[TRIANTAFYLLIDES, LOIZOU AND HADJIANASTASSIOU, JJ.]

NICOS K. SHACOLAS,

Appellant-Defendant,

v.

SOFRONIOS MICHAELIDES AND ANOTHER,

Respondents-Plaintiffs.

(*Civil Appeal No.* 4619).

Contract—Breach—Condition as to time—Waiver of condition by conduct—Effect of such waiver—Damages for breach of contract—Sale of goods—Deliveries of beetroots—Stipulated delivery periods of the essence of the contract—Waiver by conduct of party's (in the present case : of appellant's-buyer's) right to insist on the strict observance of the contractually stipulated delivery periods—No reasonable notice by such party, after such waiver, making time at a future date of the essence of the contract—Therefore, the refusal, in the circumstances, on the part of such party (in the present case of the buyer-appellant) to accept any further deliveries of beetroots by the respondents-sellers, amounts to a breach of contract giving rise to damages in favour of the sellers-respondents—The Sale of Goods Law, Cap. 267, *section* 13 (1), *identical to section* 11 (1) (*a*) *of the English Sale of Goods Act,* 1893—*See, also, herebelow.*

Damages—Damages for breach of contract—Quantum of damages—Measure of damages for non-acceptance of goods sold—General principles upon which the Appellate Court will interfere with awards of damages—No erroneous estimate of damages in the present case by the trial Court—See, also, hereabove under Contract.

Time—When time is of the essence of the contract—Waiver by conduct to insist on the strict observance of the period of time stipulated under the contract—Right of the party (who so waived his right) to give reasonable notice to the other party making time at a future date of the essence of the contract—See, also, above under Contract.

Waiver—Time—Time of the essence of the contract—Waiver by conduct of party's right to insist on strict observance of the

periods of time contractually stipulated—Failure to give reasonable notice making time of the essence—See above under Contract; Time.

Civil Procedure—Appeal—Damages—Principles upon which the Court of Appeal will interfere with awards of damages made by trial Courts—Findings of fact based on the credibility of witnesses—Principles upon which the Court of Appeal will interfere with such findings made by trial Courts.

Sale of Goods—Breach—Time—Damages—See above under Contract; Time; Waiver.

Witnesses—Credibility of—Principles upon which the Court of Appeal will disturb findings of fact made by trial Courts and based on the credibility of witnesses—See, also, above under Civil Procedure.

Findings of fact—See above under Civil Procedure; Witnesses.

Credibility—Credibility of Witnesses—See above under Civil Procedure; Witnesses.

In these consolidated cases both respondents-plaintiffs had claimed damages for breach of contract, namely for the non-acceptance by appellant-defendant of the balance of the contracted quantities of beetroots. The Full Distrct Court of Nicosia found in favour of the plaintiffs, now respondents, and assessed the amount of damages at £886 for respondent 1 and £2,257.790 mils for respondent 2 (including, in his case, an amount of £618.940 mils due for beetroots already delivered, before breach).

The defendant appealed against that judgment on several grounds, the main one of which is that the trial Court failed to treat time as being of the essence regarding deliveries by the respondents; and that there was in fact a breach of contract on their part because of their failure to deliver the agreed quantities of beetroots within the periods stipulated in their respective contracts. It was further contended on behalf of the appellant that the trial Court wrongly believed the evidence of certain witnesses for the plaintiffs-respondents; and that, in any event, the trial Court erred in assessing the amount of damages awarded to the plaintiffs-respondents.

The salient facts of the case as rightly, in the opinion of the Supreme Court, found by the trial Court, on the material before it, are as follows :

The respondents are farmers and the appellant an exporter of agricultural produce. By contracts made in December, 1963, both respondents agreed to sell to the appellant their crops of beetroots, deliveries to begin, at the instance of the appellant, as from the 1st April, 1964, and to last until the 15th and 20th May, 1964, respectively. The two contracts are otherwise similar in all material respects (price, quantity, quality etc. etc.).

