1980 February 12

[A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

ANTONAKIS GAVRIEL AND ANOTHER,
Appellants-Defendants,

v.

THE ELECTRICITY AUTHORITY,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5744).

Principal and agent—Independent contractor—Adjoining landowners—Easements—Support—Withdrawal of support by independent contractor—Liability of principal—Section 12(1)(c) *of the Civil Wrongs Law, Cap.* 148.

Immovable property—Easements—Support—Withdrawal of support a non-delegable duty at common law—Position when damage arising from breach of such duty is caused by an independent contractor—Section 12(1)(c) *of the Civil Wrongs Law, Cap.* 148 *not applicable.*

The parties to this appeal were owners of adjacent plots of land. The respondents-plaintiffs, who had a right of way ten feet wide along the east end of appellants' plot as well as a right of placing underground cables across such right of way, erected an electricity transformer substation on their plot and also laid underground cables across the said right of way. The appellants-defendants, by means of a contract in writing, agreed with a certain contractor to demolish the house that was standing on their plot (No. 762) and excavate an area of 70x70 feet to a depth of 15 feet. On October 26, 1973 the supply of electricity was cut in the area served by the substation in question because of damage to the electric cables laid in plot 762, which was due to the subsidence of the soil caused by the excavations carried out by the contractor on the instructions of the appellants. The trial Court found that the damage complained of was caused by the withdrawal of support from neighbouring land and held that the appellants as owners of the land were liable for the acts of their independent contractor as being guilty of nuisance (see section 46 of Cap. 148) by interfering with that right of easement.

Upon appeal by the defendants the only ground of appeal was that the trial Court was wrong in its interpretation and application of section 12(1)(c)* of the Civil Wrongs Law, Cap. 148.

Held, that the withdrawal of support from neighbouring land is one of the earliest examples of a non delegable duty at common law and section 12(1)(c) of Cap. 148 has no application to the breach of a non-delegable duty; that a person who in law has such a duty cannot divest himself of liability for the damage caused by its breach whether same was committed by him or by an independent contractor acting for his benefit, by invoking the said statutory provision; and that, accordingly, the appeal must fail.

Appeal dismissed.

Cases referred to:

Bower v. *Peate* [1876] 1 Q.B.D. 321 at p. 326;
Hughes v. *Percival* [1883] 8 App. Cas. 443;
Spicer v. *Smee* [1946] 1 All E.R. 489;
Aghazade and Others v. *Shemi*, 24 C.L.R. 176;
Dervish v. *Sami* (1963) 2 C.L.R. 82;
Job Edwards Ltd. v. Birmingham Navigations [1924] 1 K. B. 341 at p. 355.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Stylianides, P.D.C. and Michaelides, D.J.) dated the 30th June, 1977, (Action No. 6772/73) by virtue of which they were adjudged to pay £1,866.210 mils for damages suffered by the plaintiffs as a result of nuisance created by an independent contractor engaged by the defendants.

Chr. Kitromilides, for the appellants.

G. Cacoyiannis, for the respondents.

A. Loizou J. gave the following judgment of the Court. This is an appeal against the judgment of a Full District Court of Nicosia, by which the appellants were adjudged to pay £1,866.210 mils and costs for the damage suffered by the respondents as a result of a nuisance created by an independent contractor engaged by them.

The only ground on which this appeal has been argued is that the trial Court was wrong in its interpretation and application of section 12(1)(c) of the Civil Wrongs Law, Cap. 148.

* Quoted at pp. 59-60 *post*.

The two appellants, father and infant son are owners of immovable property, plot No. 762 s/p 21/54.3.4, situate at Makarios III avenue, Nicosia. The respondents are a body corporate established under the Electricity Development Law, Cap. 171 and are the registered owners of the adjacent plot No. 763 on which they erected an electricity transformer substation. They also have a right of way ten feet wide along the east end of plot 762 as well as a right of placing underground cables across the said right of way. They did in fact lay such underground electric cables across the said right of way and this transformer supplied with electricity a large area of Nicosia town in the vicinity of Hilton hotel. Plot 763 was also part of plot 762 prior to its acquisition for these purposes in 1972.

It was alleged in the statement of claim, paragraph 3, and expressly admitted by the appellants in their defence, that they knew of all the constructions carried out by the respondents on plot 763 and of the placing of the underground electricity cables across the aforementioned right of way.

By contract in writing, dated the 23rd June, 1973, appellant 1, for himself and acting on behalf of his minor son, appellant 2, agreed with a certain Andreas Stavrinides to demolish the house that was standing on plot 762 and excavate an area of 70 x 70 feet and to a depth of 15 feet. This excavation would extend from the boundary of the 10 feet right of way towards the rest of plot 762, and from plot 763 up to 10 feet from the boundary line of plot 762 with Makarios III Avenue.

