1981 December 16

[LORIS, STYLIANIDES, PIKIS, JJ.]

YIANNOULA ARISTOTELOUS,

Appellant-Plaintiff,

v.

GENERAL INSURANCE CO. LTD. OF CYPRUS,

Respondents-Defendants.

(*Civil Appeal No.* 5990).

Civil Procedure—Practice—Proceedings at trial—Triable issues—Action on insurance policy for damage caused by fire—Exception clause—Burden of proof of circumstances justifying invocation of—And burden of proof of facts leading to entitlement under the policy.

Findings of fact—Making of, within province of trial Court—Principles on which Court of Appeal may interfere.

Insurance—Fire insurance—Exception clause—Principles of construction—Exclusion of liability in case of damage from fire occasioned by, inter alia, *war, warlike operations, a coup or unlawful or military acts directed towards usurping State power—Fire erupting as a result of an exchange of fire between illegal forces who supported the coup d'etat of the 15th July,* 1974 *and forces loyal to the State—Judicial notice of circumstances surrounding the coup—Events attending said coup fitting description of a "war like operation"—And staging of a coup, where it is the agent of destruction by fire, specifically excluded from ambit of insurance policy.*

Judicial notice—Coup d'etat of July 15, 1974*—Circumstances surrounding it—Judicial notice of.*

Coup d'etat of 15, 1974*—Events attending it—Whether "a war like operation" within meaning of exception clause in fire insurance policy.*

On the morning of 15.7.1974 the premises of the appellant at Engomi, Nicosia, caught fire and as a result were damaged.

They were insured against fire with the respondents which disputed liability, relying on an exception clause of the insurance policy which excluded liability in case of damage resulting from fire where it was occasioned by

(a) natural disaster and

(b) extraordinary military operations or undertakings, war, invasion, enemy action, hostilities or warlike operations, mutiny, military uprising, a coup or unlawful military acts directed towards usurping State power.

In an action by the appellant against the Insurance Company the trial Judge, after finding that the fire erupted in the course and as a result of an exchange of fire between illegal forces who supported the coup d'etat of July 15, 1974, on the one hand, and forces loyal to the State, defending lawful order, on the other, held that the loss suffered was not covered by the insurance policy in view of the provisions of the exception clause; and hence this appeal. Preliminary to the hearing the trial Judge gave a ruling on the burden of proof to the effect that the burden of proving the primary facts leading to entitlement under the provisions of the policy was on the plaintiff and that the evidential burden of establishing the prerequisites to exception remained with the defendants.

Upon appeal by the plaintiff:

Held, (1) that the trial Judge was right in the assessment of the triable issues, and the directions on the order that the proceedings should follow, cannot be faulted; and that very rightly he found that the burden of proving the circumstances justifying the invocation of the clause excluding liability would rest with the defendants who would, consequently, rank as the first party for purposes of presentation of their case (Civil Procedure Rules, Order 33, rule 7).

(2) That the finding of the trial Judge, regarding the cause of the fire, was, on the evidence, perfectly open to him; that the fact-finding process is preeminently the province of the trial Court; that the live atmosphere of the trial is par excellence the appropriate forum for sifting and evaluating conflicting evidence; that unless the findings of the trial Court are groundless

or unreasonable from an objective angle, little, if any, room for interference is left for this Court, and none exists here.

(3) That though exception clauses in insurance policies must be construed strictly this rule of construction confers no discretion on the Court to ignore the plain provisions of the contract of the parties that must, in the absence of doubt, be given effect to, and none exists here; that the submission that the coup staged on the 15th of July involved acts outside the letter or spirit of the provisions of the exception clause can be upheld only if both the plain provisions of the contract and the tragic events of that morning are to be ignored; that this Court can indeed take judicial notice of the circumstances surrounding the coup, notorious facts that marked the history of the country and scarred the life of the people; that the coup brought catastrophe in its wake and misery in its aftermath; that on any view of the events attending the coup of the 15th July, 1974, they fit the description of a warlike operation directed against the State and its people, aimed to oust the lawful Government of the country and install in their stead the aspirant usurpers of State powers; that the coup amounted to concerted action, involving the use of brutal force for the purpose of overthrowing the lawful government and demolishing democratic institutions; that the staging of a coup itself (κίνημα), where it is the agent of destruction by fire, is specifically excluded from the ambit of the insurance policy; and therefore the owner cannot rely on the provisions of the contract of insurance for indemnification for the loss she suffered; accordingly the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Cornish v. *Accident Insurance Co.* [1889] 23 Q.B.D. 453 at p. 456;

Re Etherington and Lancashire and Yorkshire Accident Insurance Co. [1909] 1 K.B. 591 at p. 601.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Papadopoulos, S.D.J.) dated the 30th June, 1979 (Action No. 5785/74) dismissing her claim for the sum of

£2,000.– as compensation for the damage caused by fire to her premises which were insured against fire with the defendants.

Ch. Solomonides with *Ph. Valiantis*, for the appellant.

P. Polyviou with *S. Middleton (Mrs.)*, for the respondent.

LORIS J.: On 14.12.1981 we announced our decision to dismiss the appeal with costs. Pikis, J. will now proceed to give our reasons for our decision.

PIKIS J.: On the morning of 15.7.1974 the premises of the appellant at Iacovou Patatsou Street, Engomi, Nicosia, caught fire and were in consequence set ablaze, and in the result badly damaged. They were insured against fire with the defendants to whom the plaintiff applied for compensation. The defendants refused to pay, disputing liability in the circumstances under which the premises were set on fire, relying on an exception clause of the insurance policy between the parties; hence the present action. In due course, the parties settled the question of quantum of damages estimated at £2,000.–; therefore, the issues that had to be resolved at the trial were limited to two, that is, ascertainment of—

(a) The cause or causes of the fire that flared up in the premises and damaged the property of the plaintiff, and the determination of

(b) the liability of the defendants under the contract of insurance, in the light of the provisions of clause 6 that excluded liability under certain circumstances defined therein.

