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CARPANTINA SOCIETE ANONYME v. THE FIRM P. IOANNOU & Co.

[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

(Jan. 28, Mar. 10, July 31, 1942)

CARPANTINA SOCIETE ANONYME, *Appellants*,

v.

THE FIRM P. IOANNOU & Co., *Respondents.*

(*Civil Appeal No.* 3706.)

Territorial Jurisdiction of District Courts—Courts of Justice Law, 1935, section 15 (1) (a)—Cause of action—Rules of Court, 1938, Ord. 6, r. 1 (e)—Practice—Service on agent under Ord. 5, r. 8—Conditional appearance—Defence under protest—Sale of goods—c.i.f. Contract—Breach—Failure to ship—Failure to tender shipping documents—Conflict of laws—Submission—Agreement to refer disputes to foreign Court.

The respondents were a firm of merchants of Famagusta and the appellants were a Roumanian Société Anonyme who carried on business as timber merchants and exporters in Bucharest, Roumania. By a contract in writing dated 24th May, 1939, at Bucharest, the appellants undertook to ship timber to respondents c.i.f. Famagusta at an agreed price. During all material times the appellants had as their representative in Cyprus one C. H. L., and it was through him that most of the correspondence relating to the contract passed. The appellants failed to ship the timber from the port of Constanza in accordance with the contract, and, though this was not pleaded, they did not forward the shipping documents relating to it to the respondents.

The appellants being in Bucharest, the respondents obtained leave to serve the writ upon the said C. H. L., the appellants' representative in Cyprus. The appellants filed a conditional appearance and later a defence under protest denying that the District Court of Famagusta had jurisdiction to entertain the claim, or that service on C. H. L. was proper service. The appellants further contended that by a special clause in the contract the only competent Court to try the action was the Commercial Court at Bucharest.

Held: (i) As the contract was not entered into in Cyprus and as it could not be considered to have been made by or through an agent trading or residing in Cyprus on behalf of a foreign principal, the cause of action did not arise either wholly or in part within the jurisdiction, within the meaning of section 15 (1) (*a*) of the Courts of Justice Law, 1935, and, therefore, the Court had no jurisdiction to hear and determine the action.

(ii) In order to bring a case within Order 6, rule 1 (*e*) of the Rules of Court, 1938, there must be a contract and the action founded on a breach of it, and the breach complained of must be one that was committed within the jurisdiction. If it were possible for the respondents to bring their case within this rule by saying that there was a breach of the contract

in Cyprus by the appellants not forwarding the shipping documents to Cyprus as agreed on, they were debarred from arguing it before the Court as they had failed to plead it.

(iii) A special clause in a contract giving exclusive jurisdiction to a foreign Court is similar to a reference to arbitration and is binding on the parties.

Per Griffith Williams, J.: (i) Presumably, the failure to forward shipping documents whether the goods were despatched or not would constitute a breach of contract sufficient to found a cause of action within the jurisdiction.

(ii) A defendant by filing an unconditional appearance is considered to have submitted to the jurisdiction of the Court, in the same way as he might have done by prior express agreement. If, however, as in the present case, he files an appearance under protest, or a conditional appearance, he is at liberty either to apply to have service on him set aside or to plead in his defence the Court's lack of jurisdiction.

Mayer v. *Claretie* (1890), 7 T.L.R. 40, D.C., and *Firth* v. *De Las Rivas* (1893) 1 Q.B. 768, followed.

Judgment of the District Court of Famagusta reversed.

Appeal from a judgment of the District Court of Famagusta (Action No. 200/40) given in favour of the respondents (plaintiffs).

J. Eliades for the appellants.

P. N. Paschalis for the respondents.

The facts appear sufficiently in the judgments:

CREAN, C.J.: This is an appeal from the District Court of Famagusta whereby judgment was given in favour of the respondents for the sum of £138. 1*s*. 3*p*. as damages for a breach of a contract alleged to have been entered into at Famagusta in the month of May, 1939.

