

Samuel L. Levy - - - - - *Appellant*

v.

Assicurazioni Generali - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 3RD JUNE, 1940

Present at the Hearing:

LORD THANKERTON

LORD JUSTICE LUXMOORE

SIR PHILIP MACDONELL

[*Delivered by* LORD JUSTICE LUXMOORE]

On the 13th November, 1936, the appellant entered into a contract of insurance against loss or damage by fire with the respondent company in respect of a stock of merchandise deposited in a warehouse situate in the commercial centre, Jaffa. The terms of the contract are embodied in a policy of insurance issued by the Respondent Company to the appellant. The only condition material to be considered in this appeal is condition 6. It is in the following terms:—

“ 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:—

(1) Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance.

(2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military, naval, or usurped power, martial law or state of siege 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."

On the 14th December, 1936, a fire occurred in the warehouse containing the insured stock and damage was caused thereto to an extent which was subsequently fixed by agreement between the parties at £P.1,900.

The appellant claimed payment of this sum from the Respondent Company but the latter refused to pay alleging that the appellant's claim was not covered by the policy because one or other of the occurrences specified in sub-clause 2 of condition 6 existed at the time when the fire occurred.

On the 30th March, 1937, the appellant instituted proceedings against the Respondent Company in the District Court of Jaffa claiming payment by the Respondent Company of the sum of £P.1,900 with interest and costs. In the course of these proceedings a preliminary question was raised for the determination of the District Court, viz., whether the onus of proving the existence of one or other of the occurrences specified in sub-clause 2 of Condition 6 of the Policy lay on the appellant or on the Respondent Company. On the 27th January, 1938, the District Court held that the onus of proof was on the Respondent Company. As the result of this ruling when the action subsequently came on for hearing on the 1st June, 1938, Counsel for the Respondent Company called as a witness on behalf of that Company the Assistant District Superintendent of Police at Telaviv. No other witness was called either on behalf of the Respondent Company or of the appellant and after hearing argument by Counsel on behalf of both parties the District Court reserved judgment. On the 16th June, 1938, the District Court ordered the Respondent Company to pay to the appellant the sum of £P.1,900, interest and costs. The basis of this decision, as appears from the written judgment of the District Court is that the Respondent Company had not discharged the onus of proving that abnormal conditions existed at the date of the fire in the area where the warehouse was situate, the Court holding that the question whether the conditions were abnormal must be decided by comparing the conditions existing at the date when the policy was issued with those existing before the 19th April, 1936, when certain Emergency Regulations under the Palestine (Defence) Order in Council, 1931, were made by the High Commissioner for Palestine.

On the 12th July, 1938, the Respondent Company appealed to the Supreme Court of Palestine from the order of the District Court of Jaffa. The Supreme Court, on the 8th December, 1938, allowed the appeal and set aside the judgment of the District Court, entering judgment for the Respondent Company with costs in the Supreme Court and in the District Court. The appellant has appealed to His Majesty in Council from the judgment of the Supreme

Court with the leave of that Court. The Supreme Court held that upon the true construction of Condition 6 of the policy if abnormal conditions were alleged by the Respondent Company to have existed at the date of the fire the onus of proving that the loss was covered and was not excluded by Condition 6 was on the Insured and not on the Respondent Company. The Supreme Court dealt with this question in the following passage:

“ In the 3rd paragraph of the clause ‘ (i.e. of 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 this criticism of the ruling of the District Court with regard to onus of proof is well founded and that the District Court was in error in holding that the onus of proving that one or other of the occurrences specified in sub-clause (2) of Condition 6 existed at the time of the fire was on the Respondent Company. It was placed upon the appellant by the express terms of the contract. There can be no doubt that as a matter of agreement between parties the onus of proof of any particular fact or of its non-existence may be placed on either party in accordance with the agreement made between them (see *Re Hooley Hill Rubber & Chemical Co. v. Royal Insurance Co.* [1920] 1 K.B., p. 257 per Scrutton, L.J. at p. 273.). 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. The position is summed up by the Supreme Court in these words:—

“ Bearing in mind as I have said that the object of a fire insurance is to insure against fire and that it is common knowledge that in many cases it is difficult, if not impossible, to prove the cause of a fire and that the condition does not provide that the insured shall prove the cause of the fire I am of opinion that the insured can discharge the onus of showing that the abnormal conditions could not reasonably have caused or contributed to the fire. In the result subject to the shifting to and fro of the onus of proof in order that the plaintiff (i.e. the appellant) may recover it is necessary for the Court to be satisfied either that there was no abnormal condition joined by a chain of causation to one of the events set out in the earlier part of the condition or that if there was that condition of affairs it did not affect the fire.”