Determination of the first question, above posed, necessitated evaluation of the evidence before the Court, whereas the second required the construction of the relevant exception clause, raising a matter of documentary construction that had to be resolved as a matter of law, in view of the provisions of the relevant stipulation read in the context of the policy as a whole.

Preliminary to the hearing, the trial Judge gave a ruling on the burden of proof, as it emerged on a consideration of the pleadings with reference to the sequence in which the parties should present their case. Very rightly the learned Judge pointed out that, if the sole issue meriting adjudicating was that of the applicability of the exception clause, the burden of proving

the circumstances justifying the invocation of the clause excluding liability would rest with the defendants who would consequently rank as the first party for purposes of presentation of their case (Civil Procedure Rules, Ord. 33 r. 7). However, this was not the only factual issue arising, as other material facts were in dispute, particularly facts relating to the circumstances that sparked off the fire. In the light of this complexion of the case, the trial Judge directed that, inasmuch as the burden of proving the primary facts leading to entitlement under the provisions of the policy was on the plaintiff, he should be the first party to open his case and proceed with the production of evidence. Nevertheless, the evidential burden of establishing the prerequisites to exception, as one may infer from the ruling of the Court, remained with the defendants. In our judgment, the trial Court was right in the assessment of the triable issues, and the directions on the order that the proceedings should follow, cannot be faulted. Therefore, the complaint made by the appellant in this respect cannot be sustained.

The policy insured the premises against fire subject to certain well-defined exceptions enumerated in clause 6, designed to exclude liability in two cases of damage resulting from fire, that is, where it was occasioned by a—

(a) natural disaster and

(b) extraordinary military operations or undertakings. Clauses 6(c) and (d) exclude, in particular, loss or damage emanating or arising from war, invasion, enemy action, hostilities or warlike operations, mutiny, military uprising, a coup or unlawful or military acts directed towards usurping State power.

It was of crucial importance for the Court to determine, in the first place, what caused the fire that destroyed the property of the plaintiff-appellant, the subject-matter of the contract of insurance. After evaluating the evidence, Papadopoulos, S.D.J., as he then was, with the advantage he had of studying the demeanour of the witnesses, found that the fire erupted in the course and as a result of an exchange of fire between illegal forces who supported the coup, on the one hand, and forces loyal to the State, defending lawful order, on the other. This finding was, on the evidence, perfectly open to the Court and nothing further need be said on the matter. The fact-finding process is pre-eminently the province of the trial Court.

The live atmosphere of the trial is par excellence the appropriate forum for sifting and evaluating conflicting evidence. Unless the findings of the trial Court are groundless or unreasonable from an objective angle, little, if any, room for interference is left for this Court, and none exists here.

With the above factual background in mind, the Judge resolved that the loss suffered was not covered by the insurance policy in question, in view of the provisions of clause 6, earlier referred to, holding in effect that the damage was the direct product of the hostilities of 15.7.1974.

Mr. Solomonides argued strenuously, for the appellant, that the trial Court erred in its interpretation of the provisions of clause 6, and invited us to find for the appellant notwithstanding the findings of the trial Court. Reference was made to the principles governing the construction of exception clauses in insurance policies supporting the view that exception clauses must be construed strictly and any ambiguity therein must be resolved against their beneficiary, the defendants in this case (E.R. Hardy Ivamy's General Principles of Insurance Law, 2nd ed., pp. 224, 225, 223, 369; *Cornish* v. *Accident Insurance Co.* [1889] 23 Q.B.D. 453 at p. 456). Any doubts discernible in the terms of exception clauses must be resolved against the profferor, the insurers in this case (Re *Etherington and Lancashire and Yorkshire Accident Insurance Co.* [1909] 1 K.B. 591 C.A. at p. 601). The rule requiring strict construction of exception clauses is not limited to insurance contracts, it is of a wider application and applies to all exception clauses in every kind of agreement purporting to limit the principal obligations undertaken by a party thereto. The underlying principle is that a party to the agreement must not be allowed to take away with one hand what he has bargained to give with the other. This rule of construction, however, salutary though it is, it confers no discretion on the Court to ignore the plain provisions of the contract of the parties that must in the absence of doubt, be given effect to, and none exists here. The submission that the coup staged on the 15th of July involved acts outside the letter or spirit of the provisions of clause 6, can be upheld only if we are to overlook both the plain provisions of the contract and the tragic events of that morning. We can indeed take judicial notice of the circumstances surrounding the coup, notorious facts that marked the history of the country

and scarred the life of the people. The coup brought catastrophe in its wake and misery in its aftermath. On any view of the events attending the coup of the 15th July, 1974, they fit the description of a warlike operation directed against the State and its people, aimed to oust the lawful Government of the country and install in their stead the aspirant usurpers of State powers. The coup amounted to concerted action, involving the use of brutal force for the purpose of overthrowing the lawful government and demolishing democratic institutions. The staging of a coup itself (κίνημα), where it is the agent of destruction by fire, is specifically excluded from the ambit of the insurance policy.

Regrettably for the owner, he cannot rely on the provisions of this contract of insurance for indemnification for the loss suffered as a result of the fire of the 15th of July, 1974. Like thousands of our compatriots, the appellant remains remediless for the great harm done by those who staged and perpetrated the coup.

The appeal is dismissed with costs in favour of the respondent.

Appeal dismissed with costs.