those in the policy under consideration, see *loc. cit.* p. 429:

"In the third paragraph of the clause (condition 6), the parties have expressly agreed as to the onus of proof, and I know no reason why they should not do so. It is true that the primary object of a fire policy is to insure against fire, that it is often difficult to prove how a fire emanates, and that the company draws up the policy, and, in consequence, where there is an ambiguity, courts are inclined to construe it in favour of the insured, but there seems to me to be no ambiguity in the paragraph. 'Allege' does not mean 'prove', and I would point out, with all respect to the court below, that, if its interpretation is applied, this paragraph would appear to be surplusage. In the result, when the company relies upon the third paragraph, it is upon the insured to prove either the absence of the exception or that, if the exception existed, it did not occasion or contribute to the

loss, and that the loss did not arise out of it, or that the loss or damage, in cases where abnormal conditions existed, happened independently of the existence of such abnormal conditions".

"Their Lordships think that this criticism of the ruling of the District Court with regard to onus of proof is well-founded.....".

Further down at p. 430 the following passage approving the Supreme Court appears:—

"The Supreme Court, having thus disposed of the question of onus, proceeded to consider what the insured must prove if the court is satisfied that abnormal conditions existed at the date of the fire, and pointed out, no doubt rightly, that in that case the insured must prove positively what was the cause of the fire, or that the abnormal conditions could not in any reasonable probability have caused the fire".

From what we have just quoted it is plain that what the insured is expected to do in a claim against an insurance company under a policy containing the provisions referred to is to prove positively the cause of fire, or that the abnormal conditions could not in any reasonable probability have caused the fire, and not rely on mere denial to the effect that his case does not fall within the excepted perils.

Learned counsel for the appellant has drawn our attention to the fact that a plaintiff was not bound to disclose his evidence in his pleadings and the question on whom the onus of proof lies was irrelevant in considering an application for further particulars. No doubt the onus of proof is bound up to some extent with the materiality and sufficiency of the facts which ought to be pleaded in a statement of claim. A plaintiff is not expected to plead matters which the law presumes in his favour. But he must, however, plead sufficient facts which if proved would entitle him to succeed. The opponent is entitled to know what is to be proved, as distinct from how it is to be proved, which would support a claim or counter-claim.

We are of the opinion, therefore, that the learned Judge did not err in principle in exercising his discretion and ordering better and further particulars in the way he did.

The appeal, therefore, is dismissed with costs. The appellant-plaintiff to deliver the particulars ordered by the lower Court within three weeks and all proceedings in the action to stay until he does so.

Appeal dismissed.
Cross-appeal allowed to the limited extent as aforesaid.