1982 September 6

[A. LOIZOU, SAVVIDES AND STYLIANIDES, JJ.]

TAKIS XENOPOULOS,

Appellant–Plaintiff,

v.

THOMAS NELSON (INSURANCE) LTD., AND OTHERS,

Respondents–Defendants.

(*Civil Appeal No.* 6220).

Contract—Insurance contract—Construction—Principle of construction contra preferentem.

Evidence—Extrinsic evidence—Written agreement—Circumstances under which extrinsic evidence may be admitted to vary or supplement it—Party adducing extrinsic evidence cannot be allowed to complain.

Contract—Insurance—When acceptance of a contract of insurance is subject to condition there is no contract until condition is performed—Receipt of premium—Effect—Insurance on the life of a mare subject to the production of veterinary certificate as to the soundness of the health of the mare—Production of certificate referring to a date before conditional acceptance of proposal—Condition procedent not performed—No contract formed and insurers not liable.

These proceedings arose out of the death of a mare and related to a dispute as to whether the mare was covered by an insurance or not. On 5.6.1976 the plaintiff, owner of the mare, attended the office of Andreas Papageorghiou who was authorised to act on behalf of the insurers. After having a talk with the plaintiff, Papageorghiou made a note at the back of the last livestock insurance for the said mare.

> "I certify that on production of a certificate by veterinary surgeon Mr. Savvides, the mare 'Xenia' will be considered as re-insured for the sum of £2,500. Its colt (female) born on 19.4.1976 from southern star will also be considered as insured for the sum of £1000").

On the same day the plaintiff and Papageorghiou separately rang up veterinary surgeon Savvides and requested him to examine the mare and issue the relevant veterinary certificate. In the afternoon of the same day the plaintiff gave to Papageorghiou an envelope containing cheques for an amount equal to the premium and a veterinary certifiate issued by Savvides on his examination of the mare on 3.6.1976. The mare died on the night of the 6th-7th June, 1976 and when the plaintiff asked for payment of the amount insured the defendants declined any liability because the mare was not examined by Savvides and no veterinary certificate as to the health of the mare was issued or presented by Savvides. The trial Court dismissed plaintiff's claim against the defendants for the amount insured having held that the veterinary certificate of health was a condition precedent to the insurance policy and this condition was not performed because what the defendants actually asked was not just a mere production of the certificate of Savvides, they actually asked Savvides to go at any time after the 5.6.1976 to examinate the mare and produce his findings for the health condition of the animal after 5.6.1976, not before.

Upon appeal by plaintiff it was mainly contended that as the condition precedent—the above note—emanated from the insurers it should be construed contra preferentem and that the Court admitted and acted upon oral evidence which varied the written agreement, as set out in the note.

Held, that if there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases against the company; that the general rule is that when a transaction has been reduced to, or recorded in, writing either by requirement of the law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document; that extrinsic evidence, however, is admissible to show the true nature of the transaction, although such evidence may vary or add to the written instrument; that where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at the time of executing the document, if it be not inconsistent with

the documentary terms; that the inference that the writing was or was not intended to contain the full agreement may be drawn not only from the document itself, but from extrinsic circumstances; and that, therefore, the trial Court rightly took into consideration the surrounding circumstances in order to ascertain the true intention of the parties as expressed in the document, and gave effect to it.

Held, further, that the evidence as to the request by Papageorghiou that Savvides should examine the mare and issue a medical certificate upon such examination was adduced by the plaintiff and irrespective of any other consideration the plaintiff cannot be allowed to complain about this.

(2) That when the acceptance of a contract of insurance is subject to a condition, there is no contract until the condition is performed; that the receipt of the premium and its retention by the insurers may raise the presumption, in the absence of any circumstances leading to a contrary conclusion, that the insurers have definitely accepted the proposal; that the offer of the premium in the way it was offered in this case could not be considered as acceptance, as it was dependent upon a vet certificate of the soundness of health of the mare; that receipt by Andreas Papageorghiou of the envelope in which the vet certificate of 3.6.1976 and the cheques for the premium were enclosed, in the circumstances of this case, does not preclude the defendants from maintaining that the condition precedent was not performed; that the issue of a veterinary certificate and the production thereof as to the soundness of the health of the mare were to the root of the subject of the insurance; that Savvides on 5.6.1976 was employed by the insurers and, therefore, he was acting as their agent; that there is no doubt, however that on 3.6.1976 he was the agent or veterinary surgeon acting for and on behalf of the owner; that on 3.6.1976 he was labouring under a distinct capacity than the one for which he was employed by the insurers; that he issued a certificate with regard to the health of the mare on 3.6.1976, the day that he examined the mare on behalf of the owner; that the insurers cannot be obliged to attach an insurance on the life of the mare, the certificate of soundness of health of which refers to a date before their conditional acceptance of the proposal; that the condition precedent was not performed because the presentation

of the certificate of the examination with respect to the health of the mare of 3.6.1976 is insufficient to amount to performance; and that, therefore, no contract was formed and the insurers are not liable; accordingly the appeal must fail.