The appellants against whom judgment was given are the Carpantina Société Anonyme Roumaine pour l' Industrie Forestiere of Bucharest, Roumania; and their representative in Cyprus, at the time of the contract, was Costas Haji Loizou. The respondents are P. Ioannou & Co. of Famagusta; and they instituted this action, on foot of which they got the judgment appealed from, on the 19th of February, 1940. Their claim against the appellants was for £159. 4*s*. damages for breach of a contract entered into at Famagusta in May, 1939, between them and C. Haji Loizou of Limassol as agent of the appellant company. The allegation in the respondents' claim is that the appellants undertook to sell and deliver to them c.i.f. Famagusta 226 cubic metres of timber at 62*s*. per cubic metre which they failed and refused to deliver. The claim for damages is the difference between the market price

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plus insurance, freight and war risk insurance, which amount to £983. 16*s*. and the contract price c.i.f. which is £824. 12*s*. That difference is £159. 4*s*., but as the learned President, District Court, was of opinion that there was no agreement as to the payment of £21. 2*s*. 6*p*. for war risk insurance this amount was deducted from the damages claimed and judgment given for the respondents for £138. 1*s*. 3*p*.

The negotiations between the parties resulted in a contract in writing, and this contract in writing was produced. It is dated the 24th May, 1939, and is headed "Bucharest". Possibly because it was written by the appellants who have their place of business there, and signed by them there. It is set out in this document that the place of execution of the contract is Constanza, and it may be taken, that is the port from which the timber was to be shipped to Famagusta to the respondents. In case of *force majeure* provision is made in the contract to safeguard the appellants. And provision is also made for dealing with any dispute that may arise. As to this term of the contract the wording of it is as follows: "Whatever the nature of the dispute which may arise on the execution of the present contract, the purchaser will have no right either to repudiate the agreed payment or the goods on arrival of the steamer and the dispute shall be later settled amicably. In case of no amicable settlement the dispute shall be brought before the Commercial Tribunal of Bucharest, which alone is competent."

The appellants failed to ship the timber to the respondents, and so the respondents brought their action for damages for breach of the above contract, and obtained judgment for the amount above named.

In their defence to this action the appellants at the outset say that is made under protest. They plead that the District Court of Famagusta had no jurisdiction to order service of the summons on Haji Loizou, their representative in Limassol. And that the said Court had no jurisdiction to hear and determine the action because (*a*) the cause of action did not arise either wholly or in part within the limits of the district of Famagusta and (*b*) the defendants, that is the appellants now, did not reside and did not carry on business at the time of the institution of the action within the district of Famagusta. Another defence raised by them is that by the special clause in the agreement already referred to any difference, of any nature, arising out of the contract sued upon, the only competent Court to try that difference is the Commercial Court, Bucharest. And a

further defence raised by the appellants is that the service of the writ of summons on Costas Haji Loizou is not good service and that the requirements prescribed by Order 5, rule 8, under which it purports to be made, were not complied with, inasmuch as the contract was entered into between the respondents and the appellants themselves and not between their agents and the respondents.

The learned President, District Court, held that the District Court of Famagusta had jurisdiction under section 15 of Law 38 of 1935 to hear and determine the action. He also held that the parties by agreement cannot oust the Famagusta District Court of the jurisdiction vested in it, and the authority cited by him for this, is the decision of this Court in the case of *Carabet Nivogosian* v. *Phocéene S/S Co.* C.L.R., Vol. 7, p. 51. The relevant remark of this aspect of the case is made by Sir Charles Tyser, Chief Justice, where he says, "I should add that this being a foreign action, the rights of the parties are determined by English law. The English law is that the law to govern the contract is the law intended by the parties. Here the parties have agreed that Hellenic law should apply, and we should follow that law if proved. In the absence of proof that foreign law differs from the domestic law it is presumed to be the same." On the whole, I would say, this authority is more in favour of the appellants than the respondents.

