ARTEMIS COMPANY LIMITED,

Plaintiffs,

v.

1. THE SHIP " ZENICA ",
2. (*a*) SOTERIOS CHARALAMBOUS JEROPOULOS,
2. (*b*) S. CH. JEROPOULOS & COMPANY,

Defendants.

(*Admiralty Action No.* 2/63)

Damages—Assessment—Breach of agreement to carry goods—Measure of damages—Damage which naturally arose in the usual course of things—Damage likely to result from the breach—Contract Law, Cap. 149, *section* 73.

Admiralty—Action for damages for breach of agreement for carriage of goods—Denial of the alleged agreement—Finding, on the evidence adduced, that no agreement concluded.

Contract—Action for breach of agreement to carry goods.

Practice—Failure of a claim for damages for breach of alleged agreement for carriage of goods—Estimate by trial Court of damages which would be payable, in case it were held on appeal that claim should succeed.

This is an action for damages for breach of an agreement to carry oranges from Famagusta to Jeddah. Originally the sum of £3,436 was claimed but in the course of the hearing this amount was reduced to £2,473.622 mils.

The plaintiffs are a private limited company carrying on business as merchants and exporters of citrus fruit and other agricultural produce. The ship " Zenica " is a Yugoslavian ship owned by the first defendant company of Yugoslavia. Defendant No. 2 (*a*) is a shipping agent and the only general partner and manager of the firm, defendant No. 2 (*b*), which is a limited partnership, carrying on business as shipping agents and brokers.

The plaintiffs' claim, as stated in paragraph 5 of the statement of claim, is based on a contract alleged to have been concluded over the telephone on the 22nd February, 1961, between Artemis E. Hji Soteriou, who is the managing director of the plaintiff company acting on behalf of the plaintiffs, and defendant No. 2 (*a*) acting on behalf of defendant No.1

and defendants No. 2 (*b*). It was agreed that the defendants would reserve on the m.s. " Zenica " shipping space for shipment of a minimum quantity of 3,500 cases of citrus fruit for the port of Jeddah, on certain conditions specified in the statement of claim. The plaintiffs further alleged, that the defendants broke their contract by refusing to carry the agreed cargo and that, as a result, they had to sell part of the fruit locally and to export 2,281 cases to the United Kingdom which they sold at a loss, the net result being that they lost the sum of £2,473.622 mils.

The defendants deny the alleged agreement and the breach thereof.

The questions which fall for determination in this case are two :

(*a*) Was an agreement for the transport of 3,500 cases of oranges concluded between the parties and ,if yes, what were its terms ?

(*b*) If there was such an agreement, there is no doubt that the defendants broke it by failing to carry the cargo and the Court will have to determine the amount of damages to which the plaintiffs are entitled.

Held, (1) I have no hesitation in accepting the defendant's version and rejecting that of the plaintiff, and I, therefore, find as a fact fully in accordance with the version of the defendant Jeropoulos to the effect that no agreement was concluded. On this finding the claim of the plaintiff company fails.

(2) In case, however, it were held on appeal that the plaintiff company should succeed, I would have assessed the sum of £650 as damages which would be payable, in this case if the plaintiffs were successful.

(3) The plaintiffs' claim is dismissed with costs.

Action dismissed with costs.

Cases referred to :

Stroms Bruks Aktie Bolag v. *Hutchinson* (1905) A.C. 515.

Admiralty Action.

Admiralty Action for damages for breach of contract to carry oranges from Famagusta to Jeddah.

M. Montanios, for the plaintiffs.

J. Potamitis, for the defendants.

Cur. adv. vult.

The following judgment was delivered by :

JOSEPHIDES, J.: The plaintiffs' claim is for damages for breach of an agreement to carry oranges from Famagusta to Jeddah. Originally the sum of £3,436 was claimed but in the course of the hearing this amount was reduced to £2,473.622 mils.

The plaintiffs are a private limited company carrying on business as merchants and exporters of citrus fruit and other agricultural produce. The ship "Zenica" is a Yugoslavian ship owned by the first defendant company of Yugoslavia. Defendant 2 (*a*) is a shipping agent and the only general partner and manager of the firm, defendant 2 (*b*), which is a limited partnership, carrying on business as shipping agents and brokers.

