1956
Jan. 7

PANAYIOTIS S. MYRIANTHOUSIS
v.
DESPINA PETROU

to give effect to a usage which involves a defiance of the law would be obviously contrary to fundamental principle." For the reasons already stated, to hold that a local usage made promises of marriages where one party is a minor voidable but not void, would be contrary to the express provisions of sections 10 and 11.

Since we are of the opinion that the respondent's claim must fail because the contract she relies on is void, it is unnecessary for us to consider whether the appellant's defence that the respondent was an epileptic is well founded.

This appeal must be allowed and the respondent's claim dismissed.

1956
January 7

CHARLES K. JOHNSON
v.
THE TEMPERATURE LTD.

[HALLINAN, C. J. and ZEKIA, J.]
(January 7, 1956)

CHARLES K. JOHNSON of Nicosia, *Appellant,*

v.

THE TEMPERATURE LTD., Fulham (England),

Respondents

(Civil Appeal No. 4147)

Sale of Goods—Contract Law, Cap, 192, sections 73, 119 to 124 — Implied conditions or warranties — Quality and fitness of goods sold—Breach of warranty of quality—Opportunity of inspection—Reasonable time for purpose of inspection — C.I.F. contract — Passing of property — Right of rejection — Measure of damages — General and special damages—Fresh evidence—Remittal by Supreme Court upon appeal.

The plaintiff bought from the defendant company, who were manufacturers and sellers of air-conditioners established in England, an air-conditioning plant for his hotel in Nicosia, through the defendants' agent in Cyprus on a C.I.F. contract.

There was no express warranty as to the fitness of the plant but the buyer's purpose was communicated to the seller. The trial Court found that the plant was defective at the time of sale, and that it was neither fit for the purpose for which it was ordered nor merchantable.

The plaintiff kept the plant for 7½ months after its arrival in Cyprus before rejecting it, and he then claimed the refund of the purchase price and general and special damages for breach of agreement and/or breach of warranty.

During the trial the parties agreed the special damages recoverable if the plaintiff were held to be entitled to reject the plant; but through an oversight, the plaintiff did not sufficiently prove special damages if his claim to reject the goods was dismissed.

The full District Court of Nicosia,

Held. (1) that sections 119 to 124 of the Contract Law, Cap. 192, were intended to reproduce the common law rules on implied conditions or warranties of quality and fitness of goods sold:

(2) that, as the buyer's purpose was communicated to the seller, there was an implied condition or warranty as to the fitness and quality of the plant as the buyer bought on the seller's judgment and the seller agreed to supply that plant Consequently, as the plant was defective at the time of delivery, there was a breach of implied warranty,

(3) that, since the plaintiff had kept the plant for an unreasonably long time before rejecting it, he should be deemed to have accepted it, and, under section 124 of the Contract Law, Cap 192, he had lost his right to reject the goods, and he was only entitled to damages for breach of warranty;

(4) that, in the case of breach of warranty of quality, such loss was *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. Applying this principle, the Court awarded £23 general damages to the plaintiff, but rejected the plaintiff's claim for special damages

Upon appeal, the Supreme Court,

Held: The determination of the trial Court was correct but, in the special circumstances of the case, the plaintiff should be allowed to adduce fresh evidence to prove such special damages as had been pleaded.

Case remitted to trial Court for this purpose.

District Court Action No. 197/53

The judgment of the Full District Court of Nicosia (consisting of Zenon, P.D.C., and Josephides, D.J.) was delivered by·

ZENON, P.D.C.: The plaintiff's claim is for—

(1) £2247.0.0, being refund of price and cost of installation of an air-conditioning unit supplied by the defendants and installed in the plaintiff's hotel by the second defendant, on the ground that the said unit did not properly function; and

(2) damages for breach of agreement and/or breach of warranty or otherwise.

The plaintiff is the manager and proprietor of Carlton Hotel, Nicosia, and the first defendant (to whom we shall hereinafter refer as the "defendant company") is a limited company incorporated in London, and they are the manufacturers, sellers and distributors of TEMKON air-conditioners

The plaintiff alleged in his Statement of Claim that the second defendant was at all material times the agent of the defendant company for the import, sale, distribution and installation of the aforesaid units and/or held himself out to be the agent of the said company. The second defendant admitted that he acted as the agent of the defendant company for the import and sale of the said unit, but the defendant company denied it, and throughout the hearing they strenuously tried to prove that the second defendant was not their agent and that they simply sold to him personally the aforesaid air-conditioning unit.

The plaintiff's case as set out in the Statement of Claim was formulated in paragraphs (10), (11) and (12) of the Statement of Claim and was as follows:

"(10) In view of the fact that the air-conditioning unit was and is defective and/or was not properly functioning and/or in breach of the express and/or implied warranty by the defendants and/or either of them as to its quality and fitness, the plaintiff by a letter dated 27th June, 1952, strongly protested to the defendants and held the defendants liable for damages sustained by the plaintiff".

"(11) Alternatively, plaintiff alleges that the defendant No. 2 was not a skilled and fit person to make the installation which he held himself out as capable of doing and that on account of his unskilfulness and inexpertness the installation twice was not properly made and on account of it the air-conditioning unit was incapable of working and/or generally was and became unfit."

"(12) Alternatively the plaintiff alleges that both on account of the unfitness of the article supplied and on account of the unsatisfactory and improper way that it was installed by the agent of the defendant No. 1, i.e. defendant No. 2, the plaintiff sustained damages."

At the close of the case for the defendants the plaintiff withdrew para. (11) above against the second defendant, referring to unskilful installation, and the second half of para. (12) above referring to the same matter, and he pressed his claim against the second defendant as agent of the defendant company only.

