CASES
DECIDED BY
THE SUPREME COURT OF CYPRUS
ON APPEAL
AND
IN ITS ORIGINAL JURISDICTION

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[TRIANTAFYLLIDES, P., L. LOIZOU, DEMETRIADES, JJ.]

KYRIACOS AGATHANGELOU,

Appellant-Plaintiff.

v.

THE MOTOR UNION INSURANCE CO. LTD.,

Respondents-Defendants.

(*Civil Appeal No.* 5677).

Contract—Contract of insurance—Fire Policy—Clause therein limiting time for enforcing rights thereunder—Not contrary to section 28 of the Contract Law, Cap. 149—Whether said clause a condition or a warranty—And effect of breach thereof.

The sole issue in this appeal was whether a clause* in a Fire Policy, which provided that if the insured does not commence an action within three months from the rejection of his claim all benefits under the policy shall be forfeited, was operative against the insured in view of the provisions of section 28** of the Contract Law, Cap. 149.

* The relevant clause is clause 13 which is quoted at p. 5 post.

** Section 28 is quoted at pp. 8–9 post.

Held, (1) that a clause that prescribes legal proceedings after limited period is a reasonable provision in a policy of insurance in cases of loss to specific property, as in such cases the insured is the only person who is well aware of the conditions and facts of his claim and he can always bring to Court his action immediately; that the contract of insurance is a voluntary one and the insurers have a right to designate the terms upon which they will be responsible for losses; that a term, therefore, which provides that in case of a difference upon a loss the legal remedy to which the insured is entitled to should be taken within a fixed period or, otherwise, it is forfeited, is most reasonable as the legal remedy should be taken before the Courts whilst the transaction or the conditions of the loss are recent; and that though it is in the interest of the insurance companies that the extent of losses sustained should be speedily ascertained, it is, also, to the interest of the insured that the losses should be speedily adjusted and paid; accordingly clause 13 of the Fire Policy is not contrary to section 28 of the Contract Law, Cap. 149.

Held, further, that if the insured and the insurers agree that the insured is entitled to sue within three months of the rejection of his claim by the insurers, then it is quite clear that the Courts do not possess the discretion to extend the period so fixed and substitute for it any other period which they may deem reasonable; that a warranty in a policy of insurance corresponds with a condition in any other contract, and breach of it entitles the party aggrieved to repudiate his liability under the rest of the contract.

Appeal dismissed.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Kourris, S.D.J.) dated the 29th January, 1977 (Action No. 2144/75) whereby his claim for £1,500.- as damages in respect of a fire insurance policy was dismissed.

L. N. Clerides, for the appellant.

A. Dikigoropoulos, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Demetriades.

DEMETRIADES J.: The appellant was the plaintiff in an action he brought against the respondents, by which he claimed £1,500.- for loss occasioned by fire to goods belonging to him.

The appellant runs a SHELL petrol filling station at Nicosia. The respondents are an insurance company carrying on business in Cyprus.

The facts that led to the proceedings both before the District Court and the Appeal Court are the following:

The respondents, in consideration of a premium paid to them by the appellant, agreed to insure the stock in trade, the property of the insured or held by him in trust and/or on commission for which he was responsible, consisting mainly of motor spare parts and accessories, engine oils in tins and similar other items connected with the Insured's business as Petrol Pump Proprietor, kept in a ground floor building situated at Egypt Avenue, Nicosia, constructed of burnt bricks with a reinforced concrete roof and on the 15th May, 1972, they issued Fire Policy No. 5806573 which provided that they were to pay or make good to the appellant the value of the property at the time of the happening of its destruction or the amount of such damage. The above-mentioned Fire Policy contained a number of conditions, amongst which are the following:

"..... .....

6. This insurance does not cover any loss or damage occasioned by or through or in consequence, directly or indirectly, of any of the following occurrences, namely:-

(a) Earthquake, volcanic eruption or other convulsion of nature.

(b) Typhoon, hurricane, tornado, cyclone or other atmospheric disturbance.

(c) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war.

(d) Mutiny, riot, military or popular rising, insurrection, rebellion, revolution, military 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) which are occasioned by or through or in consequence, directly or indirectly, of 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.

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9. This insurance does not cover any loss or damage to property which, at the time of the happening of such loss or damage, is insured by or would, but for the existence of this Policy be insured by any Marine Policy or Policies except in respect of any excess beyond the amount which would have been payable under the Marine Policy or Policies had this insurance not been effected.

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11. On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf deliver to the Company.

(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

(b) particulars of all other insurances, if any.

The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this Policy shall be payable unless the terms of this Condition have been complied with.

13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy: or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured: or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this Policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited.

The said Fire Policy was renewed annually and was in force when the alleged claim of the appellant arose.

The learned trial judge, after hearing the evidence adduced before him, found that on the 20th July, 1974, Turkish Forces invaded Cyprus by air and sea; that on the 24th July, 1974, there was intermitent firing from the Turkish held side of Nicosia and that at about 9.30 a.m. a fire started in a car that was stationary at a distance of about one foot from the southern wall of the Shell shop; that 5 to 10 minutes later the fire spread over to the shop and as a result its contents were burnt down.