The plaintiffs' claim, as stated in paragraph 5 of the statement of claim, is based on a contract alleged to have been concluded over the telephone on the 22nd February, 1961, between Artemis E. Hji Soteriou, who is the managing director of the plaintiff company (to whom I shall refer as "the plaintiff" in this judgment), acting on behalf of the plaintiffs, and defendant 2 (*a*) (to whom I shall refer as "the defendant" in this judgment), acting on behalf of defendant 1 and defendants 2 (*b*). It was agreed that the defendants would reserve on the m.s. "Zenica" (which was expected to arrive in the Famagusta harbour in the morning of the 23rd February, 1961) shipping space for shipment of a minimum quantity of 3,500 cases of citrus fruit for the port of Jeddah, on certain conditions specified in the statement of claim. The plaintiffs further alleged, that the defendants broke their contract by refusing to carry the agreed cargo and that, as a result, they had to sell part of the fruit locally and to export 2,281 cases to the United Kingdom which they sold at a loss, the net result being that they lost the sum of £2,473.622 mils.

The defendants deny the alleged agreement and the breach thereof.

The questions which fall for determination in this case are two :

(*a*) was an agreement for the transport of 3,500 cases of oranges concluded between the parties and, if yes, what were its terms ?

(*b*) if there was such an agreement, there is no doubt that the defendants broke it by failing to carry the cargo and the Court will have to determine the amount of damages to which the plaintiffs are entitled.

With regard to the first question, the plaintiff's version as given in the evidence of Artemis Hji Soteriou, is that on the 22nd February, 1961 in the morning, the defendant telephoned to him and said that his motor-ship "Zenica" was going to Jeddah and if he, plaintiff, had a cargo for transport the defendant was prepared to accept it. The plaintiff then replied that he had 3,500 cases of oranges, Jaffa or oval type, and they thereupon agreed that the freight payable would be 4/- per case ; that loading should finish by the 24th February, 1961, noon ; that if the plaintiff failed to comply with these terms he would be bound to pay demurrage on the basis of $600 dollars per day *pro rata* ; and that if no berth was available for the ship the plaintiffs would have to do the loading by lighters at their expense. The plaintiff further stated that the defendant informed him also that the firm G. D. Kounnas and Sons Ltd., would not be making use of the space reserved for them on the m.s. "Zenica", and that they were going to load goods on another ship due to arrive at about the same time. According to the plaintiff, following that conversation he sent telegram, exhibit 1, to the defendant confirming their agreement on the same day (22nd February, 1961) at about 10.15 a.m. That telegram, which is a very material document, reads as follows :—

> "According today's phone conversation we undertake load Zenica arriving Famagusta Thursday morning minimum 3,500 cases citrus for Jeddah 4/- per case liner terms your condition that vessel will sail from Famagusta latest Friday 24/2 noon otherwise we shall pay demurrage on basis 600 dollars per day *pro rata*. If berth alongside quay unavailable we undertake to load by lighters our expenses Confirm immediately."

It will be noticed that that telegram does not confirm any agreement but that it applies for shipping space on the "Zenica", stating the terms offered and asking the plaintiff to confirm.

The plaintiff further stated that at about 11 a.m. the defendant rang him up from Limassol and said that the arrangement was all right and that he could proceed with the packing of the fruit, whereupon the plaintiff said that he had already given instructions for the packing. According to the plaintiff at about 1 p.m. of the same day defendant rang him up

again from Limassol and said that he had some difficulties with the firm G. D. Kounnas and Sons Ltd., and that the plaintiff then stated that he would insist on their agreement as he had already sold the oranges and the packing had begun ; that the defendant then said "all right, I shall settle the matter with the firm of Kounnas". Following this telephonic conversation the plaintiff stated that he sent on the same day at about 1.25 p.m. telegram, exhibit 2, to the defendant. That telegram reads as follows :

> " Cannot understand your statement during our todays third phone conversation that you may not be able allow us load citrus Zenica as per our concluded agreement because of Counnas objections. Following your final confirmation we have started preparations for fruit cargo and expect you honour obligation stop If you break contract we hold you fully liable for damages= ARTEMISCO."

