1985 November 29

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

PARAIKAS (SUPPLIERS) LTD.,

Appellants-Defendants,

v.

CYPRUS AIRWAYS LTD.,

Respondents-Plaintiffs.

(Civil Appeal No. 6753).

Contract—Carriage of goods by air—The General Conditions for the Carriage of Cargo, Article 8 para. 4(a) and 4(b)—Construction of.

The respondents undertook to carry by air certain goods of the appellants from Larnaca Airport to Birmingham on the terms of the agreement evidenced by an Air Waybill issued for the purpose. On 6.9.77 the goods were transported to London and from there to Birmingham by an aircraft belonging to British Airways, who are the respondents' agents there.

On 13.6.78 respondents were notified by British Airways that the clearance documents were returned to them by the consignees' agents on 21.4.78. On the 14.6.78 the respondents wrote to the appellants inter alia asking for disposal instructions as the U.K. Customs were in the process of removing the goods. Having received no reply they wrote again to the appellants stressing that "if no reply is received we can accept no liability for this shipment and any additional expenses in connection with this case will be debited to you."

A year later the respondents addressed another letter to the appellants informing them that the goods had been seized by U.K. Customs and "charges-storage to 20.3.78 U.K. £2740.00 and British Airways handling U.K. £18.70 total U.K. £2758.70 will be debited to you".

After further correspondence between the parties the respondents brought an action for the above sum and the appellants counterclaimed for the value of their goods alleging negligence of the respondents and breach of the General Conditions of the Carriage of the Goods and of the Warsaw Convention.

Article 8 para. 4(b) of the General Conditions of Carriage for Cargo in so far as relevant reads:

"Para. 4. Failure of Consignee to take Delivery.

(a) .....

(b) The shipper and owner are liable for all charges and expenses resulting from or in connection with the failure to take delivery of the consignment including but not limited to carriage charges incurred in returning the consignment...."

Article 8 para. 4(a) of the said conditions reads:

"... if the consignee refuses or fails to take delivery of the consignment after its arrival at the place of delivery, Carrier will endeavour to comply with any instructions of the shipper set forth on the face of the air waybill. If no such instructions are so set forth, or if such instructions reasonably cannot be complied with, Carrier, after forwarding to the shipper notice of the failure of the consignee to take delivery may: return the consignment on its own service or on any other transportation service to the airport of departure, there to await instructions of the shipper:"

The trial Judge gave judgment for the plaintiffs in the said sum and dismissed the defendants' counterclaim. The defendants appealed.

Held, dismissing the appeal (1) The provisions of Article 8 para. 4(a) of the General Conditions of Carriage For Cargo, which govern the contract of carriage, contain the notion of discretion i.e. it provides for a course which the carrier may take. The discretion should be exercised reasonably and not negligently. On the totality of the circumstances of this case such discretion was reasonably

exercised. There are no reasons justifying interference with the findings of fact and the conclusions drawn therefrom by the trial Judge. The respondents were rightly found not to be liable for the value of the goods.

(2) The respondents acted within the terms of their agreement with the appellants and, therefore, rightly claimed, relying on Article 8 para. 4(b) of the General Conditions of Carriage For Cargo, the amount it was charged for the storage of the said goods.

Appeal dismissed with costs.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 14th April, 1984 (Action No. 394/81) whereby they were adjudged to pay to the plaintiffs the sum of U.K. £2,758.70 for the transportation of goods by air from Larnaca Airport to Birmingham.

St. Kittis, for the appellants.

P. Polyviou, for the respondents.

Cur. adv. vult.

A. Loizou J. read the following judgment of the Court. This is an appeal from the judgment of a Judge of the District Court of Nicosia by which the appellant Company was adjudged to pay the equivalent in Cyprus pounds of U.K. £2,758.70 with interest thereon at 6% per annum from 14th April 1984, till payment and costs. They also had their counterclaim dismissed.

The facts of the case which do not seem to be in dispute are briefly these. The respondent Company undertook to carry by air certain goods of the appellants from Larnaca Airport to Birmingham on the terms of an agreement evidenced by an Air Waybill, issued for the purpose, (exhibit 1). The goods which consisted of clothing were on the 6th September 1977, transported to Birmingham from Larnaca with Flight No. C Y 3422 to London, the said aircraft belonging to the respondent Company and from London to Birmingham with Flight No. B E 3535, an aircraft belong-

ing to British Airways. It is, however, admitted that the respondent Company transported the goods to Birmingham, British Airways being their agent there.

On the 13th June, 1978, the respondent Company received from British Airways a telex (exhibit 3) by which they were informed that the clearance documents were returned to them by the consignees' agents on the 21st April, as they could not obtain import licence or payment from Customer "Stanrose Gowns" and they asked to be given disposal instructions as the United Kingdom Customs were in the process of removing the goods.