Appeal dismissed.

Cases referred to:

Mercantile Bank of Sydney v. *Taylor* [1893] A.C. 317 at p. 321;

Kalantan v. *Duff Development Co.* [1923] A.C. 395 at p. 412;

U Drive Company Limited v. *Panayi and Another* (1980) 1 C.L.R. 544 at p. 548;

Polycarpou v. *Polycarpou* (1982) 1 C.L.R. 182;

English v. *Western* [1940] 2 K.B. 156;

Lake v. *Simmons* [1927] A.C. 487 at p. 509;

Union Insurance Society of Canton Ltd. v. *George Wills & Co.* [1916] 1 A.C. 281 at p. 288;

Yorkshire Insurance Company Ltd. v. *Campbell* [1917] A.C. 218 at p. 225;

Harrington v. *Pearl Life Assurance Co. Ltd.* [1913] 30 T.L.R. 24;

Canning v. *Farquhar* [1886] 16 Q.B.D. 727.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Papadopoulos, P.D.C.) dated the 17th February, 1981, (Action No. 504/77) whereby his claim for the sum of £2,500.- being the amount the mare "Xenia" was insured and/or as damages for breach of contract and/or breach of instructions to renew an insurance policy was dismissed.

St. Erotokritou (Mrs), for the appellant.

A. Timothi (Mrs.), for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: The death of a mare resulted in the institution of this action. The plaintiff was the owner of mare Xenia. Defendants No. 1 are insurers, having their seat in London and carrying on business in Cyprus through their agents, defendants No. 2, a limited company. Defendant No.3 is the Managing Director of defendants No. 2.

After the death of the mare a dispute arose as to whether the mare was covered by an insurance or not.—The plaintiff-owner contended that a valid insurance was in existence whereas the defendants alleged that a condition precedent to the formation of the contract of insurance and the issue of a policy was not performed and, therefore, the mare was not insured at the time of her death.

The said mare was insured with the defendants for £1,250.- from 2.3.73 - 1.3.74, for £2,000.- from 6.3.74 - 5.3.75 and for £2,000.- from 9.3.75 - 30.4.76. (See certificates of livestock insurance, exhibits No. 1, 2 and 3, respectively, and indorsement on exhibit No. 3).

Andreas Papageorghiou at the material time was employed at the central offices of the Bank of Cyprus. He is the brother of defendant No. 3. On 5.6.76 the plaintiff-owner attended the office of Andreas Papageorghiou; he asked for the said mare to be insured by the defendants. Andreas Papageorghiou communicated by phone with his brother abroad and received instructions on the matter. He had a talk with the plaintiff and thereupon he made a note at the back of exhibit No. 3, the last livestock insurance for the said mare. It reads as follows:-

> "Βεβαιῶ ὅτι ἅμα τῇ προσαγωγῇ πιστοποιητικοῦ ὑπὸ τοῦ κτηνιάτρου κ. Σαββίδη ἡ φορβὰς Ξένια θὰ θεωρηθῇ ἐπανασφαλισμένη διὰ ποσὸν £2,500.-. Ἐπίσης θὰ θεωρηθῇ ἀσφαλισμένο τὸ πουλάρι της (θηλυκὸ) γεννήσεως 19.4.1976 ἀπὸ τὸν Southern Star διὰ ποσὸν £1,000.-."
>
> ("I certify that on the production of a certificate by veterinary surgeon *Mr. Savvides* the mare Xenia will be considered as re-insured for the sum of £2,500.-. Its colt (female) born on 19.4.1976 from Southern Star will also be considered as insured for the sum of £1,000.-").

On the same day the plaintiff and Andreas Papageorghiou separately rang up veterinary surgeon Savvides and requested him to examine the mare and issue the relevant veterinary certificate. The plaintiff in his examination-in-chief said: "I did what Mr. Papageorghiou told me. I rang up Mr. Savvides to come and see (examine) my mare in order to issue a certificate" - (Page 14 of the record).