Furthermore, in the course of the hearing the following special damages, in substitution for those originally claimed, were agreed to by the parties in case it were held by the Court that the plaintiff was entitled to reject the said air-conditioning unit and claim damages:

Agreed Special damages

(1) Refund of price of unit	£770
(2) Refund of import duty etc.	95
	£865
(3) Cost of structural alterations to plaintiff's hotel (including revolving doors)	220
(4) Cost of Simpson's (engineer) cooling system	207
(5) Simpson's fee	45
(6) Koumides' (plumber) and Catselis' (electrician) fees . . .	48
(7) Cost of electrical installation . . .	40
(8) Cost of water storage tank	15
Total	£1440

The defendant company in their defence denied that the second defendant was their agent and alleged that they agreed with the second defendant to sell to him as principal, alternatively as agent acting for and on behalf of the plaintiff, the said air-conditioning unit for the sum of £770 CIF Famagusta, in accordance with the terms set forth in their letter dated 12th February, 1952 (blues 12-13). They further contended in para. 3 of their defence that (*a*) the buyer assumed responsibility for the capacity and performance of the said unit being sufficient for his purpose; (*b*) that they would not be responsible for loss or damage to goods beyond the point of shipment viz. England; and (c) that the contract should in all respects be construed and operate as an English contract and in conformity with English Law and be subject to the jurisdiction of the English Courts.

We may say at once that there is nothing in the letter referred to to warrant the above three allegations.

It was further contended by the defendant company that the second defendant undertook the installation of the air-conditioning unit as principal and not as their agent, and that its failure was due to the second defendant's lack of care and skill in making the said installation, alternatively to the second defendant's failure to carry out such installation in a good and workmanlike manner. They further denied any breach of warranty and alleged that the plaintiff was not entitled to reject the said unit and that such purported rejection was invalid and ineffective as the plaintiff had accepted the unit and the property had passed to him. The defendant company finally denied that the plaintiff sustained any damage. Alternatively, if he did, such damage was alleged

not to flow from the breach of any obligation on their part towards the plaintiff; alternatively, that such damage was too remote in law.

The second defendant in his defence admitted that he acted as the agent of the defendant company in respect of one single transaction i.e. the placing of an order for the importation or purchase of the said unit. He further denied ever undertaking to have the said air-conditioning unit installed in the plaintiff's hotel and he contended that he was only requested to assist in connection with the installation and that he accepted to do so free of charge following plaintiff's instructions as to the room in which it should have been installed. He further contended that the unit was not functioning properly or at all owing to the plaintiff's inability to supply or produce an adequate quantity of cooling water and that the plaintiff himself agreed to have the equipment installed in the lounge for the sake of economy. He further alleged that on the 17th June, 1952 he addressed a letter to the plaintiff in which he was confirming the oral statement made by him on the previous day that he had no objection to the plaintiff employing a certain Mr. Simpson to complete the installation and stating that he was disclaiming any responsibility for the work done or to be done by him and he finally denied the claim of the plaintiff.

In this case the following questions fall to be determined:

(1) Was the second defendant the agent of the defendant company?

(2) If yes, was he acting for a disclosed principal?

(3) If he was, is he personally liable for any breach of warranty of his principal?

(4) Did the air-conditioning unit operate satisfactorily at any time?

(5) If not, was this due to faulty installation and/or the water cooling system or to a defect in the unit itself?

(6) Was there any express or implied condition or warranty that the unit—
  (*a*) would be fit and
  (*b*) that it would be merchantable?

(7) If yes, was the unit in fact—
  (*a*) fit for such purpose and
  (*b*) merchantable; or was there a breach of agreement or warranty?

(8) If there was a breach, did the plaintiff accept the unit?

(9) Is the plaintiff entitled to reject the unit or to be awarded damages, or to both?

(10) If entitled to damages, what is the measure of damage?

On the evidence before us we find the following facts:

On the 19th February, 1951, the defendant company wrote to the second defendant (blue 1) enclosing their catalogue showing some of the types of equipment they were manufacturing, and a price list on which they offered to give him a "discount of 10%". They also enclosed particulars of a 1-2 h.p. remote air-conditioning room cooler which they were particularly interested in selling and offered to give him "20% distributors discount". But there is no evidence that the second defendant replied to this letter; and, apparently, nothing happened until some time early in December, 1951 when the plaintiff approached the second defendant with an enquiry whether he, the second defendant, would undertake to instal an air-conditioning plant in the plaintiff's hotel. The second defendant agreed and stated that he represented a firm in England and that he would give him a quotation.

As a result, the second defendant took measurements of the lounge of plaintiff's hotel which he sent to the defendant company in his letter dated 11th December, 1951 (blue 2) stating expressly that he had an enquiry from the "Carlton Hotel, Nicosia" for an air-conditioning plant for their lounge, and giving the defendant company particulars of a small room available next to the lounge in which the equipment could be installed. He also asked the defendant company to send him a quotation for a complete air-conditioning equipment giving him the price "to include our commission" and time of delivery. The defendant company replied by their letter dated 31st December, 1951 (blue 3) enclosing their leaflet No. 361 (blue 4) and stating that "this machine should be suitable for the lounge in question". The price quoted was £770 CIF Famagusta "less 5% discount". "Terms: irrevocable letter of credit payable on a London Bank. Delivery: Three weeks from receipt of above." Leaflet No. 364 (blue 4) gives a full description of a TEMKON air-conditioner 4 h.p. water cooled packaged air-conditioner, which was eventually supplied to the plaintiff.

The second defendant communicated the contents of this letter to the plaintiff and on the 11th January, 1952 he wrote to defendants (blue 5) that "the customer is considering your tender and we have grounds to believe that we shall get the order". He added that, before finally deciding, the customer would like to know what would be the additional cost for a heater battery so that the air could be heated during the winter months and he gave details of the voltage of supply. On the 11th

1956
January 7

CHARLES K JOHNSON

v.

THE TEMPERATURE LTD

January, 1952 the defendant company replied (blue 6) that "we would suggest that your client uses ordinary floor mounted electrical convertor heaters which are readily obtainable."

The second defendant on receipt of this letter forwarded a copy to the plaintiff on the 1st February, 1952, with a covering letter enquiring whether he had taken any decision on the matter, (blue 7 and 8). On the 6th February, 1952 the plaintiff replied to the second defendant (blue 9) stating "we have decided to accept your previous quotation which we believe was £770 CIF and, as suggested make alternative arrangements for heating". The second defendant then wrote to the defendant company on the 8th February, 1952 (blue 10) referring to their letter of the 15th January and informing them that "The above customer has placed with us a definite order for the air-conditioning unit as described in your leaflet No. 364 for the sum of £770 CIF, Famagusta which includes our commission of 5%". He further asked them to let him have their confirmation on receipt of which he would request the customer to establish an irrevocable credit for the above amount in their favour. He further pointed out the voltage for which the plant would be used and asked them to supply him with detailed drawings for installation of the plant and with running and servicing instructions.