The defendant did not reply to that telegram but, according to the plaintiff, he telephoned to him from Limassol to say that he would be going to Famagusta to see him on the following day, adding that the plaintiff should proceed with the packing and that he would arrange matters with the other exporter, that is, Kounnas' company. On the following day, 23rd February, 1961, the plaintiff stated that he prepared and signed the application for shipping order (*exhibit* 3) addressed to the defendant. Although the date shown on this exhibit is the 24th February, the plaintiff, nevertheless, stated that he prepared it and sent it to the defendant's office in Famagusta on the 23rd February in the morning. This form was kept in the defendant's office until the evening when it was returned to the plaintiff at about 6.20 p.m. on the same day. According to the plaintiff, the defendant failed to see him in Famagusta on the 23rd February, as promised, and the plaintiff at 7.28 p.m. on that day sent the following telegram to the defendant in Limassol (*exhibit* 4) :

> " En sinchia chthesinon tilegraphimaton mas lipoumetha paratirisomen oti para tilephonikin sas iposchesin oti tha mas sinantousate simmeron den etirisate iposchesin parolon oti irthate Varosia. Plion evriskete limena imetha etimoi dia fortosin apo mesimvrian ke anamenomen entolin apodohis fortiou epi pliou epanalamvanomen kratoumen ymas ipefthinous zimias ean telikos den epitrepsete fortosin kata paravasin symfonias= ARTEMISCO."

The plaintiff further stated that on the following day, the 24th February, he received the following telegram

from the defendant (*exhibit* 5), which had been handed in to the Limassol telegraph office on the previous evening (23rd February) at 8.58 p.m. :—

" Artemisco Famagusta.

Reference your yesterdays and todays telegrams we repeat our telephone conversations repudiating any responsibility whatsoever as we didn't confirm Zenica nor committed ourselves in any way. Regret our promise without prejudice endeavours convince Counnas allow you load on Zenica failed=SIGMA."

On receiving this telegram on the morning of the 24th February the plaintiff stated that he rang up the defendant in Limassol and complained about it and he also complained that the defendant did not go to his office in Famagusta on the previous day as promised. The defendant then, according to the plaintiff, told him to send the cargo to the port in Famagusta and that he hoped to arrange matters with the Kounnas company. The plaintiff then sent the whole cargo of 3,500 cases of oranges to the port, the cargo underwent the usual export inspection and was found to be fit for export. In support of this statement the plaintiff produced a certificate of inspection check (*exhibit* 6), but that certificate refers only to one lorry-load of 108 cases of oranges. The defendant also produced in support of his evidence a directive from the Customs Export Officer addressed to the agents of " Zenica " (*exhibit* 7), dated the 24th February, 1961, asking them to accept on board the ship " the following goods for which the required export documents have been produced to me :— 3,500 boxes oval oranges—Artemis Co. Ltd.,". It will be noticed that this directive states that the export documents have been produced to the customs officer but not the 3,500 boxes of oranges.

The plaintiff finally stated that as the agents of the " Zenica " refused to accept the cargo on board the ship he had to take all 3,500 cases back, and the " Zenica " left without his cargo. As there was no other direct line to Jeddah the plaintiff stated that he asked his Jeddah customers to accept transhipment of the fruit in Egypt but they refused. According to the plaintiff his efforts to find another ship for Jeddah failed and he had to export 2,281 cases to the United Kingdom on the s.s. " Assiout " on the 5th March, 1961. The remaining 1,219 cases of oranges were unpacked and the contents sold at Famagusta for local consumption to minimise loss until he secured a shipping space on the s.s. " Assiout ".

It will be noted that the plaintiff alleges an oral agreement over the telephone for shipping space on the m.s. "Zenica" which was confirmed, according to the plaintiff, by his telegram exhibit 1. Althouth this is an unusual course of doing business, that is concluding an agreement orally over the telephone for the transport of such a big quantity of oranges, out of which arose a claim of some £2,500 and although the usual course of business is to conclude such agreements in writing, either by a booking note or the exchange of telegrams or correspondence, nevertheless, under our Contract Law there is nothing to prevent such an agreement being concluded orally and I would not hesitate to find that such an agreement was concluded if I have satisfactory evidence put before me.