The appellant did not call upon the respondents to start deliveries until the 8th May, 1964. The respondents in compliance with the said request of the 8th May, started delivering beetroots in the next few days. There is no doubt that the appellant had clearly waived by his conduct his right to insist on the strict observance by the respondents of the stipulated periods of delivery; it was he himself who requested the respondents not to start deliveries of beetroots until the 8th May, 1964, and in fact he kept on accepting deliveries until the 22nd May, 1964, after the expiry of the contractually stipulated periods. Be that as it may, the appellant refused as from the 22nd May, 1964, to accept further deliveries. On the 25th May, 1964, the appellant has written to the respondents and other producers of beetroots in the area a letter in which he stated, *inter alia,* that he agreed to accept deliveries until the 28th May, but this without any obligation on his part as regards quantity and price, and according to new arrangements.

Section 13(1), of the Sale of Goods Law, Cap. 267—which is identical to section 11 (1) (*a*) of the English Sale of Goods Act, 1893—reads as follows :

> "13 (1). Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated".

In dismissing the appeal and affirming the judgment of the trial Court, the Supreme Court :

Held, I. As to the question of time and the alleged waiver by the appellant-buyer of his right to insist on the strict performance of the contract :

(1) (*a*) We do agree that in the present cases the stipulated delivery periods were of the essence, in view of the nature of the subject-matter of the relevant contracts; actually, this point was not seriously disputed by the respondents.

(*b*) When time for delivery of the goods is of the essence of a contract, it follows that the vendor, who has failed to deliver within the stipulated period of time, cannot call upon the buyer to accept delivery after the stipulated period has expired; he has himself failed to fulfil his own part of the bargain and the buyer can, as a rule, plead the vendor's default as discharging him from any further obligation under the contract of sale.

(*c*) But in dealing with the present cases, sight could not be lost of the provisions of section 13 (1) of our Sale of Goods Law, Cap. 267 (*supra*)—which is identical to section 11(1)(a) of the English Sale of Goods Act, 1893 (*supra*).

(*d*) On the other hand it is well-settled that a stipulation as to time may be waived; that the buyer may waive the condition as to the time of delivery; and once he does so, his waiver is binding upon him until he gives reasonable notice that delivery must be made by a certain future date (See : *Alexander* v. *Gardner; Bentsen* v. *Taylor, Sons and Co.; Hartley* v. *Hymans; Charles Rickards Ltd.* v. *Oppenhaim; Panoutsos* v. *Raymond Hadley Corporation of New York; Bruner* v. *Moore;* and *Central London Property Trust Ltd.* v. *High Trees House Ltd. infra*).

(2) (*a*) There is no doubt that the present appellant had clearly waived by his conduct his right to insist on the strict observance by the respondent-plaintiffs of the stipulated periods; it was he himself who requested the respondents, in the first place, not to start deliveries of beetroots until the 8th May, 1964, and in fact he kept on accepting deliveries until the 23rd May, 1964, after the expiry of the stipulated periods in the contracts sued on.

(*b*) The appellant could have given eventually reasonable notice making the time of the essence of the matter, even after he had kept on accepting deliveries beyond the expiry of the contractually stipulated periods of time; but there is no doubt at all in our minds that his letter of the 25th May, 1964 (*supra*) could not be seriously treated as being, in the circumstances of the present cases, as the reasonable notice in question. Such letter is in our opinion a clumsy attempt on the part of the appellant to avoid the consequences of his own breach; and in any case, the said letter did not refer to the future performance of the contracts between the appellant and the respondents but expressly stated that any new deliveries would be subject to new arrangements.

(*c*) There is, therefore, no difficulty on our part in upholding the judgment of the trial Court on the view that even though

time was of the essence originally, the appellant by his conduct deprived himself of the possibility of terminating his contracts with respondents on such a ground, but on the contrary having waived the stipulations as to time he later on broke such contracts himself.

Held, II. On the issue of credibility of certain witnesses :

(1) With regard to the credibility of witnesses the principles upon which this Court decides appeals on this issue are well settled and we will not enter into them in detail. It must be shown that the trial Court was wrong and the onus is on the appellant to persuade this Court.

(2) And we have not been persuaded that the trial Court was wrong in accepting the evidence for the respondents-plaintiffs.

Held, III. As to the quantum of damages :

(1) The measure of damages, for non-acceptance of goods sold, is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. The trial Court in approaching the question of damages has relied mainly on the evidence of A.P. who was called on behalf of the appellant himself, and has been described as a witness with vast experience and a very truthful witness.