It was also held that the service of the writ of summons on Costas Haji Loizou was valid and from the learned President's judgment he decided this point mainly on the ground that no proceedings were ever instituted by or on behalf of the appellants to set aside the order substituting service of the writ on Costas Haji Loizou. The learned Judge refers to Order 64, rule 2, which lays down that "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any step after knowledge of the irregularity." And the trial Judge then sets out the many different steps taken by the appellants after this alleged irregularity as to substituted service and on account of them decided that the appellants must be held to have waived the irregularities pleaded by them.

From the judgment of the District Court the appellants have appealed and their first ground of appeal is that the District Court of Famagusta had no jurisdiction to hear and determine this action; and of course if they are right in this submission that would be an end of the case; for, an order or judgment made without jurisdiction is of no value.

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In support of this contention Mr. Eliades for the appellants refers to section 15, sub-section 1 (*a*) of Law 38 of 1935, and that sub-section gives original jurisdiction to every District Court to hear and determine all actions where the cause of action has arisen either wholly or in part within the limits of the district in which the Court is established. It is submitted for the appellants that the cause of action, if any, was the failure by the appellants to ship the timber from Constanza to Famagusta for the respondents, and that this failure amounted to a breach of the written contract and so gave the respondents their cause of action against the appellants. Of course the appellants do not admit any breach but they argue that if the failure to ship the timber in this case should be considered as a breach of the contract it is that breach alone which could be considered as giving the respondents a cause of action.

The case of *Johnson* v. *Taylor Bros & Co. Ltd.*, Appeal Cases, 1920, is cited by the appellants as an authority in support of the contention that the failure to ship goods at a foreign port under c.i.f. contract is the essential breach in such a contract, and where such a breach takes place, it is that breach which would give rise to a cause of action.

The head note to the above case reads: "Leave will not be granted under Order 11, rule 1, to a purchaser of goods under a c.i.f. contract from a foreign vendor to serve notice of a writ of summons on the vendor outside the jurisdiction in an action for breach of contract, where the essential breach on which the action is founded is the failure to ship the goods at the foreign port, upon the allegation of the purchaser that the breach is the failure to tender shipping documents within the jurisdiction." The case arose out of facts which were very similar to the facts in this case. An application was made to serve notice on a vendor outside the jurisdiction where the essential breach was failure to ship goods from a port outside the jurisdiction. As the goods were not shipped naturally the shipping papers were not forwarded to England, the forwarding of which was part of the contract. On the ground that this breach of the contract regarding the shipping papers occurred in England leave was given to serve the writ outside the jurisdiction and the Court of Appeal supported this view. But on the case being heard by the House of Lords the decision of the Court of Appeal was reversed and in the judgment of Lord Buckmaster it is said, "In a c.i.f. contract, in the form before us, there are two obligations cast upon the vendors—the one is to place the goods upon the vessel at the foreign port and the other to forward the shipping documents to the purchaser."

The Courts in England followed consistently the decision in *Rein* v. *Stein* 1. Q.B.D., 1892, which held that, if any part of the contract is to be performed within the jurisdiction, the breach of that part brings into play the operation of the rule. In other words service out of the jurisdiction would be allowed. And as to this Lord Buckmaster says, " Accepting this principle, there still remains the duty of examining whether this breach is the real matter in dispute. In the present instance the refusal to ship the goods is, in my opinion, the whole of the breach. Unless and until the goods are shipped the shipping documents cannot come into existence, and refusal to tender such documents is consequent upon the refusal to put the goods on board."

From this decision it is clear that a Court in giving leave to serve out of the jurisdiction must have regard to the real breach in respect of which the action is brought and not merely to a breach on which it is necessary to rely to found jurisdiction under the rule. It was argued by counsel for the respondents that the cause of action in this case arose in part within the jurisdiction of the Famagusta District Court inasmuch as the contract was made in Famagusta, payment was to be in Cyprus, and the tender of documents was to be in Cyprus. And that as a consequence of the decision in *Johnson* v. *Taylor Bros.* the English rule was changed in such a way as to allow of the non-tendering of documents being considered as a breach even though the first breach was non-shipment.