The plaintiff, in cross-examination, admitted that during the period 1960–61 he had asked the defendant to reserve shipping space for him for Jeddah and that the latter had always refused him (except this time in February, 1961), saying that the space had been reserved by Kounnas in 1960 and 1961. Although the plaintiff alleged that the defendant had carried cargo for him on previous occasions on being challenged the plaintiff was unable to give any particulars of any previous transport of cargo or to produce any documents in support of his allegation.

The other evidence adduced on behalf of the plaintiff is that of his clerk who delivered the application for shipping order (*exhibit* 3) to the defendant's office in Famagusta on the 23rd February, 1961, at about 9 or 9.30 a.m. and who received it back from the defendant's office on the same day at 6.15 p.m., when the manager of the defendant's office in Famagusta informed him (this witness) that he had instructions from the defendant in Limassol not to accept the cargo. The "Zenica" arrived in Famagusta at about noon on the 23rd February, 1961.

The third and final witness called on behalf of the plaintiff company is the company's accountant who gave particulars of the cost of the purchase of fruit, the packing and other details connected with the subsequent unpacking and sale of the oranges locally and in the United Kingdom. The cases which were shipped on the s.s. "Assiout" on the 5th March, 1961, arrived in the United Kingdom on the 18th March, 1961, and the oranges were sold at Liverpool by two brokers between the 20th March and the 5th April, 1961, at a loss. Although the brokers at Liverpool bought the oranges for themselves they sold them for the account

of the plaintiff company because, owing to delay, the oranges were inferior in quality. According to this witness, the net loss, as already stated, was £2,473.622 mils.

The telegrams (*exhibit* 10, blues 1 to 22) and the letters (*exhibit* 11, blues 1 to 11), produced by this witness, show that 16 days prior to the 22nd February, 1961, the plaintiff had agreed to export to two customers in Jeddah (Ibrahim Abushamat and Ibrahim Al-Douan) 1,000 cases of oranges at 32/- per case (see *exhibit* 10, blues 1 and 3, and *exhibit* 11, blues 10 and 11) ; and that 4 days prior to the 22nd February, 1961, he had agreed to export to another two customers in Jeddah (The National and Cold Storage and Trading Company and Ahmat Sabban) 2,500 cases at 33/- per case (see Exhibit 10, blues 11, 15 and 16 ; and Exhibit 11, blues 7 and 3) ; and that he was trying to find shipping space to fulfil his commitments.

The letters in *exhibit* 11 from the Bank of Cyprus Ltd., to the plaintiff company show that the Jeddah customers had opened irrevocable credits for the export of oranges as follows :

(*a*) *Credit No.* 2625 (Bank of Cyprus) (See *exhibit* 11, blues 9 and 11) :—Irrevocable credit for £800 for account of *Ibrahim Abushamat*, Jeddah for 500 cases oval oranges, in one shipment by steamer from Cyprus to Jeddah without transhipment, between 4th February and 4th March, 1961 ;

(*b*) *Credit No.* 2626 (Bank of Cyprus) (See *exhibit* 11 blue 10) :—Irrevocable credit for £1,600 for account of *Ibrahim H. Al-Douan*, Jeddah, for two equal shipments of 1,000 cases of oval oranges at 32/- per case CIF Jeddah, shipment not later than the 7th March, 1961, by steamer from Cyprus to Jeddah without transhipment. The credit was opened on the 7th February, 1961.

(*c*) *Credit No.* 2628 (*exhibit* 11, blues 4 to 7) :—Irrevocable credit for £3,200 for the account of the *National and Cold Storage and Trading Company*, Jeddah, for 2,000 cases of oranges at 32/- per case CIF Jeddah, in one shipment, not later than the 25th February, 1961, without transhipment. The credit was opened on the 9th February, 1961. The price was subsequently increased to 33/- per case (see cable of 15 February, 1961, *exhibit* 10, blue 11).