On the same day, viz. 8th February, 1952 (blue 11) the second defendant replied to the plaintiff's letter of the 6th February (blue 9) thanking him for his order for an air-conditioning unit "offered by our principals Messrs. Temperature Ltd. and described on leaflet 364". He repeated the price quoted by his principals and the time for delivery and informed the plaintiff that on receipt of his principals' confirmation he would advise him to establish an irrevocable letter of credit in the principals' favour for the above amount. On the 12th February, 1952 the defendant company wrote two letters to the second defendant (blues 12 and 13). In the first letter (blue 12) they stated "please find enclosed our confirmation price and delivery for one air-conditioning unit as described in our leaflet No. 364". We have included in our price of £770 CIF Famagusta 5% commission for yourselves." In the second letter (blue 13) which was entitled "Carlton Hotel, Nicosia" (as was all other correspondence between them), they referred to the second defendant's letter of the 8th February (blue 10) confirming that they could deliver the air conditioning unit ordered for the agreed price of £770 CIF Famagusta; delivery would be three weeks from receipt of "your irrevocable letter of credit for the above amount". They further informed the second defendant that they were arranging to compile three service manuals which would incorporate plan layout drawings, but that they could not

commence this work until receiving a drawing from the second defendant of the room to be air-conditioned and the surrounding rooms.

On receipt of these letters the second defendant wrote to plaintiff on the 19th February, 1952 (blue 14) informing him that he had received a confirmation from his principals for the order as forwarded, and suggested that plaintiff should establish an irrevocable credit through his bankers in favour "of our principals Messrs. Temperature Ltd., Burlington Road, Fulham, London S.S.6, England, valid for six weeks which they will give them ample time to obtain shipping space and thus avoid the necessity of credit renewal." He further requested the plaintiff to let him know the name of the bank in England through which his (plaintiff's) local bankers would establish the credit and the number of the credit so that he might inform his principals accordingly.

On the 23rd February, 1952 the plaintiff replied (blue 16) informing the second defendant that he had established an irrevocable credit in the sum of £770 through the Ottoman Bank Nicosia with the Ottoman Bank of 20/22, Abchurch Lane, London, in favour of the defendant company. On the same day the second defendant wrote to the defendant company (blue 15) informing them of the contents of the plaintiff's letter and asking them to pay special attention to the question of packing so that the equipment would arrive in good condition, and stating that he was preparing a drawing of the room to be air-conditioned and of the adjoining small room where the equipment would be installed, and that he would let them have it in the course of the next few days. In fact on the 28th February, 1952 he wrote (blue 17) to the defendant company enclosing a drawing of the lounge of the plaintiff's hotel (blue 18) and giving them details of the size of the rooms etc., and asking them to let him have the plant lay-out drawings and service manuals as soon as possible in case any structural alterations would have to be made.

On the 29th February, 1952 the defendant company wrote to the second defendant (blue 19) acknowledging receipt of this letter dated 23rd February, 1952 (blue 15) and noting that an irrevocable credit had been opened in their favour, and promising to arrange to ship the equipment within three weeks. As nothing was heard from the defendant company until the 4th April, 1952, the second defendant cabled to them on that day as follows: "Carlton Hotel please cable if plant shipped stop airmail layout drawings promised your letter 12th February".

Eventually the air-conditioning unit arrived in Cyprus some time in May, 1952, the bill of lading having been issued in the name of the plaintiff who took delivery of

it at Famagusta and paid the sum of £95 for Customs duties, land charges and transport to Nicosia. On receipt of the unit the plaintiff informed the second defendant of it and asked him to assist in the installation of the said unit. The second defendant consented to supervise the installation of the unit free of charge provided the plaintiff paid the plumber and electrician required to do the job. At first it was suggested by the second defendant and agreed to by plaintiff that the unit should be installed in the lounge, as the manufacturers' leaflet No. 364 stated that the equipment was made in such a way as to ensure quiet operation. The inauguration day was fixed some 15 days later. In fact the second defendant supervised the installation until Saturday the 14th June, 1952.

On the 28th May, 1952, the defendant company wrote to the second defendant (blues 21-22) apologizing for the delay in forwarding the necessary installation drawings and explaining that they had mislaid the drawings sent by the second defendant. They enclosed a "typical" drawing which did not show the exact position of the walls etc., and stated that the unit had been supplied generally as their leaflet No. 364, and they gave further technical particulars.

As the defendant company did not include any instruction or service manual in the air-conditioning unit and as the second defendant had some difficulty in obtaining the necessary parts for the water cooling system (blue 25), and as the plaintiff could not supply sufficient condenser cooling water viz. 5 gal. per minute to run to waste, other methods of cooling the water had to be improvised and the inauguration had to be fixed for Saturday the 14th June at the suggestion of the second defendant (blue 25).

When the unit was installed in the lounge the plaintiff found that the noise was excessive and uncomfortable and it was decided to move the unit outside the lounge. It could not be installed in the small room adjoining the lounge as it was not possible to accommodate the outlet duct. The persons in charge of the installation were Koumides, a plumber, and Joseph Adamides, an electrician.

When the unit was first tried after installation it refrigerated for 10-15 minutes and then it ceased refrigerating. Then the water cooling system was changed and the unit tried again. It worked for half an hour but the air-cooling was not sufficient, and the second defendant made some other alteration in the water cooling system, a temporary arrangement for the inauguration day, i.e. 14th June, for which day the plaintiff had invited a number of persons to attend a cocktail party. The second defendant was present when the unit was switched

on at 9.30 a.m. on that day, but then he had to leave to accompany an overseas visitor to Dekhelia. In the result the unit did not refrigerate, on the contrary it produced a temperature higher than the temperature outside the room.