The soil in that area is clay and the land is sloping towards the centre of the town, and on account of this natural condition certain measures had to be taken for the carrying out of the excavation in a safe and harmless to the adjacent properties manner.

By letter dated the 29th August, 1973, the attention of the appellants was drawn by the District Mechanical Engineer of the respondents to the fact that upon a local examination of the static condition of the building of the aforesaid Substation by its Civil Engineers and advisers, Messrs. Santama, it was found that same was highly dangerous and ready to collapse at any moment with its mechanical equipment and the cables which were connected with it. The appellants were further asked to

secure proper advice from their engineers for the safe support and the reinstatement in its previous condition of the said property the soonest possible; they were also held responsible for any damage caused or to be caused to it and or for any accident that might occur as a result of that situation. In fact, the trial Court had no difficulty on the evidence before it to conclude that the said excavations were carried out in a negligent manner.

On the 26th October, 1973, the supply of electricity was cut for the area served by the said Substation because of damage to the electric cables laid in plot 762, which damage was due to the subsidence of the soil caused by the excavations carried out by the said contractor on the instructions of the appellants. The respondents in the first place took a number of emergency measures to remedy the situation as they could not leave such a part of the town without electricity. In that respect they installed a pole mounted transformer. Then on advice from their architect, they erected a new supporting wall as the one constructed by the appellants was defective. After waiting for the completion of the building works of the appellants, the respondents proceeded to replace the damaged cables and according to pre-existing plans, the old transformer was replaced by a stronger one. The cost of all these works which were necessitated by the damage caused by the subsidence of the soil and the interference with the exercise of the right of easement of the respondent, was assessed at the amount of the judgment.

The right to support from the adjacent or subjacent soil may be claimed in respect of land in its natural stage or in respect of land subject to an artificial pressure by means of buildings or otherwise. As stated in *Gale on Easements*, fourteenth Ed., p. 287 by quoting 2 Rolle's Abridgment, Trespass, Justification, I, pl. 1: "It seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie".

It is the case for the appellants that having employed an independent contractor, they were absolved from liability. Section 12 of the Civil Wrongs Law, Cap. 148, excludes the common law principle as enunciated in the case of *Bower* v.

Peate [1876] 1 Q.B.D. 321 in which at page 326, Cockburn, C.J., said:

> " A man who orders work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful".

The House of Lords in *George Martin Hughes* v. *John Percival* [1883] 8 App. Cas. 443 approved *Bower* v. *Peate* and made it clear that an adjoining building owner cannot divest himself of the responsibility by delegating the performance of building operations to an independent contractor. The aforesaid passage from *Bower* case was also quoted with approval by Atkinson J., in *Spicer* v. *Smee* [1946] 1 All E.R. 489. There is really no room for doubt as to the certainty and clarity of the Common Law on the subject. In Cyprus in the case of *Mehmet Vahip Aghazade and others* v. *Faik Shemi*, 24 C.L.R. p. 176 the Supreme Court found that the trial Court, in that case, correctly relied on the statement of the Law in *Bower* v. *Peate* in spite of the argument advanced in that appeal to the effect that the appellants who employed an independent contractor were not liable for the manner he executed his work. It is true that in that case no express mention is made to the provisions of section 12(1)(c) of the Civil Wrongs Law, Cap. 148, but it can be safely deduced from the argument advanced regarding the liability of the owner of the adjacent land that reliance was placed on the provisions of that section as in our case, as the Law on the subject in England was otherwise definite on the point.

Whilst at this point we find it useful to set out here section 12, which reads as follows:

> "12(1) For the purposes of this Law—
>
> (a) any person who shall join or aid in, authorise, counsel, command, procure or ratify any act done or to be done by any other person shall be liable for such act;

(b) any person who shall employ an agent, not being his servant, to do any act or class of acts on his behalf shall be liable for anything done by such agent in the performance of, and for the manner in which such agent does, such act or class of acts;

(c) any person who shall enter into any contract with any other person, not being his servant or agent, to do any act on his behalf shall not be liable for any civil wrong arising during the doing of such act:

Provided that the provisions of this paragraph of this sub-section shall not apply if—

(i) such person was negligent in the selection of such contractor, or

(ii) such person interfered with the work of the contractor in such a way as to cause the injury or damage, or

(iii) such person authorised or ratified the act causing injury or damage, or

(iv) the thing for the doing of which the contract was entered into was unlawful.

(2) Nothing in this section shall affect the liability of any person for any act committed by such person."