It is perfectly accurate as stated by counsel for the respondents that the English rule was altered on account of the above decision, but it still appears to be necessary in order to bring a case within this branch of the sub-rule that (1) there must be a contract and the action must be founded on a breach of it, (2) the breach complained of must be one that was committed within the jurisdiction, and (3) the defendant must not be domiciled or ordinarily resident in Scotland or Ireland.

If it were possible for the respondents to squeeze their case under this rule by saying that there was a breach of the contract in Cyprus by the appellants not forwarding the documents to Cyprus as agreed on, it seems to me they are debarred from arguing that now, because, the learned trial Judge declined to hear any evidence as to non-delivery of shipping documents on the ground that there was no pleading on that point.

It has been argued further by counsel for the respondents that " cause of action " referred to in the above section 15 of Law 38 of 1935 means " every fact which is material

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to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse" and as he alleges the contract was made in Cyprus, payment was to be made in Cyprus and the shipping documents were to be sent to Cyprus, he submits the cause of action partly arose in Cyprus and so the case could be heard and determined in Cyprus. But as set out in Halsbury's Laws of England, Vol. 1, p. 8, the popular meaning of the expression "cause of action" is that particular act on the part of the defendant which gives the plaintiff his cause of complaint. In this case I would say, without a great deal of hesitation, that the particular act of the defendant which gave the plaintiffs their cause of complaint was the failure of the defendants to ship this timber from the Roumanian port Constanza to Famagusta and that that was the only breach on which the plaintiffs founded their action, and that view is, in my opinion, borne out by the plaintiffs' own statement of claim. If that be so, then there was no jurisdiction in the Famagusta District Court to hear and determine the case. The two main grounds on which the respondents rely for their argument that the cause of action partly arose in Cyprus are that payment was to be made in Cyprus and the shipping documents were to be tendered in Cyprus. Neither of these is pleaded in the respondents' statement of claim and in any event no payment would be made if the goods were not shipped and no shipping documents would be tendered if there were no shipment as in this case.

The next point raised by the appellants is that they did not reside or carry on business within the jurisdiction of the Famagusta District Court and so it is argued again the Court had no right to hear and determine the action. There seems to be no doubt from the evidence that Costas Haji Loizou represented the appellants in Cyprus and the order of the Court directed service of the writ upon him. But considering that the written contract was not signed by him but by the appellants themselves in Bucharest it is very doubtful if he could be considered such an agent as would lead one to conclude that the appellants carried on business in Cyprus. He took no step of any importance in this matter without consulting the appellants, and from the record of the evidence he does not appear to have had any authority to do any act which would bind the appellants. In my opinion Costas Loizou was not such an agent as could lead one to the conclusion that the appellants carried on business in Famagusta district and consequently they did not come within that part of section 15 which says the defendants must reside or carry on business in the district before an action can lie against them in the District Court.

The term in the written contract that any dispute which may arise on the execution of the contract shall be brought before the Commercial Tribunal of Bucharest has been argued at some length and the submission for the respondents on this point is that it contemplates only disputes which might arise after the contract has been carried out and disputes arising before the performance of the contract are not within the jurisdiction of the Bucharest Commercial Tribunal. As against this view counsel for the appellants refers to the case of *Austrian Lloyd S/S Co.* v. *Gresham Life Assurance Society Ltd.*, 1903 1 K.B.D., p. 249. In this case a policy effected on the life of a foreigner with an English Company contained a condition that the interested parties expressly agreed to submit all disputes which might arise out of the contract of insurance to Courts having jurisdiction in such matters in Budapest, and it was held that an action on the policy in England would be stayed. Other decisions to the same effect were cited and the principle emerging from them is that such a clause in the contract is similar to a reference to arbitration and is binding on the parties.

My opinion is that this clause in this agreement includes all disputes arising out of the contract; for, if it were not so there would have been definite and unambiguous words in it to shew that disputes arising before the execution of the contract were excluded from its operation.

To me, there seems a certain amount of difficulty in coming to a conclusion where this contract was made. It is said by the respondents it was made in Famagusta and by the appellants that it was made in Bucharest.

