

1978 April 3

[TRIANTAFYLIDIS, P., STAVRINIDES, L. LOIZOU, JJ.]

KEM LTD., AND OTHERS,

Appellants—Applicants,

v.

THE POPULAR BANK OF CYPRUS LTD.,

Respondents.

(Civil Appeal No. 5760).

*Forced sale—Stay of—Stricken debtor—Terms on grant of stay—
More onerous than those that had been agreed upon by the parties,
regarding payment off of the debts in question, prior to the abnormal
situation—Terms had to be those which could be reasonably met
by the debtors in the light of the circumstances prevailing when
such terms were prescribed by trial Court—Discretionary powers
of trial Court exercised wrongly—Intervention by Court of Appeal
—Terms amended—Section 3 of the Debtors Relief (Temporary
Provisions) Law, 1975 (Law 9/75).* 5

*Court of Appeal—Discretion of trial Court—Review of—Principles
applicable.* 10

The trial Court ordered stay of two forced sales of movable property of the appellants, under section 3* of the Debtors Relief (Temporary Provisions) Law, 1975 (Law 9/75), on condition that they shall pay C£300.— on 1.12.1977 and C£85 per month on the first day of each month commencing on 1.1.1978. 15

It was found by the trial Court that the business of the appellants has been substantially affected by the abnormal situation, brought about by the Turkish invasion, to such an extent as to render it unable to pay its contractual obligations out of which this debt arose; and that until some time before the invasion the appellants were making certain payments against this debt and the respondents had accepted the debtors' pre-war offer 20

* Quoted in full at p. 348 *post*.

to pay C£300.- in July, 1974, and C£70 per month thereafter; none of these payments was ever made.

5 Upon appeal counsel for the appellants submitted that the trial Court exercised its discretion wrongly in imposing the above terms.

Held, (after referring to the principles on which an appellate Court can interfere with the exercise of the discretion of a trial Court).

10 (1) That the trial Judge has exercised his discretionary powers in such a wrong manner as to make it necessary for this Court to interfere on appeal, because, though he found that, "irrespective of the pre-war financial difficulties" of appellant 1, its business has been substantially affected by the abnormal situation brought about by the Turkish invasion to such an extent
15 as to render it unable to pay its contractual obligations such as those out of which the debts to the respondents arose, nevertheless he imposed terms, in the course of granting an order of stay of the forced sales, which were more onerous than those which had been agreed to between the parties regarding the
20 payment off of the debts in question prior to the catastrophe of the Turkish invasion in 1974 (pp. 353-54 *post*).

25 (2) That this is a case where a stay of the forced sales has been granted as a measure of relief in the context of the abnormal situation created after the Turkish invasion and the terms to be imposed had to be those which could be reasonably met by the appellants in the light of the circumstances prevailing when such terms were prescribed by the trial Court.

30 (3) That the terms will be amended by cancelling that part of the order which relates to the payment of the sum of C£300 and by reducing the monthly instalments from C£85 to C£50 per month.

Appeal allowed.

Cases referred to:

Georgiades v. Lambrides & Another (1978) 1 C.L.R. 244.

35 Appeal.

Appeal by applicants against the terms imposed by the District Court of Nicosia (Boyiadjis, S.D.J.) dated the 5th November,

1977, (Appl. No. 173/76) when it ordered that two forced sales of movable property of the applicants should be stayed under the provisions of section 3 of the Debtors Relief (Temporary Provisions) Law, 1975 (Law 9 of 1975).

C. HadjiNicolaou, for the appellants. 5

P. Ioannides, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLIDIS P.: In this case the appellants are complaining against the terms which were imposed by the Nicosia District Court when it was ordered by that Court that two forced sales of movable property of the appellants should be stayed, under the provisions of section 3 of the Debtors Relief (Temporary Provisions) Law, 1975 (Law 9/75). 10

The said section 3 reads as follows:- 15

“ 3.- (1) During the abnormal situation any forced sale shall be stayed upon an order of the Court made on the application of the debtor, submitted in accordance with the provisions of any rules of Court.

(2) When dealing with an application for the stay of sale the Court shall take into account - 20

(a) whether the debtor is a stricken debtor;

(b) the amount of the debt on the date of the application by the debtor for the stay of the forced sale in relation to the original amount of the debt and the value of the property in respect of which the application for the stay of the forced sale is made; 25

(c) the market conditions in respect of the sale of property in the area in which the forced sale is to take place; 30

(d) whether, having regard to all the circumstances greater hardship will be caused by staying the forced sale than by not staying the same and the effect of each of these on the others. 35

(3) The Court in dealing with an application for the stay of a forced sale may, if it deems expedient so to do,

order such stay on condition that the debtor shall pay the debt or part thereof by so many instalments and at such intervals and on such other terms as the Court may deem fit in the circumstances of each particular case.