The trial Judge, on the evidence adduced, ruled that he was satisfied that the plaintiff failed to prove positively the cause of fire that destroyed his goods; that same could not have, in any reasonable probability, been caused by or attributed to the firing from the Turkish held sector of Nicosia, and that from the evidence before him, he came to the conclusion that the car from which the fire spread over to the shop of the plaintiff was not in any way damaged by mortar missiles or bullets.

Having reached the above conclusions, the trial Judge proceeded to deal with two submissions made by the defence, namely that the plaintiff—

(a) in breach of clause 11 of the Fire Policy had failed to submit to the respondents a claim in writing within 15 days of the loss, and

(b) was in breach of clause 13 of the Policy.

The learned trial Judge dismissed the first submission of the defence having reached the conclusion that though clause 11 of the Policy is a condition precedent and that the insured ought to have delivered his claim within 15 days from the loss, the respondents had waived their rights arising by virtue of this clause of the Policy, in view of their letter dated the 9th January, 1975, sent to the appellant in reply to his letter –claim—dated the 29th December, 1974, which reads:–

> "We acknowledge receipt of your letter of the 29th December 74, the contents of which received our careful consideration.
>
> The circumstances under which your property was destroyed on the 20th July 74 are well known to us and these have been confirmed by several formal sources. We, therefore, regret to inform you that we are unable to accept your claim and must refer you to Conditions Nos 6, 11 and 13 of your policy".

On the second submission of the defendants, the trial Court found that as the plaintiff filed his action more than four months after his claim was rejected by the defendants on the 9th January, 1975, clause 13 of the Policy came into operation and that the plaintiff had forfeited all benefits to which he was entitled under the Policy.

He further found that the fact that the plaintiff addressed on the 3rd March, 1975, another letter to the agents in Cyprus of the defendant Company (exhibit No. 4), to which the defendants replied by letter dated 31st March, 1975 (exhibit No. 5) the time ought not to be calculated from the 31st March, 1975, because the defendant Company had already rejected the claim of the plaintiff by their said letter of the 9th January, 1975, in which letter they also referred the plaintiff to clause 13. The view taken by the trial judge was that the plaintiff ought to have commenced the action within three months from the 9th January, 1975 and that as he had failed to do so, the action had to be dismissed.

The appellant appealed against the judgment of the trial Court. The defendants, also, cross-appealed.

After learned counsel for the appellant concluded his address, learned counsel for the respondents asked for leave to limit his address in reply to the submissions of the appellant, as his intention was, if the appeal failed, not to pursue his cross-appeal. In view of the statement of counsel for the respondents, the Court proceeded to hear his arguments in reply to the submissions of the appellant.

By his appeal the appellant complains against that part of the judgment of the trial Court which resulted in the dismissal of his action on the basis of clause 13 of the Fire Policy, exhibit No. 1.

His grounds of appeal and the reasons thereof are:-

"1. The judgment of the trial Court is erroneous both in law and in fact.

2. The Hon. Court erroneously came to the conclusion that clause 13 of exhibit 1 was operative against the appellant in view of the express provision in s.28 of Cap. 149 of the Laws of Cyprus.

3. The Hon. Court erroneously came to the conclusion that the period of 3 months envisaged by condition 13 of the Insurance Policy should run from the 9.1.1975 and not from the 31.3.1975.

4. In any case respondents were estopped by conduct from raising the above point inasmuch as they were in close

contact with appellant during the period between January and May, 1975 and they had a duty to disclose to him that time was running against him by virtue of condition 13 of the above Policy.

5. The Hon. Court failed to apply the principles of equity in this case and decide in favour of the appellant once the Hon. Court found that failure to lodge the claim within 3 months was a technical one.

6. Since condition 13 was not a condition going to the root of the Insurance Policy but merely a warranty, even if there had been a breach thereof by appellant of this condition, the Hon. Court should not have treated it as depriving appellant of all benefits under the Policy".

Learned counsel for the appellant submitted on ground 2 of his appeal that the trial Court erroneously came to the conclusion that clause 13 of the Fire Policy was operative against the appellant in view of the express provisions of section 28 of the Contract Law, Cap. 149.

Section 28 of Cap. 149 provides:-

"28(1) Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the Courts, or which limits the time within which he may thus enforce his rights, is void to that extent.

(2) This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

When such a contract has been made, legal proceedings may be brought for its specific performance, and if legal proceedings, other than for such specific performance, or for the recovery of the amount so awarded, are brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the legal proceedings.

(3) This section shall not render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration".

In arguing his case on this ground of the appeal counsel for the appellant further submitted that in view of the express provisions of sub-section (1) of section 28 a party to a contract cannot—

(a) contract out of the provisions of Cap. 149, in that he cannot forego his rights by private agreement; and

(b) the Limitation of Actions Law, Cap. 15, gives the right to a party to a contract to bring an action within six (6) years from the date the cause of action occurred.