The evidence goes to shew it was drawn up by the appellants in Bucharest and signed by them there, and by the respondents later in Famagusta. In a letter of the 18th May, 1939, the appellants' representative states that the lowest price for the timber is 62 shillings. On the following day the respondents write and counter-offer 60*s*. and in the event of that being considered as an impossible price then the representative is to offer 61*s*. There is a gap between that date and the 23rd May when a cable was evidently received from the appellants and a note put on the specification of the timber that the respondents accept the price 62*s*. for delivery c.i.f. Famagusta.

From the correspondence between the parties produced it is almost impossible to say where the contract was made. It shews, however, that respondents' offer of 60*s*. was refused and their offer of 61*s*. also refused. But ultimately the price of 62*s*. was agreed on but there is nothing to shew if that sum of 62*s*. was offered by respondents and accepted by appellants, or if it was the original price quoted by

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appellants and accepted by the respondents. The final agreement, however, was evidently made in Bucharest as the appellants drew up the contract there, signed it there and then sent it to Famagusta for signature by respondents.

For the reasons I have given I am of opinion this appeal should be allowed with costs; and apart from those reasons, I think, the appellants were put at such a disadvantage in being called on to proceed with the case with Roumania in such a disturbed state that it was almost impossible for them to defend the action as effectively as they might have done had they been present.

GRIFFITH WILLIAMS, J.: This is an appeal from a judgment of the District Court of Famagusta given in favour of the respondents (plaintiffs in the Court below) for the sum of £138. 1*s*. 3*p*. as damages for breach of contract.

The plaintiff-respondents are a firm of merchants of Famagusta and the defendant-appellants are a Roumanian Société Anonyme, who carry on business as timber merchants and exporters in Bucharest, Roumania.

The dispute in this action arose out of a contract by correspondence reduced into a formal contract in writing dated 24th May, 1939, between appellants and respondents whereby the appellants undertook to ship timber to respondents in accordance with a specification therewith at a price of 62*s*. per cubic metre. During all material times the appellants had as their representative in Cyprus one Costas Haji Loizou, and it was through him that most of the correspondence relating to the contract passed. The appellants failed to ship the timber from the port of Constanza in accordance with the contract, and, though this was not pleaded, did not forward the shipping documents relating to it to the respondents.

The respondents brought their action for damages, claiming £159. 4*s*. for failure to ship the timber, being the difference between the market price plus freight and insurance and war risk insurance and the c.i.f. contract price. In his judgment the learned President, District Court, deducted from this amount the sum of £21. 2*s*. 6*p*. claimed for war risk insurance and gave judgment for £138. 1*s*. 3*p*. only.

The appellants being in Bucharest, the respondents obtained leave to serve the writ upon the said Costas Haji Loizou, the appellants' representative in Cyprus. The appellants filed a conditional appearance and later a defence under protest denying that the District Court, Famagusta,

had jurisdiction to entertain the claim, or that service on Costas Haji Loizou was proper service. The appellants further contended that by a special clause in the contract the only competent Court to try the action was the Commercial Court of Bucharest.

The questions that this Court has to consider in this appeal are as follows :—

(1) Whether the cause of action arose wholly or in part within the district of Famagusta.

(2) Whether the defendants reside or carry on business within the district of Famagusta.

(3) Whether service on Costas Haji Loizou was good service.

(4) Whether the appellants by taking no steps to set aside service on Loizou but proceeding further in the action thereby waived their rights, accepted service and submitted to the jurisdiction of the Court.

(5) Whether the following provision in the contract ousted the District Court of Famagusta from jurisdiction to hear the matter :—

> " Whatever the nature of the dispute which may arise on the execution of the present contract, the purchaser will have no right to either repudiate the agreed payment or the goods on the arrival of the steamer and the dispute shall be later settled amicably. In case of non amicable settlement the dispute shall be brought before the Commercial Tribunal of Bucharest which alone is competent."

