1985 May 11

[MALACHTOS, J.]

VASSOS AIVALIOTIS LTD.,

Plaintiffs,

v.

MICHAEL ATHANASSIOU,

Defendant.

(Admiralty Action No. 76/74).

Contract—Bailment—Goods lost or damaged whilst in the bailee's possession—Onus on him to show that the loss or damage occurred without any neglect of himself—Section 109 of the Contract Law, Cap. 149.

Damages—Breach of contract—Pre-estimated or liquidated damages—Penalty clause—Principles applicable—Section 74 (1) of the Contract Law, Cap. 149.

The plaintiff company was the owner of the motor launch "Haralambos". On the 3rd October, 1974, the defendant entered into an agreement with the plaintiff whereby he hired the said motor launch for three months to use it for the salvage of scrap iron from a wrecked ship at Paphos. On the same day the motor launch, while sailing from Limassol to Paphos, towing at the same time a pontoon, was totally destroyed by fire and sank near the Akrotiri Peninsula within the SBA while in the possession and/or under the control of the defendant. As a result the plaintiff instituted this action claiming damages for the loss of the said launch. Plaintiff alleged that the boat was totally lost as a result of the negligence of the defendant and claimed damages of £3,000.- as provided by clause (4) of the agreement which was as follows:-

> "... In the event of the total destruction or loss of the above motor launch the hirer is obliged to pay to the owner the value of the launch being £3,000.- (three thousand pounds)".

The defendant denied that the destruction of the launch was due to his negligence and alleged that the cause of the fire was the unfit and defective condition of the launch which the plaintiff had impliedly warranted to be in good condition fit for the purpose required and free from any faults and defects rendering it unfit for the purpose it was required which purpose was known to the plaintiff at all times. The defendant adduced no evidence to explain the cause of the fire.

Held, that as the fire occurred while the launch was in the possession and under the control of the defendant, or his servants the onus is on him to show how it was caused and that the cause was not the result of his negligence (see section 109 of the Contract Law, Cap. 149); that from the evidence adduced it is clear that the defendant has failed to discharge such burden of proof cast upon him, as he has failed to disprove that the fire and subsequent destruction of the launch was due to his negligence and to prove that the actual cause of the fire was the unseaworthiness and unfit condition of the launch; and that, therefore, the claim of the plaintiff must succeed.

Held, further, that bearing in mind the evidence adduced the amount of £3,000.- provided by clause (4) of the agreement, is not a penalty clause but represents the actual value of the launch which was the agreed estimate of damages the plaintiff would suffer in the event of its loss.

Judgment for plaintiff for £3,000.-

Cases referred to:

Smith, Hogg and Co. Ltd., v. *Black Sea and Baltic Central Insurance Co. Ltd.* [1940] A.C. 997 at p. 1005;

Morris v. *C.W. Martin & Sons Ltd.* [1965] 3 W.L.R. 276 at p. 282;

Holy Monastery of Ayios Neophytos v. *Antoniades* (1968) 1 C.L.R. 10 at p. 28;

Christopher Hill Ltd. v. *Ashington Piggeries Ltd.* [1969] 3 All E.R. 1496 at p. 1524;

Roper v. *Johnston* [1873] L.R. 8 C.P. 167;

Pilkington v. *Wood* [1953] Ch. 770.

Admiralty Action.

Admiralty action for £3,000.- damages for the loss of their motor launch "Haralambos" as a result of the negligence of the defendant.

A. Markides, for the plaintiffs.

A. Timothi (Mrs.), for the defendant.

Cur. adv. vult.

MALACHTOS J. read the following judgment. The plaintiff company in this Admiralty Action was the owner of the motor launch "Haralambos" Registration No. LL 333 and the defendant is a shipowner from Greece trading in scrap iron.

On the 3rd October, 1974, the defendant entered into an agreement with the plaintiff whereby he hired the said motor launch for three months to use it for the salvage of scrap iron from a wrecked ship at Paphos. On the same day the motor launch, while sailing from Limassol to Paphos, towing at the same time a pontoon, was totally destroyed by fire and sank near the Akrotiri Peninsula within the SBA while in the possession and/or under the control of the defendant. As a result the plaintiff instituted this action claiming damages for the loss of the said launch.