As the plaintiff was under the impression that the failure of the unit was due to the bad workmanship and unskilful installation of the second defendant he contacted Mr. Simpson, a refrigeration engineer, on the Sunday, 15th June, and on the following day, viz. on the 16th June, 1952, he published an apology in the Cyprus Mail (blue 27) which shows that at that time he was under the impression that the whole failure was due to unsatisfactory installation; in fact he stated in that apology "the air-conditioning unit is of first class British manufacture, its quality and ultimate efficiency is not in doubt. The installation is unsatisfactory and it is regretted it will not be used until efficiency is assured".

On Tuesday, the 17th June, the plaintiff's then advocate, Mr. Rustomji, invited the second defendant to meet the plaintiff in his (plaintiff's) hotel. At this meeting the plaintiff suggested calling Simpson, and the second defendant said that he had no objection but that he would not be responsible for Simpson's work. He was then asked by plaintiff to confirm this in writing and he accordingly wrote (blue 26) on the same day, stating that he had no objection to the plaintiff employing Mr. Simpson for the completion of the installation of his air-conditioning plant, and that it was understood that he (second defendant) would have no responsibility for the work of Mr. Simpson. From that day, i.e. 17th June, 1952, the second defendant dropped out of the picture altogether so far as the plaintiff is concerned, until the 24th of December, 1952, when plaintiff's advocate addressed a letter to him (blue 35) claiming £2,247 in respect of the said unit, alleging that it had never properly functioned, etc., to which letter we shall refer in detail at a later stage of this judgment.

From the 17th June onwards Simpson took charge of the installation apparently with the object of putting right the water cooling system etc. But as it eventually emerged the water cooling system was not really to blame as there was actually a defect in the unit itself, but we would rather follow the sequence of events.

On the 27th June, 1952 plaintiff wrote a very long letter to the defendant company (blue 28) marked "strictly confidential", and from that day onwards all the correspondence which was exchanged between the plaintiff and the defendant company was exchanged behind the back of the second defendant who was kept in complete ignorance of the correspondence. In that letter (blue 28) the plaintiff was blaming the second defendant for incompetence in installing the unit, and informing the

defendant company that he intended suing the second defendant for damages; and he was asking them to submit the matter to their legal adviser for an opinion.

Three days later, i.e. on the 30th June, 1952, the second defendant wrote to the defendant company (blue 29) complaining that he was very disappointed that he did not find in the case containing the unit an instruction and maintenance manual which was necessary, and asking them to give the weight of the refrigerant in the unit and other particulars. He further gave a short summary of facts regarding the installation of the unit in the plaintiff's hotel.

On the 2nd July, 1952, the defendant company replied (blue 30) to plaintiff's letter (blue 28) thanking him for exonerating their equipment in his published apology and informing him that a machine of that size was never completely silent, but when fed with 4-5 gallons of condenser water at a temperature of approximately 75°F. it is considered quiet enough to put in a public room; if the condenser water supplied to it was above that temperature the noise level would increase. They further remarked that they merely undertook to supply the plant and not to instal it and that they were unable to accept any responsibility for alleged inefficiency in that connection. They added that they were unable to advise the plaintiff regarding his claim against the second defendant, and they forwarded, for the first time, an instruction manual for the plaintiff's guidance in operating the machine. On the 8th July, 1952 the defendant company replied to the second defendant's letter of the 30th June, enclosing for the first time an instruction manual, which is marked blue 32 in this case.

Meantime Simpson went on with his experiments and the plaintiff, after obtaining the advice of another four English technical advisers, wrote to the defendant company on the 21st August, 1952 (blue 33) giving them the result of Simpson's tests: the lowest mean temperature drop ever achieved with the unit was 6-7 degrees when the room was empty; at no time did the unit reduce the temperature to below 78°F. The plaintiff further stated that the motor operated but the unit did not work, nor did it produce refrigerated air. The defendant company replied by their letter of the 1st September, 1952 (blue 34) stating that it appeared that the unit was insufficiently charged with gas, and suggesting that he should contact the local refrigerator service man who might be able to check this. They further asked the plaintiff to check the air temperature of the air in and out of the unit with the servicing cover in position, and to forward details of the cooling tower, and the quantity of water in gallons per minute; and they gave further particulars of the amount and temperature of water required to be circulated in order for the machine

to operate satisfactorily. They concluded by stating that they looked forward to receiving the plaintiff's reply regarding those matters when they felt sure they would be in a better position to assist him.

The plaintiff never replied to this letter, but some 3 months and 24 days later, viz. on the 24th December, 1952, his advocate addressed a letter to the defendant company and the second defendant (blue 35) claiming (*a*) the sum of £2247 in respect of the said unit which he alleged had never properly functioned, and (*b*) damages for breach of agreement and/or breach of warranty in regard to the sale of the said article. The concluding paragraph of that letter was as follows: "He, therefore, rejects it altogether and for settlement's sake he will be willing to accept, without prejudice, £2247.0.0 as above stated plus reasonable amount for damages and his legal costs." The defendant company did not reply to this letter but the second defendant replied through his advocate on the 2nd January, 1953 (blue 36) informing plaintiff that he (second defendant) had acted as agent for the defendant company in respect of the supply to the plaintiff of the said unit, and disclaiming any liability in respect of any complaint or claim by the plaintiff. He added that the letter of plaintiff's advocate was the first and only intimation about the alleged non-functioning of the unit since the despatch to the plaintiff of his (second defendant's) letter of the 17th June, 1952 (blue 26).

On the 3rd January, 1953 the second defendant wrote to the defendant company enclosing a copy of the letter of plaintiff's advocate (blue 35) and of his reply, and giving them an outline of the facts regarding the installation of the unit. He at the same time expressed surprise that he had heard nothing from them regarding certain correspondence which had been exchanged between them and the plaintiff on the subject. Eventually the writ of summons was taken out in this case on the 22nd January, 1953.

