[CREAN, C.J., AND HALID, J.]

MUNICIPAL CORPORATION OF KYRENIA, *Appellants*,

v.

COSTAS HARALAMBOU CATSELLIS, *Respondent*.

(*Civil Appeal No.* 3704.)

Agreement—Breach by both parties—Condition precedent—Warranty.

By an agreement in writing the appellants undertook to supply respondent with all the electric current needed by him for his hotels and houses, and in particular that they would run their engines 8 or 9 hours a day from 15th May to 15th October each year to supply the respondent with current for the working of his refrigerators during the day time. The respondent on his part agreed to pay a minimum amount of £150 for the price of current consumed during any one year. The appellants failed to run their engines for 8 or 9 hours a day as agreed and the respondent thereby suffered damage. The price of the actual amount of current consumed and paid for by the respondent was £92. 3*s*. 3½*p*., and, on his refusal to pay more on account of the damage he had sustained, the appellants brought this action for the difference between that sum and the £150 stipulated in the agreement, namely £57. 7*s*. 5*p*. The defence raised was that the appellants by failing to run their engines as agreed had broken their agreement, and that the running of their engines as agreed was a condition precedent to the respondent's liability for payment of the £150. Alternatively the respondent claimed £57. 7*s*. 5*p*. damages for breach of contract by the appellants.

Held: The stipulation as to the quantity of current supplied did not amount to a condition precedent, but to a warranty and though a breach might give rise to a claim for damages it would not affect the other terms of the contract.

Appeal from a judgment of the District Court of Kyrenia.

S. Christis for the appellants.

Ch. Demetriades for the respondent.

The judgment of the Court was delivered by:—

CREAN, C.J.: This is an appeal from the District Court of Kyrenia dismissing the action of the Municipal Corporation of Kyrenia for £67. 6*s*. 8*p*. for electric current supplied to the Defendant from the 1st September, 1939, to the 31st August, 1940.

The action was founded on a written agreement entered into between the parties on the 31st March, 1938. This agreement was to remain in force for five years from that date.

It was agreed that the Municipal Corporation of Kyrenia would supply the defendant with all the electric current needed by him for the lighting and ventilating of his hotels and houses, and also the current needed by him for the machinery installed in these hotels and houses.

As it was not usual for the Municipality to supply current during the daytime, a clause was contained in this agreement, whereby the Municipality agreed that they would run their engines for 8 or 9 hours a day from the 15th May to the 15th October each year, in order to be able to supply the defendant with current for the working of his refrigerators in daytime. This term of the contract is contained in clause 3 of the agreement, and in the following clause the defendant agrees to get all his supply of electric current from the Municipality.

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In the next clause of the agreement the price of the current is agreed upon, and after reciting what the price is to be, the agreement reads :—" But in no case the price of all the electric current consumed during each year shall be less than the amount of £150 ". The agreement goes on to say that should consumption at the above rates per kilowatt be smaller, the purchaser is bound to make up the amount of £150 on the 31st of August each year. This is clause No. 5 in the agreement, and though it is not a particularly well worded one, we think it conveys moderately clearly that the defendant, in consideration of the low price at which the current would be supplied to him, agreed to pay £150 a year, even, if he did not use that amount of current.

From the 1st September, 1939, to the 31st August, 1940, the current consumed by the defendant was valued at £92. 3*s*. 3½*p*. according to the price agreed on between the parties. Of this amount £9. 19*s*. 3*p*. was due by the Military Authorities, and as that sum was paid by them it has to be deducted from the £92. 3*s*. 3½*p*. and so it appears the value of current actually consumed by the defendant amounts to £82 odd. The difference between the price of current supplied and £150 is the amount claimed by the Municipality, and in their reply to the defence of the defendant they say that amount is £57. 7*s*. 5*p*. In that figure the sum of £9. 19*s*. 3*p*., paid by the Military Authorities is taken into account and credited.

The evidence shews that the engines of the Municipality for generating electricity were not working the 8 or 9 hours daily between the 15th May and 15th October, 1940, as agreed on between the parties, and as a consequence thereof the defendant was put to considerable expense by way of having to purchase ice for his hotel. It was alleged by one of the witnesses for the Municipality that the defendant verbally agreed to the non-fulfilment of this part of the contract, but the District Judge did not accept that evidence, and found as a fact that the defendant never agreed to the abandonment of that part of the agreement which provides for the engines working for 8–9 hours a day between 15th May and 15th October, 1940. The Court having found this, it is not necessary to discuss whether a formal written contract like the present one, can be varied by a verbal agreement during its continuance.