(*d*) *Credit No.* 2629 (*exhibit* 11, blues 1, 2 and 3) :—Irrevocable credit for £800 for account of *Ahmat Sabban*, Jeddah, for 500 cases of oval oranges. Shipment in one shipment without transhipment between 11th February

and 10th March, 1961. The credit was opened on the 11th February, 1961. The price was subsequently increased to 33/- per case (see above cable *exhibit* 10, blue 11).

This concludes the evidence adduced on behalf of the plaintiff company.

The version of the defendant appears in the evidence of defendant 2 (*a*), whose evidence on the question of the exclusivity of the shipping space on the "*Zenica*" by G.D. Kounnas and Sons Ltd., is corroborated by that of one of the directors, Takis Kounnas. According to this defendant it was the plaintiff who contacted him first about this matter on the 22nd February, 1961 at about 9 or 9.30 a.m., enquiring whether he (defendant) could reserve space on the "Zenica" for Jeddah and that he (defendant) replied, "due to the exclusivity of G.D. Kounnas & Sons Ltd., I cannot reply without securing the consent of this firm". Thereupon the plaintiff observed that as Kounnas would be loading on another ship, the s.s. "Pirot", due to arrive in the afternoon of that day they (Kounnas) would not have enough oranges to load on the "Zenica". The defendant then said that he would contact Kounnas to seek their approval and he (defendant) then pointed out to the plaintiff that he should send him (defendant) a telegram, the contents of which he dictated to the plaintiff over the telephone giving the terms of the proposed agreement. Those were the terms included in the telegram, exhibit 1. The defendant added that relying on that telegram, which would include the obligations to be undertaken by the plaintiff, he (defendant) would contact Kounnas. The telegram (*exhibit* 1) was received by the defendant at about 10.30 a.m. on that day, but as it had no signature the defendant stated that he immediately rang up the plaintiff in Famagusta and informed him of the omission and asked him to set it right; and that, in consequence of this request, shortly after a correction came from the telegraph office. The defendant thereupon contacted Takis Kounnas (witness 2 for the defence) on the telephone and consequent upon their conversation he rang up the plaintiff and informed him that Kounnas would not accept any other person to export fruit on the "Zenica". On hearing of this the plaintiff said that he had sent women to pick oranges and defendant remarked "On what basis did you do that without my confirmation? It is impossible for me to reserve space for you as I have a full booking from Kounnas". In a short while—it was after 1.30 p.m.—he received telegram exhibit 2 from the plaintiff. He stated

that he at once rang up the plaintiff and said to him on the telephone " What is all this nonsense in your telegram ". The plaintiff is stated to have replied " You exposed me as I have already cabled to Jeddah that I would load on the ' Zenica ' ". Defendant then replied " I am not interested in what you did without my confirmation. The only thing which I promise without any obligation is that tomorrow, when I shall be in Famagusta, I shall contact Kounnas and see what I can do for you ".

Pausing here it should be observed that although the plaintiff produced in evidence some 22 telegrams (*exhibit* 10, blues 1 to 22) there is no telegram from the plaintiff to any Jeddah customer that he had made arrangements to export oranges on the " Zenica ".

The defendant further stated that on the following day (23rd February, 1961) he went to Famagusta on the occasion of the arrival of the " Zenica " there, and he rang up Kounnas and had a conversation with him and, as a result, he rang up the plaintiff from his Famagusta office and said to him : " Kounnas still refuses to allow you shipping space ". On his return to Limassol on the same evening the defendant stated that he received telegram exhibit 4 after 7.30 p.m., and that soon after he sent his telegram exhibit 5 at 8.58 p.m. Defendant strongly denied that he contacted the plaintiff first and that he offered to give him space on the " Zenica ", and he also denied that in the course of their second telephonic conversation he told the plaintiff that it was all right and that he could proceed with the packing. He denied that he ever told him that he (the plaintiff) could proceed with the packing of the fruit.

The defendant's office in Famagusta sent a letter to the plaintiff company, dated the 23rd February, 1961 (*exhibit* 14), at about 6.55 p.m. on that day, giving their version substantially as stated by the defendant in his evidence.