It appears that the consignees' agents obtained the documents but they returned them for reasons that do not appear anywhere to relate to the respondent Company. On the following day, that is the 14th June, 1978, the respondent Company wrote to the appellant Company (exhibit 4) informing them that they had information that the said consignment could not be delivered to the consignee for the reason that the consignee did not respond to notices of arrival and they asked to be given disposal instructions, as the U.K. Customs were in the process of removing the goods. Then they asked whether in the circumstances they could have from the appellant Company alternative disposal instructions the soonest possible.

There was no response, by the appellant Company to this letter and on the 22nd July another letter (exhibit 5), was sent to them in which they reminded them of their previous letter of the 14th June (exhibit 4) and informed them that British Airways, Birmingham, had advised them again that that consignment had been seized by the U.K. Customs and that the consignees had one month to claim the goods from the Customs after which they would be removed and they asked them whether in the circumstances the appellant Company would be pleased to give urgently their alternative disposal instructions stressing that "if no reply is received we can accept no lialibility for this shipment and any additional expenses in connection with this case will be debited to you."

A year later another letter (exhibit 6) was sent to the appellant Company which reads:

"This is to refer you further to our letter SFO/UND/EXP/78/020 dated 14th June 1978 and 23rd July 1978 advising you for the non delivery of the above consignment for which no reply is yet received.

In this respect, we wish to inform you that we have been advised by British Airways Birmingham that the gowns have now been seized by U.K. Customs and charge-storage to 20th March 1978 U.K. £2,740.00 and British Airways handling U.K. £18.70 total U.K. £2,758.70 will be debited to you."

It was some months later that the appellant Company responded to it by letter dated the 22nd October, 1974, (exhibit 7) in which they say the following.

"We received your letter dated 23rd July 1979 and noted the contents. Regarding the consignment sent, please note that our customer in England signed a Bill of Exchange for the above goods, but on maturity they failed to pay it. Until now we have received no reply as to when they will pay the above Bill. Our bankers the Bank of Cyprus Ltd., Nicosia, informed us that their corresponding bank in England returned the above bill unpaid, which they returned to us. Under the circumstances we gave instructions to our solicitors to proceed with the case in Court in order to collect our invoice value. As regards now the storage charges amounting to £2,758.70, this is not our responsibility because our customer accepted delivery of the above goods upon arrival in England, and we have no responsibilitiy for the delay in clearance of the goods, and the storage charges involved.

In the meantime we would like to know the situation regarding the above goods. Looking forward to have your answer regarding the matter."

To this the respondent Company replied by their letter of the 14th November 1979 which reads as follows:

"Please refer to your letter KO/SO dated 22nd October, 1979, on the above quoted subject.

We were surprised to note your statement that you are not responsible for the Storage Charges amounting

to U.K. £2,758.70 because your customer accepted delivery of the above goods.

The above quoted amount represents charges for the storing of the goods because they were not received by your customer and had to remain in the stores at Birmingham. Furthermore any points of dispute between you and your customer do not and should not render Cyprus Airways liable for the payment of charges which have apparently been the result of such dispute.

We have repeatedly advised you in the past both by telephone and in writing that the goods remained undelivered and requested urgent disposal advice but we regret to say that your only response to our requests was your letter under reference:

Our conditions of carriage provide inter alia, Para. 4.)

(a) . . . . . .

(b) The shipper and owner are liable for all charges and expenses resulting from or in connection with the failure to take delivery of the consignment.

In view of the circumstances stated above and under the conditions of carriage we bear no liability either on the seizure of the goods or on the charges quoted above. You are, therefore, requested to arrange settlement of the amount of U.K. £2,758.70 the soonest possible.

Without prejudice to our rights."

British Airways in their note (exhibit 9), point out that "despite several warnings this consignment has never been collected. The freight has now been seized by U.K. Customs and we have no alternative but to bill all outstanding charges at Birmingham to shipper."

The final document produced by consent is the British Airways Invoice charging Cyprus Airways with the amount claimed.

The respondent Company relied mainly on Article 8, paragraph 4(b) of the General Conditions of Carriage For Cargo which no doubt and no-one disputed that it governed this contract of carriage. In so far as relevant it reads:

"Para. 4. Failure of Consignee to take Delivery.

(a) .....

(b) The shipper and owner are liable for all charges and expenses resulting from or in connection with the failure to take delivery of the consignment including but not limited to carriage charges incurred in returning the consignment ...."

The learned trial Judge in his judgment considered the position of the respondent Company as regards these goods and the storage incurred in respect of them and referred to Article 8 (1) (a) of the conditions of carriage by which the carrier had to deliver the consignment only to the consignee and to Article 8 (1) (b) according to which delivery of the consignment would be made upon written receipt by the consignee, and concluded that the defence of the defendants could not stand, and that in accordance with Article 8, paragraph 4(b) they must pay for the storage charges.

It is obvious that the respondent Company acted within the terms of the agreement entered into between them and the appellant Company and rightly claimed and was awarded by the judgment of the Court the amount it was charged for the storage of the said goods.