In India, as it appears from a number of legal literature that is available in the Library of our Supreme Court, it appears that section 28 of the Indian Contract Law affirms the Common Law; that it applies only to cases where a party is restricted from enforcing his rights under or in respect of a contract and that an agreement which provides that an action for the breach of any term of an agreement should be brought within a time shorter than the period of limitation prescribed by law is void to that extent. However, a clause in a Fire Policy, which operates as a release or forfeiture of the rights of the insured, is valid if the conditions contained therein are not complied with.

In Pollock and Mulla on Indian Contract and Specific Relief Acts, 9th ed., we read the following (at p. 295):-

"*Limitation of time to enforce rights under a contract.*– Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreements within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may enforce his rights, but which provide

for a release or forfeiture of rights if no suit is brought within the period stipulated in the agreement. The latter Class of agreements are outside the scope of the present section, and they are binding between the parties. Thus a clause in a policy of fire insurance which provides that 'if the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be forfeited', is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim. It was so held by the High Court of Bombay in the Baroda Spg. & Wvg. Co.'s case:"

Dutt in his book on the Indian Contract Act, 9th ed., agrees with Pollock & Mulla and this is what appears to be his opinion of this issue (at pp. 316, 317):

"*Agreements affecting the limitation of suits.* The section contemplates the suspension permanently or temporarily of the usual remedies for the enforcement of legal rights. Where parties agree to refer certain matters to arbitration and one of the parties stipulates that he will not plead limitation, the stipulation is void. A party cannot also contract himself out of his right to resort to a Court or agree to alter the period prescribed for a suit in the limitation Act. A provision limiting the right of the donee to sue for one year's arrears only is bad as offending this section. Insurance policies commonly contain the condition that 'if the claim be made and rejected and an action or suit be not commenced within three months after such rejection all benefit under this policy shall be forfeited'. Such a condition has been held not to be void. But a distinction has been drawn between the extinction of a right and the loss of a remedy. Sec. 28 of the Limitation Act shows the cases in which the loss of the remedy will destroy the right. On the other hand, the loss of a right involves the disappearance of a remedy. The section aims at the prohibition of agreements which would only operate so long as rights are in existence. Conditions which clearly and distinctly limit the period within which the suit may be brought are distinctly conditions that are void under

this section. But there is undoubtedly a marked distinction between a condition which so limits the time within which a suit may be brought to enforce rights and one which provides that there shall no longer be any rights to enforce. Such a condition is not illegal in itself".

It is our view that—

(a) A clause that prescribes legal proceedings after a limited period is a reasonable provision in a policy of insurance in cases of loss to specific property, as in such cases the insured is the only person who is well aware of the conditions and facts of his claim and he can always bring to Court his action immediately.

(b) The contract of insurance is a voluntary one and the insurers have a right to designate the terms upon which they will be responsible for losses. A term, therefore, which provides that in case of a difference upon a loss the legal remedy to which the insured is entitled to should be taken within a fixed period or, otherwise, it is forfeited, is most reasonable as the legal remedy should be taken before the Courts whilst the transaction or the conditions of the loss are recent. And

(c) Though it is in the interest of the insurance companies that the extent of losses sustained should be speedily ascertained, it is, also, to the interest of the insured that the losses should be speedily adjusted and paid.

In the light of the above, we find that clause 13 of the Fire Policy exhibit No. 1 is not contrary to section 28 of the Contract Law, Cap. 149.

Coming now to the ground of appeal that the time ought to run as from May 1975 and not as from January of that year, in that the letter which was addressed by the respondents to the appellant in reply to his claim was headed "without prejudice", we find that this ground cannot stand as it is obvious from the wording of that letter that what the respondents meant by it was that they were reserving their rights to other defences available to them which were arising out of the insurance policy.

Coming now to the ground of appeal that clause 13 was merely a warranty and not a condition, we are unable to accede to the

argument put forward by counsel for the appellant. Rightly or wrongly clauses of that kind are usually inserted in policies of insurance for the protection of the business interests directly involved, namely that all claims of the kind ought to be made at the earliest possible day and in any case while they are still fresh. If the insured and the insurers agree that the insured is entitled to sue within three months of the rejection of his claim by the insurers, then it is quite clear that the Courts do not possess the discretion to extend the period so fixed and substitute for it any other period which they may deem reasonable. As it is stated by Colinvaux in his book on The Law of Insurance, 4th ed., p. 106, a warranty in a policy of insurance corresponds with a condition in any other contract, and breach of it entitled the party aggrieved to repudiate his liability under the rest of the contract.

In the result, the appeal fails but, in the circumstances of the case and as the points raised by counsel for the appellant were indeed novel, we make no order as to costs.

As counsel appearing for the respondents asked for leave to withdraw his cross-appeal, same is dismissed with no order as to costs.

Appeal dismissed.