In the case of *Mehmet Dervish* v. *Melek Sami* (1963) 2 C.L.R. p. 82, an independent contractor was employed for an agreed sum to pull down a shop and have a new one built. The owners of the adjoining property complained that the workmen in carrying out the work failed to take the necessary precautions and worked so negligently and unskillfully as to damage the roof of their shop and claim damages. The trial Judge took the view that that contractor was the agent and servant of the employer, i.e. the land owner and there was nothing to discharge him from liability for the acts of his contractor. The President of the then High Court of Justice, who had under Article 153.1(1) of the Constitution two votes, and Vassiliades J., decided that the liability of the appellant in that case, for his contractor's acts and for those of the latter's workmen was not a matter of pure Law, and that it depended on the contract and particularly

on whether the contract established the alleged relationship of master and servant or that of principal and agent, between the appellant and his contractor. The majority took the view that there was no evidence to establish such a relationship and therefore the appeal should succeed. Zekia J., and Josephides, took a different view. Zekia J., accepted that that appellant as a proprietor of an adjoining immovable property owed a duty not to be negligent and not to cause damage to the respondent, the owner of the adjoining shop by failing to repair or maintain his own shop; that that appellant was also liable for the acts of his independent contractor which caused the injury or damage when such acts were either authorised or ratified by the employer and in that respect reference was made to sections 51 and 12 of the Civil Wrongs Law, Cap. 148. He found that the work to be executed by the contractor was within the knowledge and done with the authority of the owner and that he also ratified it in the circumstances and upheld the judgment of the trial Judge. Josephides agreeing with Zekia J., and dissenting with the majority judgment had this to say at pp. 88–89.

> " In my judgment the appellant cannot escape from the responsibility of seeing that duty performed by delegating it to an independent contractor. In the present circumstances the principle enunciated in the speech of Lord Blackburn in *Dalton* v. *Angus* [1881] 6 App. Cas. 740 at page 829, is applicable. I am of the view that sections 51 and 12 of our Civil Wrongs Law, Cap. 148, with regard to negligence, have to be interpreted and applied in accordance with common law precedents (Cf. *Vassiliou* v. *Vassiliou* (1939) 16 C.L.R., 69; *The Universal Advertising and Publishing Agency* v. *Vouros* (1952) 19 C.L.R., 87; *The Queen* v. *Erodotou* (1952) 19 C.L.R., 144; *Markou* v. *Michael* (1952) 19 C.L.R., 282; and *The Electricity Authority of Cyprus* v. *Kipparis* (1959) 24 C.L.R. 121)."

In Clerk and Lindsell on Torts 14th Edition para. 260 it is stated:

> " If the circumstances are such that the law imposes a strict or absolute duty upon the employer, then he cannot discharge his duty by delegating performance of the work in question to an independent contractor. If, therefore, the duty is not fulfilled, the employer is liable even though

the immediate cause of the damage is the contractor's wrongful act or omission. Such strict or absolute duties are often described as 'non-delegable' and may arise either by statute or at common law."

And further down at paragraph 262 it says:

" If a non-delegable duty is found to exist at common law, then the employer of an independent contractor is as much liable for its breach as if the duty had been created by statute. The difficulty is, however, to know when such a duty does exist at common law."

As an example of such a situation is given the passage in *Bower* v. *Peate* (*supra*) which has already been quoted in this judgment and need not be reproduced here.

Further in the case of *Spicer* v. *Smee* [1946] 1 All E.R. 489 at p. 493 Atkinson J., referred with approval to what was stated in the case of *Job Edwards Ltd.* v. *Birmingham Navigations* [1924] 1 K.B. 341 at p. 355 where Scrutton L.J., dealing with the question of nuisance and damage done by fire, said:

" In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land: (i) if he or his servants or agents created the nuisance; (ii) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment ....."

The withdrawal of support from neighbouring land furnishes one of the earliest examples of a "non-delegable" duty at Common Law. See Winfield and Jolowicz on Tort 10th Ed. p. 537. The authorities given for the aforesaid proposition are again *Bower* v. *Peate* (*supra*), *Dalton* v. *Angus* (*supra*) and *Hughes* v. *Percival* [1883] 8 App. Cases 443.

In this appeal the trial Court found that the damage complained of was caused by the withdrawal of support from neighbouring land and for that it held the appellants—owners of that land—and rightly so, liable for the acts of their independent contractor as being guilty of nuisance (section 46 of Cap. 148) by interfering with that right of easement. As

already seen the withdrawal of such support is one of the earliest examples of a non-delegable duty at common law and in our view section 12(1)(c) of Cap. 148 has no application to the breach of a non-delegable duty. A person who in law has such a duty, cannot divest himself of liability for the damage caused by its breach whether same was committed by him or by an independent contractor acting for his benefit, by invoking the said statutory provision.

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

Appeal dismissed with costs.