(2) Having given the matter our best consideration we have not been convinced either that the trial Court acted upon some wrong principle of law or erroneous assumption of fact, or that the amounts awarded are so extremely high, or that there was an error in the calculation of the figures, as to make them, in the opinion of this Court, an erroneous estimate of the damages to which the respondents are entitled. (See *infra* the following cases : *Flint's ; Davies'; Cacoyannis'; Kemsley Newspapers Ltd; Christodoulou's; Constantinides'*.)

Appeal dismissed with costs.

Cases referred to :

Alexander v. *Gardner* (1835) 4 L.J. C.P. 223;

Bentsen v. *Taylor, Sons and Co.* [1893] 2 Q.B. 274;

Panoutsos v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473;

Hartley v. *Hymans* [1920] 3 K.B. 475;

Charles Rickards Ltd. v. *Oppenhaim* [1950] 1 K.B. 616, at p. 623, per Denning L.J. as he then was;

Bruner v. *Moore* [1904] 1 Ch. 305;

Central London Property Trust Ltd. v. *High Trees House Ltd.* [1947] K.B. 130;

Flint v. *Lovell* [1935] 1 K.B. 354 at p. 360;

Davies v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601;

Cacoyannis v. *Papadopoulos* 18 C.L.R. 205;

Kemsley Newspapers Ltd. v. *Cyprus Wines and Spirits Co. Ltd.* "*KEO*" (1958) 23 C.L.R. 1;

Christodoulou v. *Menicou* (1966) 1 C.L.R. p. 17.

Constantinides v. *Hji Ioannou* (1966) 1 C.L.R. p. 191.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Mavrommatis & Demetriades D. JJ.) dated the 18th February, 1967 (Consolidated Actions No. 1180/64 and 1181/64) whereby the defendant was ordered to pay an amount of £886.— to plaintiff No. 1 and an amount of £2,257.790 mils to plaintiff No. 2, as damages for breach of contract.

G. Tornaritis, for the appellant.

Chr. Mitsides, for the respondents.

TRIANTAFYLLIDES, J. : The Judgment of the Court will be delivered by Mr. Justice HadjiAnastassiou.

HADJIANASTASSIOU, J. : In these consolidated cases both respondents-plaintiffs had claimed damages for breach of contract, namely, for the non-acceptance by appellant-defendant of the balance of the contracted quantities of beetroots. The Full District Court of Nicosia found in favour of the respondents and assessed the amount of damages at £886 for respondent 1 and £2,257.790 mils for respondent 2 (including in his case, an amount of £618.940 mils due for beetroots already delivered, before breach).

The appellant appealed against that Judgment on several grounds.

The salient facts, as rightly in our opinion found by the trial Court, on the material before it, are as follows :

The respondents are farmers and the appellant is an exporter of agricultural produce.

By contracts made respectively on the 14th and 20th December, 1963, both respondents agreed to sell to the appellant their crops of beetroots, deliveries to begin, at the instance of the appellant, as from the 1st April, 1964, and to last until the 15th and 20th May, 1964, respectively. The two contracts are otherwise similar in all material respects.

One of the said contracts, with respondent 1—as translated in English—reads, in its relevant parts as follows :

"

GOODS : Beetroots, Spring crop 1964, red, round, 45-90 mm. in diametre.

QUANTITY : One hundred (100) tons as well as the remainder of his whole crop in Larnaca District.

QUALITY of the Goods: Approved and fit for export in accordance with the Regulations of the Agricultural Produce Inspection Service of the Ministry of Commerce and Industry, free of soil, cleaned but not washed, cut on the upper end etc. according to the instructions of the purchaser. Variety : Red, round as above.

PRICE : Twenty mils (20) per oke of nett weight.

DELIVERY : (a) Place : the purchaser's stores in Famagusta.

(b) Time : from 1/4/64 until 15/5/64 at the instance of the purchaser.

PAYMENT : The seller has received in advance £62.590 mils as per invoice No. 02818; the balance in cash on delivery".

It is common ground that beetroot seed was supplied to both respondents by the appellant; this seed was imported by one Anthimos Papasolomontos. The respondents planted areas of 30 and 55 donums respectively.

The appellant on or about the 8th May, 1964, requested the respondents to start deliveries of the beetroots as per their contracts. The respondents, in compliance with the said request, started delivering beetroots in the next few days. As the relevant way-bills show the respondents delivered in all 16,632 and 31,022 okes respectively.