At the hearing of this case the defendant company sent to Cyprus their expert engineer in refrigeration, Mr. Kenneth Jarvis, who gave his evidence after examining the air-conditioning unit supplied to the plaintiff. Unlike Mr. Simpson who gave evidence on behalf of plaintiff, Mr. Jarvis opened the machine and found that a small component on the compressor, known as "shaft seal (gland)" was broken at the soldered joint and that this made it impossible for the unit to hold gas in the system at all. He tested the machine for three days under low pressure gas and cabled to London for replacement. He further stated that this is the most common fault of a refrigerator that they could expect from time to time, and that the seal itself cost about £3-£5 to replace and that

in addition to that he would have to purchase the refrigerant to place in the plant which would be about £15—£18. He was further of the opinion that any qualified electrical engineer could open the plant and find this fault, if he was familiar with general refrigeration practice. He further stated in his evidence that his company gave a general guarantee for all equipments for 12 months, in respect of any damage to spare parts, defects or faults in the unit. But having regard to the correspondence exchanged and leaflet No. 364 we consider that such a guarantee was not given in the present case, and that it was not one of the express terms of the agreement between the parties. Jarvis further stated that it was possible to discover the leak without taking the unit to pieces, and that this could be done by using a test lamp; and that the gland seal should be the first thing to look for in any refrigeration system if anything went wrong.

Although the defendant company as a rule test their machines before sending them out we have no evidence in this case whether the air-conditioning unit which was sent out to the plaintiff was in fact tested, nor what was the result of the test, as the defendant company have failed to include in the case containing the unit or to post to the plaintiff a "certificate of test", a form of which may be seen in blue 32.

Jarvis further stated that under normal conditions the said unit should produce a drop of 10-12 degrees Fahrenheit in normal temperature of a room. This in fact has never been achieved in the case of the unit in question. The maximum drop was 6-7 degrees and for not more than half an hour.

This witness was allowed time to replace the broken shaft seal and complete his test, and after doing so he was recalled and gave supplementary evidence two days later, on the 22nd October, 1954. He stated that he had been able to obtain a shaft seal from Limassol which he replaced on the unit and filled with refrigerant; he gas tested it for leaks and there was no leakage. Although there is still a small amount of gas to go into the system there was now sufficient refrigerant in the unit to work satisfactorily; and, in any event, there was sufficient water for the unit to work. Having carried out the necessary tests Jarvis was satisfied that the unit could work satisfactorily, and that there was nothing wrong with it. Due to the climatic conditions on the day of this test, that is the 21st October, 1954, he could not state definitely what drop in temperature could be achieved with the machine. Simpson, who was present at the tests, was also recalled and gave evidence: he agreed generally with Jarvis stating that he was quite satisfied that the machine could now work satisfactorily, but he could not say whether the results would be satisfactory in summer when there would be sustained pressure on the machine.

On the technical evidence before us we find that at the time of delivery there was a defect in the machine supplied by the defendants in the form of a broken shaft seal which allowed leakage of gas, and that that defect was put right by the engineer of the defendant company after the institution of the action, with this difference, that there is still a small amount of gas to go into the system.

We have now set out what we think are the essential facts; many of them were the subject of conflicting evidence and our statement of them shows that we have accepted the evidence of the defendants and their witnesses and rejected in some parts that of plaintiff and his witness.

Having found the facts in this case we now have to consider what is the law applicable.

As this transaction took place before the 28th May, 1953, when the Sale of Goods Law, 1953, came into operation, it is covered by the repealed sections 82-129 (relating to the sale of goods) of the Contract Law, Cap. 192. As is well known, our Contract Law is based on the Indian Contract Act, 1872, modified and extended to meet the needs of the Colony. These particular sections reproduce sections 76 to 123 of the Indian Contract Act which have since 1930 been replaced by the Indian Sale of Goods Act, 1930. The original sections of the Indian Contract Act were a codification of the English common law of the sale of goods, generally speaking.

The relevant sections for the purposes of this case are sections 119 to 124 of our Contract Law. In order to ascertain whether the English decisions are authoritative in this case we shall examine these sections to see whether it was the intention of the legislative authority to reproduce the common law, but the enactment is not complete.

Section 119 of the Cyprus law is taken verbatim from section 113 of the Indian Act. This section provides for an implied warranty where goods are sold as being of a certain denomination. The hypothetical example (a), inserted after this section in the 1930 special edition of the Contract Law, 1930 (now Cap. 192), for the purpose of illustration only (which does not form part of the Law), is based on the English case of *Gardiner* v. *Gray*, 4 Camp. 144 quoted in *Jones* v. *Just* (1868) L.R. 3 Q.B. 197 at p. 204, and it concerns goods known under the denomination of "waste *silk*". Example (b) is based on *Josling* v. *Kingsford* (1863) 13 C.B. N.S. 447; 134 R.R. 596, from which the present section appears to be derived.

Our section 120 reproduces verbatim section 114 of Indian Contract Act, and it provides for an implied warranty that the goods supplied should be fit for the

specified purpose. The example given as illustration is based on the case of *Jones* v. *Bright* (1829) 5 Bing. 533; 130 E.R. 1167. This case is the basis of the fourth rule given in *Jones* v. *Just* (supra) where all the English cases are reviewed and classified.

Section 121 is based on section 115 of the Indian Act and it expressly provides that there is no implied warranty of fitness for any particular purpose, where an article is of a well-known ascertained kind. The example given by way of illustration is based on *Chanter* v. *Hopkins* (1838) 4 M. & W. 399 which is the authority for the third rule given in *Jones* v. *Just*, cited above. Cf. sec. 14(1) of the English Sale of Goods Act, 1893, which codifies the common law.

Our section 122 is based on section 116 of the Indian Contract Act and it seems intended to give the effect of *Parkinson* v. *Lee* (1802) 2 East, 314; 102 E.R. 389, so far as it was considered to be good law. On the other hand at common law on the sale of an article for a specific purpose there is a warranty that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects: *Randall* v. *Newson* (1877) L.R. 2 Q.B. 102.

Our section 123 is based on section 117 of the Indian Act and it makes provision for the buyer's right on breach of warranty on the sale of a specific article. The example given is based on *Street* v. *Blay* (1831) 2 B. & Ad. 456; 109 E.R. 1212.

