KELLY'S CARPET-DROME (No.) 7508P/81 ✓ 243

THE HIGH COURT

IN THE MATTER OF KELLY'S CARPETDROME LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 AND 1983

Judgment of Mr. Justice Barrington delivered the 14th day of April, 1985.

This is an application for a direction on a point of insurance law arising in the liquidation of the above-named Kelly's Carpetdrome Limited.

The Applicant is the liquidator of Kelly's Carpetdrome Limited and the Respondent is the Royal Insurance (U.K.) Limited acting on behalf of themselves and other co-insurers who provided indemnity for the liquidator in certain circumstances.

Kelly's Carpetdrome Limited was ordered to be wound up, and the Applicant was appointed official liquidator, on the 28th of July, 1981.

The Applicant is a member of the well known accountancy firm of Messrs. Coopers and Lybrand and, on his appointment, became a beneficiary of certain insurance cover which arises on foot of an agreement between that firm and the Respondents. This policy of insurance is known as insolvency insurance and provides automatic cover to members of the firm of

Coopers and Lybrand when appointed as either liquidators or receivers over companies. This form of insurance was designed to be of particular assistance to accountants who take up the position of liquidators of companies and provides a form of blanket insurance cover in respect of their activities, and the property over which they were appointed, once the insurers are notified.

By Order of Mr. Justice Costello dated the 23rd day of April 1982 it was declared that the businesses carried on by Kelly's Carpetdrome Limited and by another company, Monck Properties Limited, constituted a single business enterprise and that all the assets, undertakings and liabilities of Monck Properties Limited fell to be aggregated with those of Messrs. Kelly's Carpetdrome Limited in the winding up of the latter company. The liquidator duly notified the Respondents of the making of the said aggregation Order of the 23rd of April 1982, and the assets which formerly belonged to the said Monck Properties Limited thereupon obtained the benefit of cover under the liquidator's said insolvency policy with the Respondents.

Among the assets of Monck Properties Limited were certain premises at 345, 347, 349 and 355 North Circular Road, Dublin. On the 14th of June, 1982 these premises were destroyed by fire.

The parties are agreed that the damage done to the premises came to some £585,000. The Respondents agree that the premises were on the date in question covered by the insolvency policy but claim that their liability is limited to 50% of the damage done in the

circumstances hereinafter appearing. They have accordingly paid the liquidator the sum of £292,500 and the present dispute concerns the other £292,500, being, the balance of the said sum of £585,000.

Both parties agree that the insurance effected by the liquidator with the Respondents was subject to the Respondents' standard terms and conditions which (at clause 8) contained the following provision -

> "If at the time of the destruction or damage to any property hereby insured there be any other insurance effected by or on behalf of the insured covering any of the property destroyed or damaged, the liability of the company hereunder shall be limited to its rateable proportion of such destruction or damage."

The Respondents claim that there was another insurance "effected by or on behalf of the insured", and that, in the circumstances, the Respondents are entitled to limit their liability under the insolvency policy to 50% of the loss.

This claim of the Respondents arises in the circumstances set out below.

By agreement dated the 28th day of January, 1981, the said Monck Properties Limited let to a third company, Messrs. Kelly's Carpet Drive-in Limited, the said premises at 345, 347, 349 and 355 North Circular Road for a term of two years and nine months from the 8th day of December, 1980.

Under the terms of the said letting agreement the said Messrs. Kelly's Carpet Drive-in Limited were obliged

to repair the said premises, but were not under any express obligation to insure them. Indeed, under clause 2 paragraph (i) of the letting agreement the tenant covenanted -

> "That he shall not do or suffer to be done anything which may render the landlord liable to pay in respect of premises or the building in which the same are situate or any part thereof more than the present rate of premium for insurance against fire on residential premises or which may make void or voidable any policy for such insurance."

It does not appear that, at the date of the fire, Messrs. Monck Properties Limited had any insurance of the kind contemplated by the above covenant. But it does appear that the said Messrs. Kelly's Carpet Drive-in Limited took out fire insurance in respect of the said premises with Lloyds Underwriters and others for a period of twelve months commencing on the 18th day of August 1981. In the normal course this cover would have been effective on the date of the fire on the 14th of June 1982. It is not clear whether Messrs. Lloyds ever issued a formal policy but there is no doubt that they purported to give insurance cover to Messrs. Kelly's Carpet Drive-in Limited in respect of fire and that they "noted" the interest of Messrs. Monck Properties Limited in the premises.