In the afternoon of the same day at the race-course, during

the races of the day, the plaintiff gave to Andreas Papageorghiou an envelope containing cheques for an amount equal to the premium and a veterinary certificate (exhibit No. 4), issued by Savvides on his examination of the mare on 3.6.76. Papageorghiou understood that what the plaintiff handed him was a veterinary certificate and the premium in cheques. He did not examine these documents. It was Saturday afternoon. His brother would be coming from Greece after the weekend and he intended to hand them over for examination and further action to his brother. On the night of the 6th - 7th June, 1976, that is to say, on Sunday night, the mare died. She was found dead early in the morning of 7.6.76. A P.M.E. was carried out on 7.6.76 by Efstathiou (P.W.3), a veterinary surgeon, in the Government service, who concluded that the cause of death was asphyxia due to intestinal tympani. Papageorghiou brothers were informed of the death after the burial of the corpse on 8.6.76.

The plaintiff thereafter asked for payment of the amount insured. Defendants No. 2 through the Managing Director, G. M. Papageorghiou, informed the plaintiff that the mare was not considered insured. The company declined any liability as the mare was not examined by Savvides and no veterinary certificate as to the health of the mare was issued for the insurance company by Savvides or presented as per written statement. This was repeated by letter dated 10.6.76 addressed to the plaintiff by defendants No. 2 and signed by defendant No.3 as Director (exhibit No. 5).

The trial Court found that the veterinary certificate of health was a condition precedent to the insurance policy. This was not contested before us. The Court considered this condition precedent to the insurance policy and decided that this condition was not performed. The relevant passage from the judgment reads as follows:-

> "Now I shall examine if this condition was fulfilled. There is no doubt that a vet certificate was issued and it is before the Court as exhibit No. 4. But does it comply with the requirements of the condition? My answer is no. The instructions of the defendants to Dr. Savvides were given on the 5.6.76 and he produced a certificate dated 3.6.76. I do not accept that that is sufficient fulfilment of the con-

dition. Because one must examine the root of the condition and not the surface. What the defendants actually asked is not just a mere production of the certificate; they actually asked the vet to go at any time after the 5.6.76 to examine the mare and produce his findings for the health condition of the animal after 5.6.76, not before. They were not and could not be interested in the health of the animal prior to the time they gave the relevant instructions. They could only be interested in the condition of the health of the animal from the moment they gave instructions to the vet and onwards; definitely not backwards. The fact that Mr. Andreas Papageorghiou put in his pocket some cheques and the vet certificate at the race-course does not alter the situation. Besides I believe him when he said that he never examined these documents".

It is common ground that Dr. Savvides did not examine the mare on 5.6.76. On 3.6.76 he visited the farm of Costas Christofi (P.W.4); he examined a number of other horses and saw Xenia. On 5.6.76 he issued the veterinary certificate (exhibit No. 4). It is dated 3.6.76. At the bottom thereof we read: "Date of examination: 3rd June, 1976".

It was contended for the plaintiff-appellant that the condition precedent is the one written down by Andreas Papageorghiou and no more. As this emanated from the insurers, it should be construed contra preferentem - or to state if in full - verba chartarum fortius accipiuntur contra preferentem, i.e. against the person who put the language into the document upon which he is relying; that the Court admitted and acted upon oral evidence which varied the written agreement, as set out in that confirmation or note, and submitted that the condition precedent consisted of the presentation or production or issue of a medical certificate by Savvides, without Savvides examining the mare, and that the date of the certificate or the examination of the mare did not constitute part of the condition precedent, and the issue and production of the certificate by Savvides of 3.6.76 was sufficient performance of the condition precedent. Savvides was the agent of the insurers and as the condition precedent was fulfilled, the defendants were liable to pay the amount insured.

The general rule is that when a transaction has been reduced

to, or recorded in, writing either by requirement of the law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document. Extrinsic evidence, however, is admissible to show the true nature of the transaction, although such evidence may vary or add to the written instrument. Where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at the time of executing the document, if it be not inconsistent with the documentary terms. The inference that the writing was or was not intended to contain the full agreement may be drawn not only from the document itself, but from extrinsic circumstances. (*Mercantile Bank of Sydney v. Taylor,* [1893] A.C. 317, at 321).

Cave, L.C., in *Kelantan v. Duff Development Co.,* [1923] A.C. 395, at 412 said:-

> "No doubt surrounding circumstances may not be used for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to agree; but if a judge or an arbitrator, knowing the terms of a deed and the circumstances surrounding its execution is satisfied by those means that the parties intended by that instrument to agree to terms which, though not clearly expressed, are in his belief to be implied in it, there is no reason why he should not give effect to it".

In view of the above we are of the opinion that the Court rightly took into consideration the surrounding circumstances in order to ascertain the true intention of the parties as expressed in the document, and gave effect to it.

We may observe that the evidence as to the request by Papageorghiou that Savvides should examine the mare and issue a medical certificate upon such examination was adduced by the plaintiff and irrespective of any other consideration the plaintiff cannot be allowed to complain about this. (*U Drive Company Limited v. Efstathios Panayi and Another,* (1980) 1 C.L.R. 544, at 548; *Polycarpou v. Polycarpou,* (1982) 1 C.L.R. 182).