Our section 124 is based on section 118 of the Indian Act and it concerns the rights of a buyer on breach of warranty in respect of goods not ascertained. This section is intended to reproduce the principles laid down in the cases of *Heilbutt* v. *Hickson* (1872) E.R. 7 C.P. 438. and *Mondel* v. *Steel* (1841) 8 M. & W. 858; 151 E.R. 1288.

The object of analysing at length our sections 119-124 was to show that it was the intention of the legislative authority to reproduce the common law regarding "warranties" on the sale of goods, and that the enactment did not contain a complete statement of that law; and it is now permissible for us to look to the English decisions as authoritative.

The common law rules on the subject of implied conditions or warranties of quality and fitness were conveniently stated and the cases classified by Mellor, J. in the case of *Jones* v. *Just* (1868) quoted above. The following extract from page 202 of the Report is, we think, applicable to the case under consideration:—

> "Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined

thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: *Chanter* v. *Hopkins*, *Ollivant* v. *Bayley*.

"Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown* v. *Edgington*, *Jones* v. *Bright*. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing* v. *Fidgeon*."

Benjamin on Sale, 8th edition, p. 629, gives a summary of the common law as follows:

..."A condition or warranty as to fitness or quality is implied only so far as a buyer does not buy on his own judgment. The buyer buys on his own judgment if he selects or defines the specific chattel or class of goods he requires, although he may state the purpose for which he is buying. He buys on the seller's judgment if the seller agrees to 'supply' goods, and there is no opportunity, or no genuine opportunity, of inspecting them. If the buyer's purpose be communicated to the seller, the seller's obligation is to supply goods fit for that purpose; if the goods are bought under a commercial description, his duty is to supply merchantable goods."

Having stated the law applicable to this case we shall now consider separately each of the questions which fall to be decided.

Question 1: Was the second defendant the agent of the defendant company?

On the evidence before us we are satisfied that the second defendant acted throughout as the agent of the defendant company. He received the order from the plaintiff, and transmitted it to the defendant company. The plaintiff established an irrevocable credit in favour of the defendant company in London who issued the bill of lading and the other documents in the name of the plaintiff who took delivery of the air conditioning unit at Famagusta. The defendant company, on receipt of the £770 from plaintiff, sent to the second defendant as their agent his commission of five per cent, as agreed (see blue 12 and second defendant's evidence).

Question 2: Was the second defendant acting for a disclosed principal?

On the correspondence before us we are satisfied that the second defendant throughout acted for a disclosed principal, viz. the defendant company.

Question 3: Is the second defendant personally liable for any breach of warranty of his principal?

Section 238 of our Contract Law is applicable to this case. This section provides that in the absence of any contract to that effect, an agent is not personally bound by contracts entered into by him on behalf of his principal. But such a contract is presumed to exist in case where the contract is made by an agent for the sale of goods for a merchant resident abroad. This section is based on section 230 of the Indian Contract Act, concerning which Pollock and Mulla (6th edition, page 639) have the following note: "On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced as in other cases, from the terms of the contract and surrounding circumstances. The circumstances that the principal is a foreigner give rise to a presumption, but only a presumption, of an intention to contract personally, and the presumption may be rebutted by indication of an intention to the contrary". See also 1 Halsbury's Laws (3rd Edn.) 230, para. 518; and *Rusholme* v. *Read* (1955) 1 A.E.R. 180.

In this case the presumption is rebutted by a clear indication apparent in the correspondence that the second defendant was not contracting personally but as the agent of a disclosed principal, i.e. the defendant company. Consequently he is not personally liable for any breach of warranty of his principal.

Question 4: Did the air-conditioning unit operate satisfactorily at any time?

On the evidence before us we are satisfied that the said unit did not operate satisfactorily before the commencement of this action. In fact, it never refrigerated for more than half an hour; and it did not bring about a drop in temperature of more than 6 or 7 degrees Fahrenheit. At no time did the unit reduce the temperature to below 78 degrees Fahrenheit. After action and in the course of the hearing, the engineer of the defendant company was given an opportunity of examining the said machine. As a result he found that there was a defect in it which he was allowed to put right and in the end the said unit functioned satisfactorily, and at the time when he gave his supplementary evidence he was in a position to state that there was nothing wrong with it.

Question 5: Was the non-functioning of the said unit due to faulty installation and/or the water cooling system or to a defect in the unit itself?

At one time it was thought both by the plaintiff and the second defendant that there was something wrong either with the water cooling system or with the installation. But eventually it has been proved to our satisfaction that the non-functioning of the said unit was due to a defect in the unit itself.

Question 6: Was there any express or implied condition or warranty that the unit (a) would be fit for a particular purpose, and (b) that it would be merchantable?

On the facts before us we find that there was no express condition or warranty beyond the statements made in the leaflet No. 364. We do not accept the plaintiff's version that the second defendant agreed to any other express condition or warranty. In any event there is an implied condition or warranty as to fitness and quality in the present case as the buyer did not buy on his own judgment. He bought on the seller's judgment, as the seller agreed to supply the goods, and there was no opportunity or genuine opportunity of inspecting them. The buyer's purpose was communicated to the seller and the seller's obligation was to supply goods fit for that purpose. This is not the case of a well-known ascertained article ordered of a manufacturer (s. 121). The principles applicable to this case are the fourth and fifth rule laid down in *Jones* v. *Just* (supra). Firstly the seller was bound to supply goods fit for the particular purpose, i.e. for air conditioning and, secondly, it was further an implied warranty in the contract that he should supply goods of a merchantable quality.

Question 7: Was the unit in fact (a) fit for such purpose and (b) merchantable; or was there a breach of agreement or warranty?

On the evidence before us we find that the unit when supplied to the plaintiff was defective and it was therefore neither fit for the purpose for which it was ordered nor merchantable. We, therefore, conclude that there was a breach of implied warranty under our law.

Question 8: Did the plaintiff accept the unit?

This is a CIF contract. The law as regards the passing of property and the right of rejection under a CIF contract is stated in *Hardy* v. *Hillerns* (1923) 2 K.B. 490 at p. 499, and Halsbury's Laws of England 2nd edition. pages 221 and 224.