Their Lordships see no reason to disagree with this summary if by the phrase "no abnormal condition joined by a chain of causation to one of the events set out" in Condition 6 nothing more is meant than the non-existence of any one of the occurrences enumerated in sub-clause (1) or sub-clause (2) of the condition for it seems plain as a matter of construction that the abnormal conditions referred to in Condition 6 are not abnormal conditions generally but such conditions as arise out of or in connection with any of the occurrences enumerated in the two sub-clauses. But the Supreme Court do not appear to have considered whether on the evidence before the District Court it was possible to hold that any one of the specific occurrences mentioned in sub-clause 2 existed at the date of the fire because when criticising the judgment of the District Court the Supreme Court states that the Court below "does not appear to have decided if conditions were abnormal in the general sense but to have decided that they were normal within the contemplation of the parties in that the state of affairs when the policy was issued is the standard of normality to be applied." The attitude of the Supreme Court is made clearer by a later passage in the judgment which reads:—

"At the date of the fire the Emergency Regulations ' (meaning those made by the High Commissioner under the Palestine (Defence) Order in Council, 1931, already mentioned) ' were in force—in itself that would seem to be an abnormal condition other than physical but it could hardly be suggested that the loss did not happen independently of that."

It is to be observed that the passing of Emergency Regulations is not one of the occurrences specified in either of the sub-clauses of Condition 6. The Supreme Court called attention to the evidence of the Assistant District Superintendent of Police in detail, the facts noticed being (a) that after the removal of the Curfew in the Jaffa Area on the 26th October, 1936, fires took place frequently in that area; (b) the existing enmity between Jews and Arabs at the time of the fire; (c) the existence of a boycott which prevented Arabs from buying Jewish goods and vice versa; (d) that it would not be safe for Jews to walk in the quarter where the warehouse was situated at 6.45 p.m. on the 14th December, 1936; (e) that police patrols were carrying arms—rifles—at that date; (f) there were a number of outrages in December, 1936, in Jaffa a number of bombs were thrown. In addition to the evidence set out above it was admitted by the parties that an official communique was printed in the Palestine Post of the 16th October, 1936, under the heading Official Communique, Thursday, 15th October. "There are no incidents to report since noon yesterday. The public is informed that owing to order having been restored and the absence of acts of violence, in future Official Communiques will be issued only when the occasion demands and the daily issue of an Official Communique as a matter of routine is being discontinued." No doubt, considered apart from any other occurrence, the facts stated might lead to the conclusion that the conditions in the area were abnormal at the material date, but with all respect to the judgment of the

Supreme Court this is not the point. The point is does the evidence establish that one of the occurrences mentioned in sub-clause 2 existed on the 14th December, 1936? Their Lordships invited Mr. Tristram Beresford, who appeared for the Respondent Company at this Board to state which of the occurrences enumerated in sub-clause (2) of Condition 6 he alleged was in existence at that date. He stated quite frankly that he did not think he could succeed except under the heading "civil commotion"; and he argued that the evidence established that such a condition, at the date of the fire, in fact existed. It is stated in "Welford and Otter-Barry's Fire Insurance" 3rd Edition, at p. 64 that:

"The phrase 'civil commotion' is used to indicate a stage between a riot and civil war. It has been defined to mean an insurrection of the people for general purposes though not amounting to rebellion, but it is probably not capable of any precise definition. The element of turbulence or tumult is essential; an organised conspiracy to commit criminal acts where there is no tumult or disturbance until after the acts does not amount to civil commotion. It is not, however, necessary to show the existence of any outside organisation at whose instigation the acts were done."

This statement appears to their Lordships to be accurate and to be borne out by the several authorities cited in the notes to the text. In their Lordships' judgment the proved facts in this case fall far short of those which were held in *Cooper v. The General Accident Fire and Life Assurance Corporation* 128 L.T. p. 481 and in the *Motor Union Insurance Co., Ltd., v. Boggan* 130 L.T. p. 588, respectively, to be sufficient to satisfy the phrase "civil commotion." Their Lordships are satisfied that on the facts proved there was no civil commotion in existence at the date when the fire occurred and their Lordships so hold. Having regard to this finding and to the admission made by Counsel already mentioned their Lordships are bound to proceed on the footing that none of the occurrences specified in sub-clause (2) of Condition 6 existed at the material date and to hold that the Respondent Company's reliance on Condition 6 fails. Their Lordships are consequently of opinion that the Supreme Court of Palestine was in error in holding that the appellant was not entitled to recover under the policy.

In the result their Lordships are of opinion that the judgment of the Supreme Court ought to be set aside, and the judgment of the District Court of Jaffa restored and that the Respondent Company should pay to the appellant his costs here and in the Supreme Court. They will therefore humbly advise His Majesty accordingly.

In the Privy Council

SAMUEL L. LEVY

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ASSICURAZIONI GENERALI

DELIVERED BY LORD JUSTICE LUXMOORE

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