With their counterclaim the appellant Company sought to recover the value of their goods on the ground of as they alleged, the negligence of the respondent Company, and that the latter acted contrary to the terms of the General Conditions of Carriage for Goods and of the Warsaw Convention. In particular they alleged that the respondent Company failed and or neglected to inform them in time for the failure of the consignees to take delivery of the goods, that they failed to take steps for the return of the goods to the airport of departure, that they failed to take steps for the sale of the goods by public or private auction, that they stored the goods without any authorisation in a way detrimental to them and as a result thereof, they were

seized by the U.K. Customs, and that they did not take any steps for the protection of their interests and that they acted contrary to their duties as carriers.

As regards the contention of negligence concerning the alleged failure of the respondent Company to inform the appellant Company in time for the failure of the consignees to take delivery of the goods, the learned trial Judge found that such allegation was contrary to the facts. As already seen the respondent Company was informed by British Airways on the 13th June, 1978, that the consignees failed to collect the goods and next day they themselves informed the appellant Company of such failure about which, it is apparent from the subsequent correspondence, that the appellant Company knew already.

Regarding the contention that the respondent Company failed to take steps for the return of the goods to the airport of departure and take steps for the sale of the goods, the learned trial Judge found that these matters were governed by Article 8 paragraph 4 (a) of the Conditions of Carriage which provides that:

> ".... if the consignee refuses or fails to take delivery of the consignment after its arrival at the place of delivery, Carrier will endeavour to comply with any instructions of the shipper set forth on the face of the air waybill. If no such instructions are so set forth, or if such instructions reasonably cannot be complied with, Carrier, after forwarding to the shipper notice of the failure of the consignee to take delivery may: return the consignment on its own service or on any other transportation service to the airport of departure, there to await instructions of the shipper;"

The construction placed by him on the said provision was that it provides a course which the carrier may take. The words, used as he pointed out being "may" and not "shall."

It is correct that this provision introduces the notion of discretion which in our view has to be exercised reasonably in the circumstances and not negligently. Indeed the respondent Company repeatedly sought from the appellant Company their instructions of disposal and none was given.

On the contrary as it appears from the totality of the circumstances and the letter of the 14th November 1979, in particular, the goods in question had to be stored somewhere and the respondent Company stored them with the stores of British Airways in Birmingham and their said handling agents charged them for such storage. They in turn claimed from the appellant Company on the strength of the contract between them as the goods had not been taken delivery of by the consignees. In these circumstances the learned trial Judge concluded that this ground of negligence could not succeed.

On the question of the goods having been stored without, as alleged, any authorization and in a way detrimental to the appellant Company and as a result of which the goods in question were seized by the Customs Authorities there, the learned trial Judge concluded that this was also unfounded as the facts were that the goods were stored prior to the collection of the documents by the consignees and were left there unclaimed. Furthermore as regards the allegation that the respondent Company was negligent in not taking any steps for the protection of the interests of the appellant Company and that it acted contrary to their duties as carriers he found that no evidence existed and he went further to conclude that on the evidence available the respondent Company acted in accordance with their duties as carriers and in the interests of the appellant Company.

It is as a result of these findings and the conclusions drawn thereon and the interpretation placed by him on the relevant terms of the agreement between the parties that the counterclaim was dismissed.

The appellant Company by their present appeal in essence contest the construction given by the learned trial Judge to the relevant Conditions of Carriage and their legal significance and they also challenge his conclusions that the respondent Company was not negligent, and that it acted within its authority and in discharge of its duty to protect the interests of the appellant Company.

We have referred at length to the correspondence exchanged, which in fact consisted at one stage of successive written communications addressed by the respondent Com-

pany to the appellant Company to which the latter did not respond and the rest of the facts of the case from which, in our view it was rightly concluded by the learned trial Judge that there was no negligence on the part of the respondent Company in having the goods in storage awaiting the instructions for disposal of the appellant Company. The question of the return of the goods to the port of departure is governed as already seen by Article 8, paragraph 4(a) to which reference has been made and we agree with the learned trial Judge that as already pointed out, this provision contains the notion of discretion which on the totality of the circumstances it was reasonably exercised in the interests of the appellant Company. It was clear that the absence of any response by them was apparently on account of their awaiting the outcome of their efforts to resolve their dispute with their client, for which the respondent Company could not be blamed.

On the whole therefore and having given our best consideration to the arguments advanced on behalf of the appellant Company, we have not been persuaded that there are any reasons justifying our interference with the findings of fact and the conclusions drawn therefrom by the learned trial Judge as regards the question of the alleged negligence and the exercise of their discretion under Regulation 8 (4) (a) of the General Conditions of Carriage for Cargo. The respondent Company was in our view rightly found not to be liable for the value of the goods seized by the U.K. Customs and as already said they were entitled to the storage fees they incurred and for which the judgment appealed from was given in their favour.

For all the above reasons the appeal is dismissed with costs.

Appeal dismissed with costs.