The Respondents' case is that the insurance taken out by Messrs. Kelly's Carpet Drive-in Limited was insurance effected "by or on behalf of" Messrs. Monck Properties Limited and that as by virtue of the said aggregation

Order of the High Court of the 23rd of April, 1982, Messrs. Monck Properties Limited was declared to be one enterprise with Messrs. Kelly's Carpetdrome Limited and the assets and liabilities of the two companies aggregated, the said insurance cover should be regarded as insurance cover taken out "by or on behalf of" Messrs. Kellys Carpetdrome Limited. In these circumstances the Respondents claim that the situation is caught by clause 8 of their standard conditions and that they are, accordingly, entitled to limit their liability under the insolvency policy.

After the fire it would appear that the liquidator first purported to formulate a claim under the Lloyds policy. Insurance Brokers acting for Lloyds admitted by letter dated the 20th of July 1982, that the interest of Monck Properties Limited had been "noted on the policy". They added, however, that the nature of Messrs. Monck's interest in the property had not been disclosed to the underwriters who were unaware that Messrs. Monck Properties Limited owned the premises and that Messrs. Kelly's Carpet Drive-in Limited were merely tenants. Later Messrs. Lloyds repudiated liability on foot of the policy and claimed that it was void ab initio. It is not clear on what grounds Messrs. Lloyds made this claim, but the liquidator clearly fears that Messrs. Lloyds claim to repudiate may be well founded and has shown no enthusiasm for pursuing the claim against Messrs. Lloyds any further. The Respondents, however, say that the liquidator should at least exhaust his remedies against Messrs. Lloyds before asking them to indemnify him in respect of the second

moiety of the damage.

The liquidator, on the other hand, says that the only policy governing the loss suffered by him is the insolvency policy effected by his firm with the Respondents. No other policy, he submits, was effected by him, or on his behalf, to protect his estate from the loss of damage by fire. Likewise, he submits that his position, or that of Kelly's Carpetdrome Limited, or that of Monck Properties Limited, cannot be worsened by the act of the tenant of Monck Properties Limited in taking out insurance to protect its own interest and having the interest of the landlord noted on the policy. Likewise, he submits that the action of the tenant of Monck Properties Limited in purporting to take out insurance with Messrs. Lloyds Underwriters cannot have the effect of forcing the liquidator to bring against Messrs. Lloyds a claim in which he has no faith instead of relying on the perfectly valid policy which his firm admittedly has with the Respondents.

The fundamental principle of insurance law is that the policyholder is indemnified against specified losses but is never allowed to make a profit out of the happening of the event insured against. For that reason the policyholder cannot improve his position by taking out a second policy with another company against the same risk because, should the risk insured against materialise, the amount recoverable under each policy will abate proportionately and the total amount recoverable by the policyholder will be the same.

Clauses such as clause 8 in the Respondents' standard

conditions are designed to deal with this principle of double insurance. But, the liquidator submits, the present case is not a case of double insurance because the estate of the tenant and the estate of the landlord are different. The relevant principle in the present case is not that of double insurance but of subrogation. If the Respondents compensate the liquidator in full under the terms of the insolvency policy they will be entitled to the benefit of any claim which the liquidator may have against Messrs. Kelly's Drive-in Carpetdrome Limited and through them against Messrs. Lloyds Underwriters.

Messrs. Monck Properties Limited and Messrs. Kelly's Carpetdrome Drive-in Limited had interests in the same property but their estates in the property were quite different. The landlord was entitled to receive his rent and his interest consisted of the reversion expectant on the determination of the tenancy. The tenant was entitled to enjoyment and occupation of the premises subject to the terms and conditions of the tenancy agreement.

The issues and facts are very similar to those dealt with by Chief Baron Palles in the case of Andrews and ors. .v. The Patriotic Assurance Company of Ireland (No. 2) 18 Law Reports (Ireland), page 355. In that case the plaintiff was the owner of a house which he had leased to a tenant. The lease contained a covenant on the part of the tenant to repair but did not contain a covenant to insure. The landlord insured the premises with the defendant company in the sum of £1000 and the tenant also insured them with another company in the sum of £1100.