Takis Kounnas, who is one of the directors of G. D. Kounnas & Sons Ltd., gave evidence in support of the defendant's case and corroborated the above evidence in so far as it refers to their firm. This witness produced the contract of the Kounnas company with the defendants regarding the exclusivity of the shipping space on the " Zenica " (in fact this was not contested by the plaintiffs) ; he corroborated the defendant that on the 22nd February, 1961, he asked him (the witness) whether they would consent to the plaintiffs loading oranges on the

"Zenica" for Jeddah and that he (the witness) refused and referred him to their contract; he also confirmed that on the 23rd February, 1961, he had a second conversation on the telephone with the defendant who asked him again if he would be prepared to allow shipping space on the "Zenica" for the plaintiffs and he refused again saying that they required the space on both ships (the "Zenica" and the "Pirot"), and that they would not waive their rights under the contract. In fact, the Kounnas firm loaded on both ships. On the second occasion the defendant asked this witness whether he would have difficulty in making use of the whole space on the "Zenica" and said that he would be prepared to help him and this witness replied that he had no difficulty.

In short the defendants denied having ever concluded an agreement with the plaintiff company to carry their oranges from Famagusta to Jeddah. The defendant's version is that they simply undertook, without any obligation, to persuade Messrs. G. D. Kounnas and Sons Ltd., to allow part of the shipping space on the "Zenica", of which they had the exclusive use, to the plaintiff company and that the Kounnas firm refused to allow any shipping space to the plaintiff company.

The whole of the case turns substantially on the evidence of Artemis Hji Soteriou on the one hand and Soterios Jeropoulos on the other. In weighing their evidence the following points have to be taken into consideration:

(*a*) *Exhibit* 1, the telegram from the plaintiff company to the defendants, not only does not support the plaintiff's version that an agreement was concluded during the first telephonic conversation on the 22nd February, 1961, in the morning, but, on the contrary, it points exactly in the opposite direction; that is to say, that the parties were in the stage of negotiations and that the plaintiff was asking the defendant to "confirm immediately".

(*b*) The cables exchanged with the Jeddah purchasers and the correspondence regarding the opening of confirmed credits (*exhibits* 10 *and* 11) show that the plaintiff company was making arrangements to send oranges to Jeddah beginning with the opening of credit on the 4th of February, 1961 and the cable dated the 5th February, 1961; and the letters from the Bank of Cyprus, confirming the

opening of credits on behalf of the Jeddah purchasers in favour of the plaintiff company, refer to credits which were opened between the 4th February and the 11th February, 1961. The plaintiff's cables further show that prior to the 22nd February he had agreed to export 3,500 cases of oranges to Jeddah and that he had been trying to secure shipping space for Jeddah. This documentary evidence tends to show that it was the plaintiff who was interested in finding shipping space for Jeddah and that it was more probable that it was the plaintiff who contacted first the defendant asking him for shipping space on the " Zenica " to Jeddah, rather than that the defendant offered shipping space to the plaintiff in the first instance to carry oranges to Jeddah. This probability is strengthened by the fact that the firm of G. D. Kounnas and Sons Ltd., had the exclusivity of the shipping space on the " Zenica " and the defendant was not in need of looking for customers for the " Zenica ". The question of the exclusivity by the Kounnas firm is conceded by the plaintiff company ;

(*c*) It is significant that after the defendant's last telegram of the 23rd February, 1961 (*exhibit* 5) which was sent to the plaintiff at about 8.58 p.m., repudiating any liability, there is no other letter or telegram or other evidence of any representation by the plaintiff company regarding this case (subject to paragraph (*e*) below) for a period of nearly two years, that is to say, up to the 29th January, 1963, when the plaintiff company instituted the present action.

(*d*) There is no cable from the plaintiff company to any of the Jeddah customers informing them that they had made arrangements to ship oranges on the " Zenica " ;

(*e*) Although the plaintiff stated in evidence that even on the morning of the 24th February, 1961, the defendant told him on the telephone to send the cargo to the port and that he (the defendant) hoped to arrange matters with Kounnas, he (the plaintiff) had sent a cable on the previous evening, *i.e.* on the 23rd February, 1961, at 8.35 p.m. (*exhibit* 10, blue 19) to his Jeddah customers stating " reference orders oranges please amend credits allowing trans-

shipment Port Said due steamer contracted broke agreement.....". This at least shows (irrespective of whether there was an agreement or breach thereof) that in the evening of the 23rd February, 1961, the plaintiff had received information that his oranges would not be loaded on the "Zenica".