In the petition the plaintiff alleges that the boat was totally lost as a result of the negligence of the defendant and claims damages of £3,000.- as provided by clause (4) of the agreement which is as follows:-

> "... In the event of the total destruction or loss of the above motor launch the hirer is obliged to pay to the owner the value of the launch being £3,000.- (three thousand pounds)".

On the other hand, the defendant in his answer, admits that he entered into an agreement with the plaintiff for the hire of the motor launch for a period of three months at £80.- per month and also that according to clause (4) of the said agreement the hirer was to pay to the plaintiff

the amount of £3,000.-, as being the value of the boat in the event of its destruction or loss. He contends, however, that the true value of the said launch was not more than £500.- Finally, he admits that the motor launch was destroyed by fire on the 3rd October, 1974, but denies that this was due to his negligence and alleges that the cause of the fire was the unfit and defective condition of the launch which the plaintiff had impliedly warranted to be:

(i) in good and proper condition;

(ii) fit for the purpose required; and

(iii) free from any faults and defects rendering it unfit for the purpose it was required which purpose was known to the plaintiff at all times.

Thus the plaintiff was in breach of the terms, conditions and warranties of the contract between them and so he counterclaims for:-

(1)	the rent paid by him for the month of October, 1974,	£	80
(2)	salvage money paid to the SBA for rescuing the pontoon, and	£	600
(3)	damages for loss of profits for 300 tons of scrap iron at £20.- per ton.	£	6000
	Total	£	6680

The Financial Administrator of the plaintiff company, Pantelis Costas Michaelides, in giving evidence as P.W. 1., stated that the company is the owner of the motor launch "Haralambos" Reg. No. LL333. On the 3rd October, 1974, he entered into a written agreement with the defendant for hire to the latter of the said launch for three months, at £80.- per month. The rent of £80.- for the first month was paid in advance. According to this witness, the actual value of the launch was, in fact, more than the £3,000.- stated in the agreement and its condition was excellent. He further stated that the defendant was asked to insure the launch but as he did not have sufficient time to do this, being a Saturday, he preferred to accept clause (4) of the agreement.

In cross-examination he admitted that a certain Andreas

Keferakis bought a similar boat from the plaintiff company for the sum of £450.-, but this was of smaller size and in a dilapidated condition. Her engine was useless.

This witness denied that there was leakage of petrol from the petrol tanks of the motor launch and that the said tanks were taken off and repaired.

Haris Aivaliotis in giving evidence at P.W. 2, stated that the value of the engine of the motor launch, which was bought in 1963 by his father, would at the time he was giving evidence be about £10,000.- The launch, which was in a good condition, required only some minor repairs near the stern, when he let it to the defendant, which repairs were carried out before delivery.

In cross-examination, he denied that the petrol tanks of the launch were leaking petrol and needed repairs and that such repairs were ever carried out.

On the other hand, the defendant in giving evidence, stated that he hired the launch from the plaintiff as he required it for the salvage of scrap iron from a ship wrecked at Paphos, which he had bought from the Cyprus Government and that he paid rent of £80.- for the first month. According to this witness, as the launch let in water, the plaintiff company undertook to repair it before delivery. When the launch was finally delivered, they found out that the petrol had ran out of the tanks and had soaked the floor boards. They notified the plaintiff who removed the tanks and repaired them. On the day of the fire, he had gone to Paphos to make arrangements for the arrival of the launch but when she failed to arrive, he returned the same afternoon to Limassol where he was informed about the fire and that the crew had been rescued by the SBA authorities who had also towed the pontoon to their Base. The SBA authorities claimed from him salvage reward of £600.-, which, however, they subsequently agreed not to collect.

He also stated that he arranged with the plaintiff company to tow the pontoon to Paphos which was done in about 4-5 days later and he began looking for another launch which he found about 15 days after the accident. The defendant then gave evidence as to what damage he

suffered in order to prove his counterclaim and he called five more witnesses.