- 5 (4) The stay under this section shall suspend the period during which a writ of sale is in force.”

The circumstances in which the stay of the forced sales were ordered are stated as follows in the judgment of the trial Court:—

10 “ The three applicants are jointly and severally indebted to the respondent-bank in the following sums:—

15 (a) £1,375.398 mils with 9% interest thereon from 1.1.1975 until final payment and £45.050 mils costs as per the judgment issued on 24.5.1976 by the District Court of Nicosia in Action No. 2051/75;

20 (b) £2,438.992 mils with 9% interest thereon from 2.6.1972 until final payment and £43.350 mils costs as per the judgment issued on 17.6.1975 by the District Court of Nicosia in Action No. 2049/75.

The aforesaid sums represent loans made by the respondent-bank to the applicants which became due and payable to the Bank before the Turkish invasion.

25 In execution of the aforesaid judgments two writs of execution against the movable property of the debtors were issued, whereupon the latters filed in Court the present application for relief under the Debtors Relief (Temporary Provisions) Law, 1975, (Law No. 9/75), (hereinafter referred to as ‘the Law’), praying for an order staying the execution of the aforesaid writs and directing payment of the debts by monthly instalments.”

30

At the end of his judgment the learned trial Judge pronounced that:—

35 “What form and extent the relief should take? What conditions are to be imposed and what provision is to be made for the payment of this debt? The debt, of course, must ultimately be paid, and the relief cannot be such as

to amount in essence to wiping off or extinguishing the debt.

.....
 The Court is thus vested with a wide discretion as to the terms which it may generally impose when granting a stay and also as to the conditions with regard to the instalments and their intervals: *Neophytou and another v. Pappasolomontos and another*, (1977) 4 J.S.C. 480. 5

Learned counsel for the applicants submitted in this respect that the Court should stay the execution for as long as the debtors pay £30.- per month. Learned counsel for the respondents submitted that the debt shall never be paid if such an order is made. 10

In exercise of my discretion in this respect, having in mind all the facts and circumstances of this case including the amount and nature of the debt, the extent to which the debtor-company has been affected by the abnormal situation and its present financial position and the amount of interest which accrues every month and is added on the principal debt, I hereby make an order staying execution of the subject-matter judgments against the applicants for as long as the abnormal situation continues to exist, on condition that the debtors shall pay the following amounts on the following dates with 10 days grace for each payment:- 15

- (a) £300.- on 1.12.1977; 25
- (b) £85.- per month on the first day of each month commencing on 1.1.1978.

With regard to the costs of this application, the applicants are adjudged to pay £25.- towards respondents' costs." 30

In the course of the hearing before us counsel for the respondents has pointed out that the monthly interest on the debts in question of the appellants is C£37, and not C£29 as stated by the trial Court in the judgment appealed from; this did not seem to be disputed by the other side. 35

It has been submitted by counsel for the appellants that the trial Court exercised its discretion wrongly in imposing the

terms that the appellants should pay towards their debts to the respondents C£300 on December 1, 1977, and C£85 monthly, as from January 1, 1978.

5 It is common ground that the decisively material aspect of this case is the financial position of appellant 1, KEM Ltd., and that the other two appellants, who are engaged in the management of appellant 1, are not, in any way, in a position to meet the liabilities concerned for the time being.

10 Regarding the financial capability of appellant 1 the trial Court accepted the evidence of its General Manager, Georghios Liatsos, and made the following findings in its judgment:—

15 “The applicant No. 1—K.E.M. Ltd.—is a transport company operating on an island wide basis their buses and tank trucks both prior to and after the Turkish invasion.

20 This company owned before the invasion between 104 and 109 buses and 25 tank trucks. When the Turkish Army occupied the north of the island, 64 buses and 6 tank trucks which happened to be in the north were lost. The company further lost their main income yielding licensed routes within Famagusta town and along the old Nicosia—Famagusta road where in all 19 buses were regularly operated on a cash basis.

25 The company is now left with 19 tank trucks out of which 12 are in circulation and with 40–45 buses out of which one is being operated along the Nicosia—Platres road and 3 have been hired by the Nicosia Bus Company for operation within the town on a long term basis. All the other buses of the company are out of circulation. Im-

30 mediately before the invasion in all 70 vehicles of the company were in actual operation.