Both parties are experienced members of the business community in Cyprus. The Court is not here concerned with ordinary uneducated persons and it is entitled to expect from the litigants a higher standard of orderliness in the transaction of their business and of accuracy in their evidence. The impression I gathered from watching closely the parties while giving their evidence in the witness box, is that the plaintiff was vague, uncertain and, at times, evasive in giving his evidence. On the other hand, the defendant has struck me as straightforward, certain and orderly in his business transactions. Weighing their evidence against the documentary and other evidence in the case and taking into account the points stated above, I have no hesitation in accepting the defendant's version and rejecting that of the plaintiff, and I, therefore, find as a fact fully in accordance with the version of the defendant Jeropoulos to the effect that no agreement was concluded. On this finding the claim of the plaintiff company fails.

In case, however, it were held on appeal that the plaintiff company should succeed, I will now proceed to make an estimate of the damages which would be payable in this case if the plaintiffs were successful.

The plaintiff company claims the sum of £2,473.622 mils as damages made up as follows :

	£ s. d.
(*a*) Proceeds from sale of 943 cases in the U.K.	1,244.18. 6
(*b*) Proceeds from another sale in the U.K. of 1,338 cases	1,789. 2.11
(*c*) Proceeds from sale of 1,219 cases locally (221,327 oranges)	973.16. 9
Total	£4,007.18. 2

This is equivalent to £4,007.908 mils, less the following expenses incurred by the plaintiffs :

	£ mils
(*a*) Additional freight to U.K.	269.840
(*b*) Cost of opening cases to sell the oranges locally	436.690
Total	£706.530

This leaves a net amount of £3,301.378 mils, total collections from the 3,500 cases of oranges.

Had the plaintiff company delivered these oranges to their Jeddah customers they say they would have collected £5,775. The difference between these two figures is the net loss of £2,473.622 mils, claimed by the plaintiff company.

Counsel for the defendant submitted that, on the evidence, the plaintiffs were not ready to load the 3,500 cases, that the evidence of Artemis Hji Soteriou is not corroborated by any other evidence, and that it is highly improbable that the oranges could have been picked and packed within such a short period. He further submitted that the proper measure of damages in the present case is that stated in Carver on Carriage of Goods by Sea, 10th Edition, at page 983, where the freighter is unable to procure other means of carriage. That measure " is the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods at the place of shipment and the amount of the freight and insurance " (*Stroms Bruks Aktie Bolag* v. *Hutchinson* (1905) A.C. 515). Relying on this statement of the law, Mr. Potamitis submitted that there was no evidence before the Court to decide the measure of damage, that is to say, there was no evidence as to the cost of replacing the oranges at Jeddah at the time when they ought to have arrived.

Finally, he submitted that on the evidence the prices of oranges were rising at the time and the plaintiff could have sold locally or in the United Kingdom at a profit.

Our law on the point applicable to cases of breach of contract is that laid down in section 73 of our Contract Law, Cap. 149. That section reads as follows :

> " 73 (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation

for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(2). ....

(3) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

It will be noticed that the measure of damage is that which "naturally arose in the usual course of things" from the breach, or which the parties *knew*, when they made the contract, to be "likely to result from the breach of it".

The latest edition of Mayne and McGregor on Damages, 12th Edition, at pages 492 to 513, contains an interesting exposition of cases on the subject of breach by carriers of goods. This is by no means an easy matter and I do not think that I have sufficient material before me in this case—either in the form of evidence or authorities cited to me—to enable me to make a satisfactory assessment of the damages.

One of the questions which arise in my mind, and to which the evidence for the plaintiff has not given a satisfactory answer or explanation, is the following : if Kounnas and Sons Ltd., who exported oranges to the U.K. in the last week in February and on the very same ship (s.s. "Assiout") which the plaintiffs exported their oranges to the U.K. on the 5th March, 1961, made a profit, why should the plaintiffs suffer a loss of about £2,500 in this case?