The landlord's policy with the defendant company was subject to an average condition very similar to condition number 8 in the Respondents' standard terms and conditions in the present case. The wording of the condition was as follows:-

> "If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person covering the same property, this Company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage."

The premises were destroyed by fire and the tenant was paid, on foot of his policy, the sum of £625, but did not apply this sum in reinstating the premises. Subsequently he became bankrupt.

The landlord claimed against the defendants on foot of his policy. The defendants denied liability except in the sum of £62, which they admitted to be due as their apportionment of the loss, and relied firstly upon the average condition quoted above, and secondly upon the plaintiffs neglect in failing to compel the tenant to repair the premises out of the insurance moneys recovered by him.

Chief Baron Palles held, on demurrer, that neither defence could be sustained.

The Chief Baron held that the case was not one of double insurance and that the clause quoted had no application because while both policies applied to the

same house, the estate of the landlord and the estate of the tenant in the house were different. Therefore, the risks assumed by the two insurance companies were different. In a passage which appears at page 365 of his Judgment the Chief Baron discusses the question of whether the risks assumed by the two insurance companies are the same -

> "But are the risks the same? The contract of the Patriotic Company is to indemnify the ..... (landlords) ..... from loss and damage by fire. The amount of that loss and damage would be determined in the ordinary way, by ascertaining the amount that their estate and interest in the premises were injured; and, as they had the benefit of a covenant by their tenant to keep in repair, which would involve an obligation to rebuild, the defendants here (if they paid them the full amount of the loss that they had sustained) would have been entitled, by way of subrogation, to stand in their place, as against the tenant, and sustain the same action, and recover the same amount from him as the plaintiffs here would have been entitled to recover, if the amount had not been paid by the Insurance Company. But the risk insured against by the Guardian Company was, prima facie at least, a wholly different risk. They contracted to pay to the tenant the damage that he sustained - that is, the damage that his estate and interest sustained, including his liability under his covenant to his

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landlords. How can these two risks be called the same? I heard no logical argument to show that the risks were the same ....."

The Chief Baron also rejected the plea that the landlords were, in ease of the defendant Insurance Company, obliged to sue the tenant to repair the premises. On the contrary, the obligation of the defendant Insurance Company was to indemnify the landlords against their loss whereupon they would become entitled, by subrogation, to any claim which the landlords might have against the tenant. At page 369 of his Judgment, Chief Baron Palles says -

"The contract of the defendants was to pay; the right of the defendants was, upon payment, to sue either in the name of the plaintiffs, or in equity in their own names. They broke their contract by not paying, and thereby failed to acquire the status of having a right themselves to institute independent proceedings, until a period arrived when, by reason of the bankruptcy of the tenant, such proceedings would be ineffectual."

It appears to me that the present case is on all fours with the case of Andrews and ors. .v. The Patriotic Assurance Company of Ireland, the only possible distinction - if it is a distinction - being that the interest of Monck Properties Limited was "noted" by Lloyds Underwriters. We do not know the circumstances in which this interest came to be "noted" or whether Monck Properties were or were not aware of the fact that their interest had been "noted"

on their tenants policy. Even if they were, the noting of their interest could only be regarded as a means of ensuring that the tenant complied with his repairing covenant by applying any moneys recovered from his Insurance Company to the repair of the premises. Such a provision cannot, in my opinion, affect the liquidator's rights against his own insurers. However, these insurers will, upon indemnifying the liquidator in respect of his loss, be entitled, by subrogation, to any rights which the liquidator may have against the tenant or its insurers.

It accordingly appears to me that the Respondent Insurance Companies are obliged to discharge in full the loss and damages sustained by the official liquidator arising from the fire which took place on the 14th of June 1982 at 345, 347, 349 and 355 North Circular Road, Dublin.

Approved.

Declan Barron

7/6/85

LIST OF AUTHORITIES CITED

Andrews v. Patriotic Assurance Company of Ireland
1886 L.R. (Ire.) Vol. 18 p. 355

North British, Mercantile Insurance Co. v. London Liverpool, Globe 1877 5 Ch. D. p. 561

Portavon Cinema Co. Ltd. v. Price and Century Insurance Co. Ltd. 1939 4 A.E.R. p. 601

Hepburn v. A. Tomlinson (Hauliers) Ltd.
1966 1 A.E.R. p. 418