D.W. 2, Demetrios Kyriakou, stated that on or about the 15th September, 1974, he was engaged to work for the defendant as a diver but he did not start work until the beginning of October as the launch was under repairs. He further stated that in the morning after the launch was delivered by the plaintiff, it was discovered that there was no petrol in the tanks as this had ran inside the boat.

He was present when the mechanic of the plaintiff, who was called, removed the tanks and repaired them. All the petrol was pumped out of the launch and the tanks re-filled. He further stated that they were towed with the pontoon by another launch of the plaintiff up to Akrotiri where they were left to continue by themselves. About three hours later a fire suddenly broke out at the stern side of the vessel and, as they were unable to find any fire extinguishers on board to put out the fire, which had immediately spread, the whole crew, consisting of three persons, including himself, were obliged to jump into the sea and climb onto the pontoon from where they were rescued by the SBA authorities. According to this witness, they did not work for about 15 days after the accident as they were trying to find another launch.

Andreas Keferakis in giving evidence as D.W. 5., stated that at the material time was in the employment of the defendant and when he warned P.W.2. Haris Aivaliotis, that there was petrol in the launch, he was told by the latter that they intended to seal up one of the petrol tanks and leave only one tank operating. He also gave evidence that he bought a motor launch from Aivaliotis similar to "Haralambos", for £450.- He spent for repairs another £1300.- and sold it for £4,000.- four years later. This launch, namely, "Victor II", was by about 23 feet smaller than "Haralambos" and was in good condition.

The main point of the defendant's defence is that the fire broke out because the launch was not fit for the purpose for which she was required, which purpose was all along known to the plaintiff who was thus in breach of his implied warranty of sea-worthiness of the launch to-

wards the defendant. Moreover, the defendant has tried in his defence to attribute the fire, which occurred while the launch was in his possession and under his control, to such alleged unseaworthiness. Evidence was given that the petrol tanks of the launch were damaged; also that the tanks were repaired and the petrol pumped out of the boat. On the other hand, on behalf of the plaintiff, it has been denied all along knowledge of any defect or repairs to the petrol tanks. It has merely been stated that what was in fact repaired was the stern of the vessel which let in water. Even if I were to accept the defendant's version that there were repairs carried out to the petrol tanks, there is, nonetheless, no evidence by the defendant that such repairs were carried out improperly or negligently. And even if the defendant's version were correct and he was able to prove that the launch was unseaworthy, as he claims, he must at the same time, be able to connect such unseaworthiness to the fire. See *Smith, Hogg and Co. Ltd.* v. *Black Sea and Baltic Central Insurance Co. Ltd.* [1940] AC 997 at 1005 per Lord Wright where he states:

> "The question is the same in either case, it is, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness".

But no evidence, expert or otherwise, has been adduced by him to explain the cause of the fire as, clearly, the mere presence of petrol in the vessel cannot in itself constitute such a cause, since petrol on its own does not ignite or explode unless it comes into contact with some source of fire. Nor is there any suggestion or evidence that there was anything wrong with the engine of the launch.

As the fire occurred while the launch was in the possession and under the control of the defendant, or his servants, the onus is on him to show how it was caused and that the cause was not the result of his negligence. As stated by Lord Denning, M.R., in *Morris*, v. *C.W. Martin & Sons Ltd.* [1965] 3 W.L.R. 276 at p. 282:

> "... if the goods are lost or damaged whilst they are in his (the bailee's) possession, he is liable unless he can show—and the burden of proof is on him to show—that the loss or damage occurred without any

neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty."

Section 109 of our Contract Law, Cap. 149, provides that "the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value of the goods bailed". In Pollock & Mulla (9th edition) at p. 665-6, referring to section 151 of the Indian Contract Act, which is identical to our above section 109, it is stated that "the loss or damage of goods entrusted to a bailee is, prima facie, evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee".

In the present case, from the evidence adduced by and on behalf of the plaintiff, which I accept as true and correct, it is clear to me that the defendant has failed to discharge such burden of proof cast upon him, as he has failed to disprove that the fire and subsequent destruction of the launch was due to his negligence and to prove that the actual cause of the fire was the unseaworthiness and unfit condition of the launch.

The plaintiff company, therefore, succeeds in its claim.

