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|  **DATE:** | March 8, 2017 |
| **OUR REF:** | 2/1692 |
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To:
Claims Department Claim Reference: 110563000003

Harel Insurance Company Ltd. Policy Number: 2056002197/09

3 Abba Hillel St., (Harel House) Name of Insured: Gindi Holdings Ltd.

P.O. Box 1954 Name of Presiding Judge:

Ramat Gan 52118 The Honorable Judge Hedva Weinbaum- Wolecki

 For the attention of: Adv. Naama Gav

Dear Adv. Gav,

Re: **Civil File 56230-05-13 (Before the Tel Aviv District Court)**

 **Danya Cebus Ltd. v Harel Insurance Company Ltd.**

Further to our report dated December 2, 2016 and further to our conduct of the above claim on your behalf, and to the mediation proceedings that have taken place between the parties before Adv. Ram Horwitz, we are writing to report on developments, on the Mediator’s settlement proposal and on our recommendation that the evaluation of the level of risk on the file be increased.

**The Statement of Claim:**

As has been mentioned, the claim is a pecuniary claim in the amount of NIS 4,574,817 filed by Danya Cebus Ltd. in relation to alleged building defects at the “Gindi Boulevard” project in Petach Tikva (in respect of which our office is also handling another claim against your company filed by the insured Shjrawi Brothers Ltd, for which your reference is: 120560000034).

The project is for the construction of 11 residential towers in Petach Tikva and is sponsored by the developer, Gindi Holdings Ltd. Gindi Holdings Ltd. has entered into a contract with Shjrawi, under which Shjrawi has been appointed to serve as principal contractor for the construction of four buildings. It has also entered into a contract with the Plaintiff, Danya Cebus Ltd, for the construction of the other seven buildings.

The claim has been filed by the Plaintiff, Danya Cebus Ltd., by virtue of a contract works insurance policy issued by your company to Gindi Holdings Ltd. in relation to the above-mentioned project, in which the contractor performing the works, Danya Cebus, is also noted under the insured’s name.

It is alleged in the Statement of Claim that, as part of the construction works at the project, the building walls were cladded with gray ‘Bir Zayit’ stones. In March 2011, before anyone moved into the buildings, it became apparent that the stones used to clad the external walls were crumbling and that hollows and holes had formed in them and this created a real danger which has actually materialized by way of the stones used for the cladding dropping from the external walls.

It is alleged in the Statement of Claim that notice was given to your company of the matters described above and that your company appointed experts to act on its behalf to assess the circumstances surrounding the event and the damages. It is alleged that, pursuant to an opinion obtained by the Plaintiff from a stone consultant, the Plaintiff performed preventative and rehabilitative works on the stones used for the cladding across an area of the external walls of 6500 m at a cost of NIS 4,508,325, being the amount claimed in the Statement of Claim.

Shortly after we took conduct of the claim, we contacted the appraisal company, Arden, and filed a statement of defense on behalf of your company, as will be detailed presently.

**The Statement of Defense Filed on Behalf of your Company**

We filed a statement of defense on behalf of your company, in which we argued that the damages and defects alleged in the Statement of Claim were not covered under the contract works insurance issued by your company.

The first reason why the contract works insurance policy does not apply to the damages alleged in the present claim is that the alleged damage was not caused by an “insured event”, since it was not caused by an accidental, sudden, and unforeseen event which caused physical damage. That is to say, the fact that various repair operations were performed, whose cost is being claimed in the present claim, means that the accidental and physical element required under the terms of the policy is not made out, since the repair operations were performed intentionally and for a purpose that, in and of itself, appears to have been legitimate. However, the fact the repair operations may have been legitimate do not make them suitable for cover under the policy. We cited the rule of the Supreme Court in the ‘Neve Gan’ case in support of this argument.

We also clarified that, the fact that unsuitable tiles were used did not, in and of itself, constitute an accidental, unforeseen event, in particular in circumstances where the inspection of the tiles carried out before they were installed demonstrated, or at least ought to have demonstrated, that they did not meet the conditions required under the standard for use of external cladding tiles. This demonstrates that the requirement for repairs was actually foreseen, and that such requirement certainly did not flow from an accidental, unforeseen event.