The air conditioning unit arrived in Cyprus some time in May, 1952, and the plaintiff took delivery of it at Famagusta and carried it to Nicosia where he started installing it in his hotel in the course of that month. He kept it from May until the 24th December, 1952, when he wrote direct to the defendant company rejecting it on the ground of breach of warranty. There is no doubt that he had a right to keep it for a reasonable time for the purpose of inspecting it. What is a reasonable time is a question of fact. In the circumstances of this case we

do not consider that a period of 7½ months is a reasonable time for such purpose. Consequently he should be deemed to have accepted the unit as he kept it for an unreasonably long time before rejecting it. See the case of *Percival* v. *Blake* (1826) 2 C. & P. 514; 172 E.R. 233; and *Milner* v. *Tucker* (1823) 2 C. & P. 15; 171 E.R. 1082.

Question 9: Is the plaintiff entitled to reject the unit or to be awarded damages or to both?

Plaintiff's counsel submitted that s. 124 was applicable to this case whereas counsel for defendant company contended that s. 123 was the correct section to apply. Section 123 refers to the case of a "specific article". "Specific goods" are goods identified and agreed upon at the time a contract of sale is made. (Cf. section 62 of the English Sales of Goods Act, 1893). In the circumstances of this case we don't think that the air-conditioning unit ordered by the plaintiff was a specific article, that is, "ascertained goods", at the time when the order was placed with the defendant company, and, it follows, therefore, that s. 123 is not applicable. But even if it were applicable, as we have already held that the unit was delivered and deemed to have been accepted by the plaintiff, then he would only be entitled to damages.

We think that s. 124 is applicable to this case, as at the time when the order was placed with the defendant company the goods were "not ascertained". As we have held that the warranties as to fitness and quality of the unit have been broken by the defendant company, the buyer under this section has the right either (*a*) to accept the goods or refuse to accept the goods when tendered; or, (*b*) keep the goods for a time reasonably sufficient for examining and trying them and then refuse to accept them. In any case the buyer is entitled to compensation for any loss caused by the breach of warranty. In this case the plaintiff alleges that he kept the goods for a time reasonably sufficient for examining and trying them and that he then refused to accept them; but we have already held that the plaintiff kept the goods for an unreasonably long time, and he should consequently be deemed to have accepted them: See *Heilbutt* v. *Hickson* (1872) L.R. 7 C.P. 438 at p. 451, 452. For these reasons we consider that the plaintiff has lost his right to reject the goods and that he is only entitled to damages.

Question 10: What is the measure of damages?

The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty: sec. 73 of our Contract Law reproducing the common law: cf. s. 53 (2) of the English Sales of Goods Act, 1893. In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods

at the time of delivery to the buyer and the value they would have had if they had answered to the warranty: See *Loder* v. *Kekulé* (1857) 3 C.B.N.S. 128; 140 E.R. 687; *Jones* v. *Just* (1868); and *Heilbutt* v. *Hickson* (1892) cited above at p. 453, (Cf. s. 53 (3) of the English Act of 1893).

Applying these principles to the present case we hold that at the time of the delivery of the unit and on the date of the issue of the writ in the present case, when the rights of the parties crystallized, the said unit was defective in this respect, that is, the shaft seal or gland was broken and it would cost about £5 to replace it; there was leakage of gas and it would cost about £18 to recharge the unit; and we estimate that a sum of about £15 would have to be paid to an engineer for examining and putting this defect right (considering that Simpson's fee for the whole work was about £44).

Consequently the estimated loss to the plaintiff from the breach of warranty was £38.0.0 as follows:

(*a*) Value of new shaft seal . . .	£5
(*b*) Value of gas	£18
(*c*) Engineer's fee	£15
Total:	£38

We therefore hold that on the date of the commencement of this action the plaintiff was entitled to £38 damages. But as in the course of the hearing the defect was partly put right by the engineer of the defendant company we consider that the damages to be awarded in this case should be reduced by £15.0.0 as follows:

(*a*) The shaft seal has been replaced by the defendant company	£5
(*b*) The unit has been partly refilled with gas but there is still a small amount to go into it. We estimate that about £10 of gas has been put into it . . .	£10
Total:	£15

Consequently we award damages in the sum of £23 in favour of plaintiff against the defendant company and costs in the scale between £25 and £50.

Now, we have to consider the position of the second defendant. The allegations of unskilfulness and faulty installation against him were withdrawn at the close of the hearing and the only claim pressed against him was for damages for breach of warranty as the agent of the defendant company. As we have held (see question (3) above) that he is not personally liable for any breach of warranty of his disclosed principal, the claim against him fails and is dismissed with costs in his favour in the scale of £500-£2000.

In the result there will be judgment for plaintiff against the first defendant for £23 damages and costs in the scale of £25-£50.

The case against the second defendant is dismissed with costs against the plaintiff in the scale of £500-£2000.

Appeal by plaintiff from the judgment of the District Court of Nicosia.

Chr. Mitsides and *M. A. Triantafyllides* for the appellant.

G. HajiPavlou for the respondent.

The judgment of the Supreme Court was delivered by:

HALLINAN, C.J.: In this case the plaintiff-appellant bought from the defendants an air-conditioning unit for his hotel. After considerable correspondence the plant arrived in May, 1952. The plaintiff had sent to the defendants the measurement of the room where the plant was to be installed and it was understood that the defendants would send detailed instructions as to how the plant should, in the circumstances, be erected. The defendants lost these measurements and finally sent some typical drawings to assist in the installation.

The sale had been effected through the second defendant, Mr. S. A. Petrides, and this gentleman who was a qualified electrical engineer undertook to instal the plant for the plaintiff. The grill-room-lounge were converted at some expense for the purpose of installing the unit and a water cooling plant was erected. However, neither the plaintiff nor Mr. Petrides were able to get the plant working. Another gentleman, Mr. Simpson, an electrical engineer who had done a specialist's course on refrigeration, was also called in by the plaintiff. The grill-room-lounge had to be reconverted back to its original state and another cooling plant was installed. Correspondence ensued between the plaintiffs and the defendants in England but the air-conditioning unit still would not work. Finally, on the 24th December, 1952, the plaintiff's lawyer wrote to the defendants rejecting the plant and claiming damages and costs. The following month this action was begun and the hearing of this action started on the 14th October, 1954. About the 20th October in that year Mr. Jarvis, an expert sent out from England by the defendants, examined the plant and at once found that it had a broken shaft seal. In order to locate this defect it was necessary to open the mechanical unit and this Mr. Simpson had not been prepared to do without the authority of the plaintiff or of the manufacturers.