As regards the damages payable to the plaintiff, it has been argued by the defendant that clause 4 of the contract is a penalty clause and that the amount of £3,000.- provided therein is not payable.

Section 74(1) of our Contract Law, Cap. 149, provides:-

"74(1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

A stipulation for increased interest from the date

of default may be a stipulation by way of penalty".

In the case of *The Holy Monastery of Ayios Neophytos Paphos* v. *Yiannakis Neokli Antoniades* (1968) 1 C.L.R. 10 at p. 28, it is stated:

> "It is identical to section 74 of the Indian Contract Act, 1872, as amended by the Indian Contract Act Amendment Act, 1889. As stated in Pollock and Mulla on the Indian Contract and Specific Relief Acts, 8th ed. pp. 480-481, these provisions in India were intended to get rid of the distinction in English Law between liquidated damages and penalties; and to carry the tendency in the English case Law on the subject to its full consequence".

This is in accord, also, with the views of Zekia J. in *Iordanous* v. *Anyftos,* 24 C.L.R. p. 97 (at p. 104) which have been quoted in the judgment of the trial Court and are as follows:

> "It is clear from the wording of the section itself that whether the sums stipulated are in the nature of a genuine pre-estimate of damages or in the nature of penalty, that makes no difference as to the discretion of the Judge to award as reasonable compensation to the party entitled thereto, a sum not exceeding the amount stipulated. No doubt when the amount named in the contract is in the nature of pre-estimated damages, that will carry weight with the Judge in fixing the amount of damages but in either case a Court is precluded from awarding damages beyond and in excess of the amount named in the contract".

Bearing in mind the evidence adduced I accept that the amount of £3,000.- provided by clause (4) of the agreement, is not a penalty clause but represents the actual value of the launch which was the agreed estimate of damages the plaintiff would suffer in the event of its loss. That evidence was given of an allegedly similar launch having been bought for £450.- cannot have any bearing on this case, since it is also in evidence that this latter launch was old and in need of extensive repairs and also smaller.

If, on the other hand, I were to accept the defendant's version as correct and that the accident occurred as a result of the unseaworthiness of the vessel, then, I would hold that the plaintiff was liable to the defendant for his counterclaim and I would have been prepared to award the defendant damages as follows:

(a) The amount of £80.- for the rent of the first month of the hire, which it is accepted by both sides that the defendant has paid to the plaintiff and which he would be entitled to recover.

(b) In para. 15(a) of the answer, the defendant claimed the amount of £600.- as salvage money paid to the SBA, but as, according to his own evidence, this money was never paid by him to the SBA, he is clearly not entitled to it and, therefore, this part of his claim should fail.

(c) In para. 15(c), the defendant counterclaimed for the amount of £6,000.- as damages suffered as loss of profit of 300 tons of scrap iron at £20.- per ton. The plaintiff has argued that such damage is not recoverable as too remote and has cited in support of this proposition section 73 of our Contract Law, Cap. 149.

Loss of profits is recoverable, if such loss was reasonably foreseeable. In *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.* [1969] 3 All E.R. 1496 at p. 1524, it was said that "... in order to establish liability for the damage caused by a breach of contract, the party who has suffered damage does not have to show that the contract-breaker ought to have contemplated, as being not unlikely, the precise detail of the damage... It is enough if he should have contemplated that damage of that kind is not unlikely". (See also Chitty on Contracts, 24th ed., Vol. 1 para. 1572. In the present instance, in the circumstances, I believe that the loss of profits would be a reasonably foreseeable kind of damage.

From the evidence it also appears that the defendant has done all in his power to mitigate his loss by finding another launch as soon as he was able to, in any event, the onus was on the plaintiff to show that the defendant failed to mitigate the damage as a reasonable man ought to have done. (*Roper* v. *Johnson* [1873] L.R. 8 CP 167; *Pilkington*

v. *Wood* [1953] Ch. 770; also Chitty on Contracts (supra) para. 1593).

For all the above reasons, there will be judgment for the plaintiff as per claim with costs to be assessed by the Registrar.

The counterclaim is dismissed.

Judgment as per claim with costs.