The rationale for this is clear. The insurance policy was intended to cover damages caused by unforeseen accidents; it was certainly not intended to cover the costs of planned and foreseen tile repairs and replacements. This is particularly so in circumstances where the stone cladding used in the first place did not meet legislative requirements or the relevant Standard and, at the time, before they were installed, the insured was aware of – or ignored - the possibility that the tiles were not fit for purpose.

We also argued that the cover under the policy for indirect and/or direct damage as a result of defective materials was not relevant in the present case, and that this was also true in respect of the policy extension for direct and/or indirect damage caused by defective design and/or work and/or materials. This is because the extension was based on two cumulative threshold conditions:

1. The damage must have been caused by an insured event set out in the property section of the policy (as detailed above).

2. The insured event must have happened during the insurance period and prior to the maintenance period.

We argued that the extension was inapplicable in the present case in respect of both projects, since neither of the two cumulative conditions have been met. First, the damage was not caused by an insured event set out in the property section of the policy, since the events and damages alleged in the claim did not constitute an insured event as defined in the policy, were not included in the risks covered under the policy, and did not constitute sudden and unforeseen damage, as detailed above.

In circumstances where the definition of insured event itself has not been met, the extension simply could not apply. The extension was intended to cover direct and/or indirect damages caused by defective work and/or defective design. However, here too, to attract cover, the damages must meet the insured event definition in the policy, namely sudden and unforeseen damages.

This argument was based on the language of the policy and on the correct way of construing such language as well as on decided case law, i.e. the Supreme Court’s construction of the application of the extension of a contractor’s insurance policy in respect of direct and/or indirect damages flowing from defective design and/or defective materials in the rule in Neve Gan, where it was held that:

*“… The provisions of an extension do not stand by themselves but are rather a kind of exception to an exception, which is subject to the definition of insured event in Chapter A of the policy. The District Court’s finding in this respect has its basis in law …”*

Although unnecessary to do so, we also argued that the second cumulative condition required for the policy to apply did not pertain, since that condition required the insured event to have occurred during the insurance period and prior to the maintenance period, meaning to say, before the apartments were handed over to the residents.

In this respect, we argued that, it emerged from both from the allegations raised in the Statement of Claim and from the information provided by the insured and the residents to Barkan and Idels, that the events described in the Statement of Claim occurred after the insurance period and after the maintenance period had started and that the condition accordingly did not apply.

Moreover, we argued that, even on the insured’s case, by which the repair and replacement of the tiles should be treated as damage as defined in the policy (an argument which is outright denied), the damage must have occurred after the insurance period and after the maintenance period had started and that the extension accordingly had absolutely no application to the present claim.

An additional reason for denying cover is that the events alleged in the claim occurred outside of the insurance period and are not covered in the framework of the maintenance period. In this respect, we argued that the events alleged in the claim occurred outside of the insurance period, since, whilst the insurance start date was specified in the list of insurance particulars, the insurance end date was defined in paragraph three of the general terms of the policy in the following terms:

*“The insurance will immediately expire in relation to those parts of the project which are handed over to the project sponsor or which start to be used (whichever is earlier) – and the same applies if the whole project is handed over or starts to be used or is completed. The insurance will expire on the date of the earliest of these events to occur even if these dates precede the date specified in the list of insurance particulars as the insurance period end date.”*

At the same time, however, there is a doubt in this regard as to when the defects became apparent since, in contrast to the part of the project performed by Shjrawi, it appears that, in respect of the project performed by the Plaintiff, Danya Cebus, the defects already became apparent whilst the project was still underway before being handed over to the sponsor and/or the residents. However, we included the above argument in the Statement of Defense at this stage, even though the matter requires further factual clarification.

In this vein, we added that the damages alleged in the Statement of Claim were not covered by the insurance cover granted in respect of the maintenance period. A 12 month maintenance period was set for the Gindi Boulevard project in the list of insurance particulars in the policy. From the language of the policy in relation to insurance cover during the maintenance period, it is clear that the policy was not intended to cover costs arising from performance of maintenance works in and of themselves (although this is not intended to imply that we consider that maintenance works form the subject matter of the claim, since this is not the case).

The purpose of the insurance cover for the maintenance period was to insure damages caused to the maintenance works and/or to third-parties (property or person) as a result of such works. However, in the present case, the insured itself does not allege that the relevant damage occurred as a result of the maintenance works.