Then, on the 20th May, 1964, when a lorry-driver, Iosef Pentafkas, went to deliver a load of beetroots, for another person, at the Lyssi warehouse of the appellant, a certain Panayis Andreou, who was in charge of the place there—and acting for the appellant—told him to inform respondent 1 that no more deliveries of beetroots were to be accepted.

As a result of this respondent 1 visited the appellant at his Famagusta warehouse with a lorry-load of beetroots and the appellant agreed to accept delivery of *that* load only and confirmed that Panayis Andreou, at Lyssi, was acting on his instructions in not accepting any more deliveries; this took place on the 22nd May, 1964, and it was the last delivery made by respondent 1.

As regards respondent 2 he found himself in the same position as respondent 1, with regard to deliveries of beetroots; on the 21st May, 1964, he was told by the appellant's agent at his village, a certain Psaras, to stop deliveries. The explanation given to him by the appellant, as well as by Psaras, was that the market for beetroots in England was no longer profitable.

It is correct that the appellant has written to the respondents and other producers of beetroots in the Xylophagou area a letter dated the 25th May, 1964, in which he stated that he had warned them repeatedly that the beetroots should have been delivered before the expiry of the stipulated periods, in accordance with the contracts of sale; that nevertheless, as the beetroots were not ready in time, he agreed to accept deliveries until the 28th May, but this without any obligation as regards quantity and price, and according to new arrangements.

In our opinion the trial Court was amply justified in finding, on evidence which it was entitled to accept as true, that the appellant, before writing this letter, had already broken his contracts with the respondents by informing them, as already stated in this Judgment, not to deliver any more beetroots.

Such letter was, in our opinion, nothing more than a clumsy attempt on the part of the appellant to avoid the consequences

of his own breach; and in any case as he stated therein deliveries would be accepted until the 28th May, 1964, *under new arrangements.*

Counsel for the appellant mainly contended that the trial Court failed to treat time as being of the essence regarding deliveries by respondents; and that there was in fact a breach of their contracts on their part because of their failure to deliver the agreed quantities of beetroots within the periods stipulated in their contracts.

We do agree that in the present cases the stipulated delivery periods were of the essence, in view of the nature of the subject-matter of the relevant contracts; actually, this point, was not seriously disputed by the respondents.

When time for delivery of the goods is of the essence of a contract, it follows that the vendor, who has failed to deliver within the stipulated period, cannot call upon the buyer to accept delivery after the stipulated period has expired; he has himself failed to fulfil his own part of the bargain and the buyer can, as a rule, plead the vendor's default as discharging him from any further obligation under the contract of sale.

But in dealing with the present cases, sight could not be lost of the provisions of section 13 (1) of our Sale of Goods Law (Cap. 267)—which is identical to section 11 (1) (*a*) of the English Sale of Goods Act 1893—and which reads :

> "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated".

In *Alexander* v. *Gardner* (1835) 4 L.J. C.P. 223, the plaintiff had agreed to sell to the defendant butter to be shipped in October. The butter was not in fact shipped till November, but the defendant had waived the condition and accepted the invoice and bill of lading. It was held that he was liable for the price, although the butter was lost by shipwreck. Tindal, C.J. said : "If the party waives the condition he is in the same situation as it had never existed". It is to be noted that, although in the case of *Alexander* v. *Gardner* (*supra*) the waiver was not in writing, but by conduct only, it was yet held to be effective.

It has been repeatedly held by Courts in the past that a stipulation as to time may be waived; that the buyer may waive the condition as to the time of delivery; and once he does so, his waiver is binding upon him until he gives reasonable notice that delivery must be made by a certain date. With regard to the waiver of a condition, in *Bentsen* v. *Taylor, Sons & Co.* [1893] 2 Q.B. 274 Bowen L.J. had this to say : "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?" In *Panoutsos* v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473, Lord Reading delivering the Judgment of the Court cited with approval the relevant dictum which is laid down as to waiver of a condition by Bowen L.J., in the case of *Bentsen* v. *Taylor* (*supra*) and added : "I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract. It seems to me to follow from the observation of Bowen, L.J. in *Bentsen* v. *Taylor* that there must be reasonable notice given to the buyer before the sellers can take advantage of the failure to provide a confirmed banker's credit". (See further *Hartley* v. *Hymans* [1920] 3 K.B. 475).