35 Only four of the vehicles now in the possession of the company are the absolute property thereof. All the other vehicles are owned by the company on hire—purchase terms.

Until the Turkish invasion the monthly income of the company was in the region of £13,000.— to £14,000.— and

its expenses in the region of £10,000.- to £11,000.- per month.

After the invasion the company's monthly income is at its best £4,000.- to £5,000.- and its expenses cut to £3,600.- to £3,700.- per month. The company has dismissed more than half of its employees and has reduced the salaries and wages of its remaining employees by 30 to 60 per cent. The directors' fees amounting to £100.- per month to each director are not paid any longer and the monthly salary of the witness who is an employed general manager of the company has been reduced from £200.- per month to £80.- per month.

The company's debts to several persons, all incurred prior to the invasion, are in the region of £400,000.-, including a debt of about £140,000.- to the Bank of Cyprus secured by mortgage of immovable property of the company situated in Limassol.

The subject-matter debt is not secured in any way and according to my calculations the interest accrued monthly thereon is approximately £29.-. Until some time before the invasion, the company was making certain payments against this debt and the respondents had accepted the debtors' pre-war offer to pay £300.- in July, 1974, and £70.- per month thereafter. None of these payments was ever made.

The company applied for and obtained relief by consent against execution of her property by two other creditors on condition that they pay £25.- per month against a debt of approximately £4,000.- and another £20.- per month against another debt of approximately £1,500.-.

Even before the invasion the company had financial difficulties and creditors had to sue for the recovery of their debts. Before 1973 the company faced 1-2 winding up applications.

There is no doubt that the debtor-company is unable to meet its contractual obligations out of which the debt arose. The question is whether the debtor's inability to

do so is due to the fact that its work or business has been affected by the abnormal situation or not.

.....

5 On the facts before me as I have found them, I have no doubt that irrespective of any pre-war financial difficulties of the debtor-company, its business has been substantially affected by the abnormal situation brought about by the catastrophe that has befallen the island by the Turkish invasion, to such an extent as to render it unable to pay its contractual obligations out of which this debt arose.”

10 It has been submitted by counsel appearing for the respondents that the discretion of the trial Court has been rightly exercised and that, in any case, there do not exist, on the present occasion, the prerequisites entitling this Court, as an appellate Court, to interfere with the exercise of the discretion of the Court below.

15 We have had occasion to refer in a number of decisions of this Court to the principles on the basis of which an appellate Court can interfere with the exercise of the discretion of a trial Court (in this respect see, *inter alia*, the case-law referred to in *Georgiadou v. Lambrides and another*, (1978) 1 C.L.R. 20 244).

In the present instance we have been satisfied that the trial Judge has exercised his discretionary powers in such a wrong manner as to make it necessary for us to interfere on appeal, because, though he found that, “irrespective of the pre-war
25 financial difficulties” of appellant 1, its business has been substantially affected by the abnormal situation brought about by the Turkish invasion to such an extent as to render it unable to pay its contractual obligations such as those out of which the debts to the respondents arose, nevertheless he imposed terms,
30 in the course of granting an order of stay of the forced sales, which were more onerous than those which had been agreed to between the parties regarding the payment off of the debts in question prior to the catastrophe of the Turkish invasion in 1974. As was found by the trial Court, the said agreed terms
35 were that the appellants would pay C£300 in July 1974 and then C£70 monthly thereafter; and, yet, after the Turkish invasion, with all its calamitous consequences for the financial position of appellant 1, had intervened, the Judge proceeded to make an

order for the payment still of the said C£300 and increased the monthly instalments from C£70 to C£85 per month, without giving any cogent reasons for adopting this course.

It has been suggested by counsel for the respondents that his decision is correct because the appellants, ever since 1974, have failed to pay even the interest on their liabilities to the respondents. But it does not appear that the appellants were in a position to pay and they yet have failed to pay; they should not, therefore, be penalized for not having done so. 5

This is a case where a stay of the forced sales has been granted as a measure of relief in the context of the abnormal situation created after the Turkish invasion and the terms to be imposed had to be those which could be reasonably met by the appellants in the light of the circumstances prevailing when such terms were prescribed by the trial Court. 10 15

We have, therefore, decided to amend these terms by cancelling that part of the order which relates to the payment of the sum of C£300 and by reducing the monthly instalments from C£85 to C£50 per month; the first instalment to be payable on May 1, 1978, with ten days' grace. 20

This appeal is, in the result, allowed to the extent indicated above, but we have decided to make no order as to its costs.

Appeal allowed. No order as to costs.