A second possibility is that the damage was caused during the maintenance period as a result of an insured event occurring during the insurance period. This possibility is also irrelevant, since, as detailed above, the relevant event was not an insured event as defined in the policy.

A third and final possibility is that the damages constituted loss or damage to the project works which occurred during the insurance period but which only became apparent during the maintenance period. We argued that this possibility also did not apply in the present case since, as detailed above, the damage occurred outside the insurance period, i.e. after the apartments were handed over.

In light of all of the foregoing, we have argued that the events and damages alleged in the Statement of Claim, which are denied in and of themselves, are not covered by the contract works insurance policy issued by your company to the insured.

**The Mediation Proceedings and Settlement Proposal:**

After the Statement of Defense was filed, the parties commenced preliminary proceedings and, as recommended by the Court, the case was simultaneously transferred to mediation proceedings before Adv. Ram Horwitz.

**Presently, after lengthy mediation proceedings, a settlement proposal for dismissing the claim in the total amount of NIS 765,000 is on the table.**

In light of the circumstances presented to us in the context of the mediation proceedings, we consider that the settlement proposal ought to be accepted. This is for the following reasons:

1. We were shown receipts in an amount of NIS 3,963,072 for actual payments made in respect of the cladding defect repairs (attached to this report).

2. The settlement amount only constitutes 15% of the repair costs, plus attorneys’ fees and VAT and opinion costs.

3. In our opinion, the dispute in this case boils down to the question as to whether the inspections performed on the stones by the laboratory (a laboratory licensed by the Standards Institution) were sufficient or not.

4. According to Eng. Idels’ opinion commissioned by your company, although some inspections were indeed performed, not all of the inspections required under Standard 2378 were carried out and, if they had been carried out, the defect in the stones could have been revealed.

5. The insured argues that the laboratory and the Standards Institution are the very parties who dictate the required inspections, that the company paid for all of the inspections and that there was therefore no failing on the company’s part. The insured further argues that the inspections mentioned in Idels’ opinion as having been omitted were inspections of stone thickness, whereas the defect in the stones which came to light had nothing to do with stone thickness but rather with the metallic layers in the stone, which cause crumbling in the stone through a corrosive process.

6. The insured argues that the defect in the stones constitutes a sudden event constituting an insured event, as defined, for all intents and purposes since, in its view, all of the inspections required under the Standard were performed and they transpired to be insufficient to reveal the existing defects; the insured accordingly argues that it is entitled to all of its damages.

7. Moreover, in circumstances where it was patently clear that it would only be a matter of time until even greater damage occurred to the stones and that the rest of the stones would also crumble in the future, there was no escaping the maintenance works recommended by the expert, Wishengrad, (whose expertise in this field is accepted by us), namely: washing the stones under water pressure; sanding down the stones; using materials such as epoxy glue to fill the holes and placing sealer in the two layers; replacing damaged stones that could not be reinforced; and reinforcing cracked stones by mechanically affixing Nirosta screws.

8. The Mediator considered that the settlement amount should be between 10%-20% of the amount claimed. The proposal on the table only represents the assumption of risk of around 15% of the amount claimed plus attorneys’ fees. In the circumstances, and in light of the ongoing risk that the Court will accept the claim that the required inspections were carried out on the stones by a laboratory certified by the Standards Institution and that it will therefore find that the alleged event was sudden and that it accordingly constituted an insured event under the policy.

9. Moreover, and as detailed above and in our earlier reports in relation to this file, there is a doubt in this claim as to when the defects became apparent. This is because it appears that the defects at the project performed by the Plaintiff, Danya Cebus, had already become apparent while the project was being performed and before the project was handed over to the sponsor and/or the residents. If this matter undergoes factual analysis at Court and it becomes clear that the foregoing was indeed the case, then our argument that there is no cover could be undermined.

10. For all of the above reasons, we consider that the risk constituted by the offer on the table would be a good one to assume, both in light of the strength of this file and in light of the outcome of similar files where the damages became apparent after handover, because we could then argue for an amount at a lower rate.

In light of the invoices shown to us in relation to the repairs actually carried out (and we would correspondingly refer you to Nachman Idels’ references in this respect) we consider that the reserve on this file should be increased to NIS 750,000.

We would be grateful if you could revert with your position on the settlement at your earliest convenience.