In considering the evidence adduced on behalf of the plaintiff company with regard to damages, their cables and correspondence (*exhibit* 10 and 11) with the Jeddah customers and the Bank of Cyprus, opening confirmed credits, tend to show that it is highly probable that the plaintiffs had taken the risk of picking the fruit and having it in their warehouse before they had secured shipping space on the 22nd February, 1961.

Even on the assumption that the defendants concluded an agreement with the plaintiffs on the 22nd February, 1961, at about 10.30 a.m. and that they broke it by the evening of the 23rd February when they returned the plaintiff's application for a shipping order (see also the plaintiff's cable to their Jeddah customer on the same date, exhibit 10, blue 19, or at the latest on the 24th February at midday when the "Zenica" left Famagusta, it is highly improbable that within that short space of time the plaintiffs were able to collect and have the 3,500 cases of oranges ready in port as alleged by them. The picking of oranges usually begins at 10 or 10.30 a.m. if it is not wet. In this case it is very improbable that the picking could have started before the following day the 23rd February at the earliest. Could such picking in Famagusta and Morphou finish on the same day, the fruit to be transported to the warehouse of the plaintiffs, wrapped and packed in the 3,500 cases by the evening of that day or even the following morning and then loaded on 32 lorries (as alleged by the plaintiff) and transported to the port on the morning of the 24th February. To my mind this is highly improbable. The documentary evidence adduced by the plaintiffs (*exhibit* 6 and 7) does not prove this. Exhibit 6 shows that only one lorry containing 108 cases was ready in port and inspected by the produce inspection service. Exhibit 7 shows that the *export documents* had been produced to the Customs authorities and not that the 3,500 cases of oranges were in port.

Even if the plaintiff gave instructions for the picking of oranges to start at Morphou immediately on the 22nd February at 10.30 a.m. it is highly improbable that the picking started at once on that day and it is very likely that the earliest it started was on the following day, the 23rd February. In fact, the plaintiffs failed to adduce any evidence to show when the picking of oranges started either at Famagusta or at Morphou. They further failed to adduce any evidence to show when such picking was completed, when the oranges were transported to their Famagusta warehouse, and they also failed to adduce any evidence either from their Morphou agent or from the orange producers at Morphou or Famagusta supporting their statement that the quantities of oranges alleged by them were delivered to them or, if delivered, the date of such delivery and the price paid for them.

Considering all these I shall proceed to assess damages on the basis that the plaintiffs had the oranges actually

in their warehouse immediately before they concluded the agreement with the defendants for the carriage of the fruit to Jeddah, taking the risk of being unable to secure shipping space. But, once they secured shipping space in consequence of their agreement with the defendants, if the latter had performed their part of the contract, the plaintiffs would have made a profit of £650 made up as follows :

(*a*) Cost price to plaintiffs 29/- per case CIF Jeddah.

(*b*) Sale price 33/- per case for 2,500 cases (see *exhibit* 10, blues 11, 15 and 16) ; and 32/- per case for 1,000 cases (see *exhibit* 10, blues 1 and 3, and *exhibit* 11, blues 10 and 11).

(*c*) Net profit of 4/- per case on 2,500 cases = £500
Net profit of 3/- per case on 1,000 cases = £150

Total net profit £650

Apart from this, I do not think that the plaintiffs are entitled to any consequential loss alleged to have resulted from the sale of the oranges locally and in the United Kingdom, as I do not think that such loss "naturally arose in the usual course of things" from the breach, nor that the defendants knew, when they made the contract, that such loss would be "likely to result from the breach of it" (section 73 (1) of the Contract Law). In the normal course of things the plaintiffs could have exported to the United Kingdom, not only without loss, but, on the contrary, at a profit, as there is evidence of rising prices at the material time and that the Kounnas company made a profit at about the same time.

In all the circumstances of the case I would have assessed the sum of £650 as damages.

However, for the reasons stated earlier in this judgment, the plaintiffs' claim is dismissed with costs.

Action dismissed with costs.