To consider the last point first : The general principle of English law is that any clause in a contract purporting to exclude the jurisdiction of the English Courts must be quite clear and unambiguous. This provision of the contract to my mind merely contemplates a repudiation by the purchaser of the goods or refusal of payment and not failure to perform by the vendors. That is to say, the non-acceptance of the goods or non-payment of the price upon acceptance would give rise to a dispute which if not amicably settled the Roumanian Company could take action in Bucharest, and only through the Commercial Court at Bucharest in which naturally Roumanian law would apply.

The clause does not contemplate any breach of the contract on the part of the vendors, nor does it bind the purchasers to sue for breach of the contract in the Commercial Court of Bucharest, but only where a dispute arises as regards the quality of the wood resulting in non-acceptance or non-payment. Hence I do not consider that this provision has any effect on the question of jurisdiction of the District Court, Famagusta.

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Now to consider questions (1) and (2), namely, what jurisdiction the District Court of Famagusta had. This is governed by section 15 of the Administration of Justice Law, 1935, which gives the Court jurisdiction to hear and determine (subject to sections 12 and 50) all actions where (*a*) the cause of action has arisen either wholly or in part within the district in which the Court is established, (*b*) the defendants or any of the defendants at the time of the institution of the action resides or carries on business within the district in which the Court is established.

Clearly sub-section (*b*) of section 15 of the Administration of Justice Law, 1935, does not apply there being no allegation that the appellants carried on business anywhere in this Colony. It remains to consider whether the cause of action arose wholly or in part within the district of Famagusta.

Where the cause of action arises is sometimes a difficult question to determine; it depends on where the contract was made and where broken. The present English rule of Court under which leave for service out of the jurisdiction can be given in actions on contracts, is Order 11, rule 1 (*e*). It is as follows :—

> "The Court has jurisdiction whenever the action is one brought against a defendant not domiciled or ordinarily resident in England to enforce, rescind, dissolve or annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract (i) made in England, (ii) made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England or (iii) by its terms or by implication is to be governed by English law. Or is one brought ..... in respect of a breach committed in England of a contract wherever made even though such breach was preceded or accompanied by a breach out of England which rendered impossible the performance of the part of the contract which ought to have been performed in England."

The local provision in the Cyprus Rules of Court, 1938, namely Order 6, rule 1 (*e*) is substantially the same substituting Cyprus for England save that sub-rule (iii) is omitted.

The rule governing the place where a contract by correspondence is made is set out in Dicey's Conflict of Laws, at p. 251, as follows: "Where there is correspondence between persons in different countries the contract is concluded in the place of final acceptance by letter or telegram." This is in accordance with judgment of Privy Council in *Benaim* v. *De Bono*, 1924 A.C., 514.

It being impossible from the correspondence produced in this action to tell whether the final acceptance of the contract price of 62*s*. was made in Bucharest or Famagusta, the Court can only have recourse to the formal contract. But this document itself is by no means conclusive, for though it gives Constanza as the place of execution, it leaves blank the place of completion. It is, however, dated 24th May, 1939, at Bucharest. The onus was on the respondents to shew that the contract was in fact completed in Famagusta, and the mere fact that the formal contract was last signed there is not in my mind conclusive. This onus the respondents have therefore failed to discharge.

The contract was not made by or through an agent trading or residing within the district of Famagusta. The alleged agent, Costas Haji Loizou, did not sign the contract on behalf of appellants, nor does he seem to have been an agent to transact their business, but was merely a go-between. Further he did not reside or carry on business within the district of Famagusta.

We must, therefore, consider whether any cause of action arose by breach within the district of Famagusta. From the terms of the contract it is clear that the timber was to be shipped c.i.f. at Constanza and that failure to ship the timber at Constanza would be a breach of the contract there and not in Famagusta. But the respondents contended that there was a breach of contract by the appellants failing to forward to them at Famagusta the shipping documents in relation to the cargo of timber.