The trial Court found "that the unit when supplied to the plaintiff was defective and it was therefore neither fit for the purpose for which it was ordered nor merchantable". The Court accordingly found that there had been a breach of an implied warranty; but considered that the plaintiff was not, under section 124 of the Contract Law, Cap. 192 (now repealed but in force when the cause of action in this case arose), entitled to refuse to accept the air-conditioning plant as he had kept the goods for a time more than was reasonably sufficient for examining and trying them. However, under s. 123 the appellant was entitled to damages for breach of warranty.

The first ground of appeal argued in this case was that the trial Court's finding that the appellant had delayed too long before rejecting the goods was against the weight of evidence. Counsel has referred us to those parts of the evidence upon which he relied in making this submission. After considering this evidence and the arguments we are not prepared to disturb the findings of the trial Court on what is entirely a question of fact and which is supported by sufficient evidence.

The other ground of appeal is that the plaintiff should have been awarded special damages. In considering the question of damages for breach of warranty the trial Court held that: "The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty... In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty:" Applying this principle the Court found that the plaintiff was entitled to £23 being the cost of the new shaft seal, the value of recharging the plant with gas and the engineer's fees, less the value of work done by the defendant to remedy the defect in the unit.

Damages for breach of contract are assessed under section 73 of the Contract Law which, as was decided in the case of *Markou* v. *Michael*, 19 C.L.R., 282, merely enacts the Common Law rule in *Hadley* v. *Baxendale* (1854). The Common Law rule is reproduced in the English Sale of Goods Act, 1893. The *prima facie* measure of damages stated in section 53 (2) of that Act may in many cases be increased by special damages recoverable under section 54 (See Mayne on Damages, 11th Edition, 199). In *Ratcliffe* v. *Evans* (1892) 2 Q.B., 524, at page 528, Bowen, L.J., explained what was the nature of special damages in these words:—

> "Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated,

for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

The trial Court has not awarded any special damages in this action and does not appear to have considered the question whether any special damage naturally resulted from the breach of contract under the particular circumstances of the case.

In our view the circumstances of this case forcibly suggest that the plaintiff has suffered special damages. The defendant sold an air-conditioning unit with a concealed defect. The consequential loss for which the defendant is liable is not what both parties contemplated when they made the contract. The principle to be applied is stated by Chalmers in the notes to section 54 of the Sale of Goods Act, 1893, at p. 155:

> "The criterion is necessarily an objective one. What the parties themselves may have contemplated is immaterial. The question is what a reasonable man with their common knowledge would contemplate as a probable consequence of the breach if he applied his mind to it."

It was reasonable for the plaintiff to assume when the unit would not work that this was due to faulty installation; and it also was reasonable that the defendants, had they known of their own breach of warranty, would foresee that the plaintiff would make this assumption. In a vain but reasonable effort to make the unit work, the plaintiff appears to have incurred considerable expense over and above what he would ordinarily have paid to instal the unit. If such expenses are included in the particulars he gave under paragraph 14 of the statement of claim, then he has suffered a substantial loss by failing to recover them.

However, before the plaintiff is entitled to recover special damages, it must be shown that he has given particulars of such items in his pleadings and that he has proved these particulars by evidence. In paragraph 14 of the statement of claim the plaintiff sets out particulars of special damage; subsequently as a result of an order to give further particulars he furnished a detailed statement of these special damages in a document dated 20th March, 1954. In the course of the trial the parties agreed on the amount to be awarded for special damages but this agreed amount (as clearly stated in the judgment) was only to be applied "in case it were held by the Court that the plaintiff was entitled to reject the air-conditioning unit and claim damages". Since the Court dismissed the plaintiff's claim to reject the air-conditioning unit and merely allowed him damages for breach of warranty, the plaintiff is not estopped by any admission made during the trial from claiming any amount pleaded as special damage

and which can be fairly held to arise as a natural consequence and in the special circumstances of the case from the breach of warranty.

Although the claim for special damage is therefore open on the pleadings, the evidence affords little help in ascertaining as to which if any of the particulars of special damage pleaded were recoverable as damages for breach of warranty where the article sold has been accepted; for this reason it would be very difficult for this Court or the Court below to determine the amount of special damages to which the plaintiff is entitled without hearing fresh evidence. It was, however, not an unnatural oversight that, after the parties had agreed on the amount of the special damages recoverable if the article could be rejected, the plaintiff should forget to prove those special damages recoverable if the article were held to be accepted.

The Supreme Court is reluctant to admit fresh evidence so as to allow a plaintiff to repair an omission on his part to prove the facts necessary to establish his claim for relief, unless in very special circumstances; but in this case we consider that such circumstances do exist. The plaintiff established a cause of action namely a breach of warranty; in his pleadings he claimed damages and gave particulars of special damage which might be recoverable in two eventualities; the special damages in one eventuality were agreed upon, but he lost sight of the necessity of proving such damage in the other eventuality. Furthermore, we consider that he may have suffered substantive loss by reason of the special damages which he has pleaded.

It is therefore ordered that this case be remitted to the trial Court to determine what, if any, special damages the plaintiff is entitled to recover which are included in the particulars furnished by him before the trial and which arose from monies reasonably expended by him upon the reasonable assumption that the defect was due to faulty installation; and the parties shall be at liberty to call or recall witnesses for examination or cross-examination and adduce all evidence relevant to this issue. The order of the trial Court awarding damages and costs is set aside so that it may determine afresh the amount of damages and the scale of costs applicable having regard to the damages awarded.

The appellant shall bear the respondents' costs of this appeal; the costs of determining the issue remitted to the trial Court shall be at the discretion of that Court.