The principle of construction contra preferentem is best and

conveniently explained as follows in *Mcgillivray on Insurance Law,* 2nd ed., p.1029, where the authorities are conveniently set out. The relevant passage adopted by Slesser, L.J., in *English v. Western* [1940] 2 K.B. 156, reads:-

> "If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases against the company. A policy ought to be so framed that he who runs can read. A party who proffers an instrument cannot be permitted to use ambiguous words in the hope that the other side will understand them in a particular sense, and that the Court which has to construe them will give them a different sense, and therefore, where the words are ambiguous they ought to be construed in that sense in which a prudent and reasonable man on the other side - that is the side to whom the policy is proffered - would understand them".

As it was said, however, by Lord Sumner in *Lake v. Simmons,* [1927] A.C. 487, 509:-

> "Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure".

The cardinal rule is that the intention of the parties as expressed by their words must prevail.

The intention of the parties must be gathered from the language of the contract, the subject-matter, and the circumstances in existence at the time it was made. (*Union Insurance Society of Canton, Limited v. George Wills & Co.,* [1916] 1 A.C. 281, at p.288; *Yorkshire Insurance Company, Limited v. Campbell,* [1917] A.C. 218, at 225).

Having regard to the material before the trial Court, to which we have just referred, and guided by the aforesaid principles, we find that there is no ambiguity in the endorsement or note of A. Papageorghiou of 5.6.76. A vet certificate of the sound health of the mare Xenia was a condition precedent to the insurance. The insurers could not be interested in the health of

the mare prior to 5.6.76 but on 5.6.76 or thereafter. Savvides, the veterinary surgeon, agent of the insurers, did not issue a certificate relating to the health of the mare after his mandate on 5.6.76. From 3.6.76, when Savvides, as agent of the plaintiff, examined the mare until 5.6.76 when Papageorghiou put down in writing the condition precedent and/or the time at which the proposal was conditionally accepted by the insurance company, a material change might have taken place in the nature of the risk. The acceptance of the risk was subject to the condition that the health of the mare proposed should be sound after the time that the note was written. The object of the condition precedent was none else but to secure for the insurers that the mare was of sound health not prior but at any time after the conditional acceptance. This is the only construction that can be placed in the circumstances on that writing. The words "on production of a certificate from Dr. Savvides" cannot be taken to mean the production of a certificate by Dr. Savvides whenever issued, either at any time prior to 5.6.76 or on 5.6.76 and thereafter, relating to the health of the mare before 5.6.76.

When the acceptance of a contract of insurance is subject to a condition, there is no contract until the condition is performed. The moment of the beginning of the risk is material. The insurance was only for a year and that moment is the commencement of the year. Before the beginning of the insurance year there is no binding contract. No insurer is interested as to the state of the person's or animal's health of yesterday or two weeks ago and no one at the time of the formation of the contract of insurance can say what would be the state of the health tomorrow or next week.

The receipt of the premium and its retention by the insurers may raise the presumption, in the absence of any circumstances leading to a contrary conclusion, that the insurers have definitely accepted the proposal. (*Harrington v. Pearl Life Assurance Co. Ltd.*, [1913], 30 T.L.R. 24; *Canning v. Farquhar*, [1886] 16 Q.B.D. 727).

The offer of the premium in the way it was offered in this case could not be considered as acceptance, as it was dependent upon a vet certificate of the soundness of health of the mare. The receipt by Andreas Papageorghiou of the envelope in which

the vet certificate of 3.6.76 and the cheques for the premium were enclosed, in the circumstances of this case, does not preclude the defendants from maintaining that the condition precedent was not performed. The issue of a veterinary certificate and the production thereof as to the soundness of the health of the mare were of the root of the subject of the insurance.

Dr. Savvides on 5.6.76 was employed by the insurers and, therefore, he was acting as their agent. There is no doubt, however, that on 3.6.76 he was the agent or veterinary surgeon acting for and on behalf of the owner. On 3.6.76 he was labouring under a distinct capacity than the one for which he was employed by the insurers. He issued a certificate with regard to the health of the mare on 3.6.76, the day that he examined the mare on behalf of the owner. The insurers cannot be obliged to attach an insurance on the life of the mare, the certificate of soundness of health of which refers to a date before their conditional acceptance of the proposal. The condition precedent was not performed. The presentation of the certificate of the examination with respect to the health of the mare of 3.6.76 is insufficient to amount to performance. Therefore, no contract was formed and the insurers are not liable.

For all the aforesaid reasons this appeal is dismissed with costs.

Appeal dismissed with costs.