It was argued in the District Court that as the Municipality only failed to carry out one part of the contract, the only right the defendant had, was to ask for damages for such breach. As to this the trial Judge said : " No party to an agreement has a right arbitrarily to fail in the fulfilment of an obligation of his, and then claim from the other contracting party to carry out his own obligation, the fulfilment of which is dependent on the obligation which he himself has failed to act up to ". From these remarks it would seem that the trial judge took the view, that as the Municipality failed to run their engines between the 15th May and 15th October for the prescribed hours daily, they were not entitled to bring their action or to be paid the £150 the minimum amount which the defendant agreed to pay annually in any event even if this consumption amounted to less than that. This is not an unreasonable view to take of the transaction but it does not seem to us to be in conformity with the law on the point.

It appears that neither side wants to repudiate or rescind this contract, and that seems to us a very wise attitude to take up; for, obviously both parties derive mutual benefits from it. The defendant under this contract gets a cheaper rate for his current than the ordinary consumer and as the Municipality sell a quarter of their entire current to him they must derive a considerable profit from this large supply to the defendant.

The record of the proceedings shews that counsel for the Municipality argued before the District Court that notwithstanding their failure to run their engines for the prescribed hours in day time, they were entitled to succeed in their action under clause 5 of the agreement which fixes £150 as the minimum amount payable by defendant. It was submitted by counsel that the above failure to run the engines in day time did not go to the root of the transaction, and if the defendant had any remedy for the breach by them of the stipulation as to daytime supply, it was by way of damages only.

For the defendant Mr. Demetriades argued that the running of the engines in day light as agreed upon, was a condition precedent to the defendant being liable for the £150, and as that condition was not fulfilled the Municipality were not entitled to succeed in their action. But to make his client's position secure he filed a counter-claim and in that, claimed the difference between £150 and the price of the current with which he was actually supplied.

These were the arguments put before the trial judge. And in this Court Mr. Christis and Mr. Demetriades have substantially relied *on the same arguments in presenting this appeal.*

The question, whether a stipulation in a contract is a condition precedent or a warranty appears from the books to have been always one of great difficulty. As said by Lord Justice Bowen in *Bentsen* v. *Taylor Sons & Co.*, (2 Q.B.D. 1893, p. 280) it is often very difficult to decide whether a representation which contains a promise amounts to a condition precedent or is only a warranty. His Lordship goes on to say, " There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances ", and suggested that " in order to decide this question, one of the first things you would look to is, to what extent the accuracy of the statement would be likely to affect the substance and foundation of the adventure which the contract intended to carry out ".

If we follow, that, and look at the contract in this case, we see that by the first clause the Municipality undertakes to supply the Defendant with all the electric current he needs for his hotels, houses and machinery. The third clause of the agreement promises that the Municipality shall operate their engines for 8 or 9 hours a day between 15th May and 15th October. The fourth clause is that the defendant binds himself to get all his electric current from the Municipality. The fifth is the clause whereby the defendant is to pay £150 a year as a minimum amount for all the current consumed, and the sixth is that the agreement will remain in force for five years from the date of it.

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The adventure, which the contract in this case is intended to carry out, is the supply of electric current to the defendant for all his business enterprises. If the Municipality had ceased entirely to supply electric current as agreed upon, then the whole adventure would have been frustrated by their refusal, and they would be debarred from bringing any action on foot of the agreement. In other words a condition precedent to the Municipality succeeding in any action on this agreement would be the supply by them of electric current to the defendant. A lesser supply of current than that agreed upon, would not in our opinion entitle the defendant to rescind or repudiate the contract because such lesser supply does not go to the root of the transaction, and is not a complete frustration of the object of the contract; therefore, the Municipality were entitled to institute this action. But such a failure or breach of the agreement though not a complete defence to an action for performance by the defendant entitles the defendant to damages for the breach by the plaintiff, and as neither party wishes the contract to be rescinded, the claim by the plaintiffs and the defendant's counterclaim for damages appear to us to be the proper course of proceedings in a case such as this.

The point of law raised in the case is one of some difficulty, for at the first glance it might appear that the Municipality had no right to bring their action before they had performed every duty imposed upon them by the written agreement. But the decided cases are against that view, and indicate that where there are several promises in a contract the failure to perform one of them, will not debar a plaintiff from bringing an action on the contract, even though he has been at fault himself in performance.

Though we decide that the Municipality were entitled to judgment in this action we are bound to say that the filing of the action seems to us a rather uncalled for proceeding, considering that the defendant takes a quarter of their whole supply of electric current, and that they failed to carry out their own promise to work their engines in day light between May and October, as they undertook to do in their agreement.

The filing of this action by the Municipality we think amounts to oppressive conduct on their part, and consequently though they succeed in their action no costs of it, here or in the District Court, are allowed to them.

On the counterclaim of the defendant we find that he is entitled to claim £57. 7*s*. 5*p*. the price of current with which he was not supplied and judgment is given for that amount.

The Order of this Court, therefore, is that the appeal of plaintiffs is allowed and judgment given in their favour for the amount they claim. No costs allowed. And on the counterclaim judgment is given for defendant for £57. 7*s*. 5*p*. No costs of appeal can be allowed, but the costs on counterclaim in the Court below is allowed.