Lindley, L.J., in *Rein* v. *Stein* (1892) 1 Q.B. 757 said, "I do not understand that it is the whole contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction and if there is a breach of that part of it within the jurisdiction." This observation on the construction of clause (*c*) of the English Order 11, rule 1, before it was amended and made more comprehensive, was approved in the judgment of the House of Lords in *Johnson* v. *Taylor Bros.* 1920 A.C., 144, a case like the present one in which the plaintiffs argued that non-delivery of shipping documents constituted a breach of contract within the jurisdiction on which an action could be founded. And this observation appears to set out the same principle as is contained in section 15 (*a*) of our Courts of Justice Law. In commenting on this observation of Lindley, L.J., Lord Birkenhead in *Johnson* v. *Taylor Bros.* said, "I understand the Lord Justice, in making that observation, to have in mind a case where a contract involves distinguishable and

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independent obligations, some of which under its terms require implement without, and others within, the jurisdiction." Then he went on, "But does such a case as this resemble that which Your Lordships have to decide? Here the fundamental breach is in limine. The real complaint of respondents against the appellant is that he did not, according to his contract, put on board ship the goods which he had contracted to sell. It is ludicrous to suppose that their substantial complaint lies in the withholding of paper symbols which could have no meaning and which indeed could have no existence when once the original breach had been committed." Then later he stated, "I am of opinion that the observations of Lindley, L.J., are well founded in relation to the facts which elicited them. But the 'part of the contract' which is to be performed within the jurisdiction must be a part which according to the tenour of its terms is susceptible of individual performance in this country, independently of the fate of other and distinguishable parts of the contract. It is in other words not permissible in such a case to found proceedings within the jurisdiction upon part of a contract which is ancillary to another part in this sense at least that the breach of that other part necessarily involves its own destruction."

As a result of the judgment in this case the English Order 11, rule 1 (*e*) was amended to read as it does now, and the Cyprus rule copies it as amended. The case of *Johnson* v. *Taylor Bros & Co. Ltd.* has by the amendment become obsolete; and so, presumably, the failure to forward shipping documents whether the goods were despatched or not would now constitute a breach of contract sufficient to found a cause of action within the jurisdiction. In the present case, however, the respondents failed to plead that a breach of contract on which they relied was the failure to forward shipping documents, and the learned President, District Court, in my opinion rightly held that as this fundamental matter was not pleaded the Court could not take account of it.

I have therefore come to the conclusion that as neither was the contract made within the jurisdiction, nor was there any breach of the contract within the jurisdiction, the cause of action could not be said to have arisen wholly or in part within the jurisdiction of the District Court of Famagusta. From this it follows that that Court had no jurisdiction to entertain the case, unless by their conduct the appellants submitted to the Court's jurisdiction.

The learned President, District Court, in his judgment held that by their action the appellants had waived any irregularity in the proceedings. He pointed out that they had not applied to set aside service of the writ, and enumerated the steps they had taken after their entry of appearance. There is however a distinction between a mere irregularity in the proceedings which gives a right to have the proceedings set aside or amended within a reasonable time, and a lack of jurisdiction, which is fundamental and prevents the Court from hearing the action. A defendant by filing an unconditional appearance, is considered to have submitted to the jurisdiction of the Court, in the same way as he might have done by prior express agreement. If, however, as in the present case, he files an appearance under protest, or a conditional appearance, he is at liberty either to apply to have service on him set aside or to plead in his defence the Court's lack of jurisdiction. This was established in the cases of *Mayer* v.*Claretie*, 1890 T.L.R., 40, E.E.D. P. & P., 974, and *Firth* v. *De Las Rivas* (1893) 1 Q.B., 768.

As, then, the appellants filed an appearance under protest and put in a defence under protest pleading lack of jurisdiction as a ground on which they relied, it seems to me that the acts they did, which were mentioned by the learned President, District Court, in his judgment, were merely such as were necessary for properly defending their action. They could not, therefore, on account of doing such acts be held to have submitted to the jurisdiction of the Court.

The question as to whether or not the order for substituted service was rightly made on Costas Haji Loizou could only arise in the event of the District Court of Famagusta having jurisdiction to entertain the action. As it is held that the Court did not have jurisdiction, and that the appellants did not submit to the jurisdiction, this question does not require to be decided.

I agree that the appeal should be allowed with costs here and in the Court below.

Appeal allowed with costs.