In *Charles Rickards Ltd.*, v. *Oppenhaim* [1950] 1 K.B. p. 616, Denning L.J. had this to say, (*inter alia*) at p. 623 : "If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it. I think not only that that follows from *Panoutsos* v. *Raynond Hadley Corporation of New York*, a decision of this Court, but that it was also anticipated in *Bruner* v. *Moore* ([1904] 1 Ch. p. 305). It is a particular application of the principle which I endeavoured to state in *Central London Property Trust Ltd.*, v. *High Trees House Ltd.* [1947] K.B. p. 130".

There is no doubt that the present appellant had clearly waived by his conduct his right to insist on the strict observance by the respondents of the stipulated periods; it was he himself who requested the respondents, in the first place, not to start deliveries of beetroots until the 8th May, 1964 and in fact he kept on accepting deliveries until the 22nd May, 1964, after the expiry of the contractually stipulated periods.

The appellant could have given eventually reasonable notice making time of the essence of the matter, even after he had kept on accepting deliveries beyond the expiry of the contractually laid down periods of time; but, there is no doubt at all in our minds that his aforementioned letter on the 25th May, 1964, could not be seriously treated as being, in the circumstances of the present cases, as the reasonable notice in question; and in any case as already pointed out the said letter did not refer to the performance of the contracts between the appellant and respondents but expressly stated that any new deliveries would be subject to new arrangements.

There is, therefore, no difficulty on our part in upholding the Judgment of the trial Court on the view that even though time was of the essence originally, the appellant by his conduct deprived himself of the possibility of terminating his contracts with respondents on such a ground, but on the contrary having waived the stipulations as to time he later on broke such contracts himself.

Going through the record very carefully we are satisfied that there was sufficient evidence before the trial Judges to support such finding and after weighing the two versions to come to the conclusion which they have reached.

Counsel has further contended that the trial Court erred in accepting the evidence of certain witnesses for the respondents.

With regard to the credibility of witnesses the principles on which this Court decides appeals on this issue are well settled and we will not enter into them in detail. It must be shown that the trial Court was wrong and the onus is on the appellant to persuade this Court. We have not been persuaded that the trial Court was wrong in accepting the evidence for the respondents.

The next submission of counsel for the appellant, with which we need deal with, is that the trial Court erred in assessing the amount of damages awarded to the respondents; especially,

that the trial Court in making such assessment overrated the production per donum, for purposes of export, of the crops of the respondents.

The measure of damages, for non-acceptance of goods sold, is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract. The trial Court in approaching the question of damages has relied mainly on the evidence of Anthimos PapaSolomontos, who was called on behalf of the appellant himself, and has been described as a witness with vast exprerience and a very truthful witness. The trial Court, had this to say in its Judgment at p. 58 : "It appears that this witness had exprerimented with the particular seed used by the plaintiffs and therefore he was in a position to state that the per donum production is 2–8 tons depending on certain factors. Of that quantity only about 50% to 75% would be fit for export. The fairest thing to do in the circumstances is to rely on the average of the two figures given by this witness. Therefore, we find that the average production per donum of both plaintiffs was 5 tons of which about 60% was fit for export, leaving, therefore, a net production of 3 tons per donum of exportable beetroots."

Having given the matter our best consideration, we have not been convinced either that the Court acted upon some wrong principle of law or erroneous assumption of fact, or that the amounts awarded are so extremely high, or that there was an error in the calculation of the figures, as to make them, in the opinion of this Court, an erroneous estimate of the damages to which the respondents are entitled. (See *Flint* v. *Lovell*, [1935] 1 K.B. 354 at p. 360, approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601; *Cacoyiannis* v. *Papadopoullos*, 18 C.L.R. 205; *Kemsley Newspapers Ltd.* v. *Cyprus Wines & Spirits Co. Ltd.* "*KEO*" (1958) 23 C.L.R. p. 1; *Tessi Christodoulou* v. *Nicos Savva Menicou*, (1966) 1 C.L.R. p. 17; *Costas Ch. Constantinides* v. *Yiangos Hji Ioannou* (1966) 1 C.L.R. p. 191).

For these reasons, we would not be justified, in disturbing the finding of the trial Court as to the amounts of damages.

We, therefore, affirm the Judgment of the trial Court; and in the result, we would dismiss the appeal with costs.

Appeal dismissed with costs.