[JOSEPHIDES, STAVRINIDES, LOIZOU, JJ.]

DEMETRIS M. LAMBRIANIDES AND 2 OTHERS,

Appellants-Defendants,

v.

THE ELECTRICITY AUTHORITY OF CYPRUS,

Respondents-Plaintiffs.

(Civil Appeal No. 4698).

Contract—Breach of contract—Damages—Sum named in the contract to be paid in case of such breach—Penalty—Stipulation by way of penalty—Party complaining of such breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for—The Contract Law, Cap. 149, section 74.

Damages—Liquidated damages or penalty—Pre-estimated loss—Sum named in the contract to be paid in case of breach—Stipulation by way of penalty—Section 74 of the Contract Law, Cap. 149—See above.

Penalty—Stipulation in a contract by way of penalty—See above.

Liquidated or pre-estimated damages—See above.

Electricity—Contract for the supply of electricity—Breach—Whether certain clause of that contract comes within the ambit of section 74 of the Contract Law, Cap. 149—See above under Contract.

By virtue of contracts signed on the 5th March, 1964, the Electricity Authority of Cyprus (plaintiffs-respondents) agreed with each of the defendants-appellants as follows:

"(1) In consideration of the Authority agreeing to extend their distribution system to make available a supply of electricity for connection to the premises described in the Schedule thereto, the guarantor (i.e. the appellant) hereby undertakes.....

.....

"(*b*) That if in any of the first FIVE YEARS commencing from the first routine meter reading taken after the date

when the said supply is made available at the said premises or would have been so made available, if not prevented by any act or omission of the guarantor..... the annual revenue received by the Authority in respect of the said supply of electricity is less than £18.000 mils..... .....the guarantor will pay to the Authority in respect of that year such sum (hereinafter called 'the deficiency sum') as may be necessary to bring the revenue so received by the Authority in that year to the guaranteed sum, provided that.....".

Material, also, are the provisions of clause 3 of the contract (which are quoted in full in the judgment, *post).*

The Electricity Authority incurred expenses in extending their distribution system, and on the 18th June, 1965, they informed the appellants that they were ready and willing to make to them available at their premises a supply of electricity. But the appellants refused to accept such supply and the Authority instituted in the District Court of Paphos the present three actions (consolidated in due course) against the appellants claiming damages for breach of contract. Eventually, the trial judge awarded such damages to the plaintiff Authority as follows: £90 in the case of the first appellant and £45 to each of the remaining two appellants. It is against these judgments that the present appeal is taken by the three defendants in the said consolidated actions.

Sections 74 of the Contract Law, Cap. 149 reads as follows:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for".

Learned counsel for the appellants, having at first challenged the findings of fact made by the trial judge regarding appellants' allegations as to fraud or innocent misrepresentation on the part of the Authority as well as to the agree-

ment being *non est factum*, proceeded to argue that the damages claimed were not liquidated damages nor penalty, that there was no evidence of pre-estimated loss, that no evidence was adduced as to the damages suffered by the Authority, and that the compensation assessed by the trial judge was not a reasonable one. He further submitted that the respondent Authority should have adduced evidence as to the original costing, the maintenance costing for the supply of electricity for the period of five years, and that the trial judge ought not to have awarded damages on the basis of clause 1(*b*) of the contract (*supra*) as penalty, but reasonable compensation under section 74 of the Contract Law, Cap. 149 (*supra*).

Counsel for the respondent Authority, on the other hand, based his case on three alternative heads: (*a*) amount due under the contract by virtue of the provisions of clauses 1(*b*) and 3 of the contract (*supra*); (*b*) although there is no express penalty stipulated, such a penalty could be inferred from reading the aforesaid clauses 1(*b*) and 3 together; and that it was the intention of the parties that the sum of £90 or as the case may be would become payable if there was a breach or interruption; or (*c*) compensation for loss or damage for breach of contract, under section 73 of the Contract Law, Cap. 149.

In dismissing the appeal, the Court:-

Held, I. As to the findings of fact made by the trial judge:

(1) The learned trial judge, after giving due weight to the conflicting versions, accepted the Authority's version and rejected that of the appellants. This being a matter of credibility, we have not been persuaded by counsel for the appellants today that the trial judge went wrong in any respect.

(2) Consequently, we uphold the trial judge on the findings of fact that there was no fraudulent or innocent misrepresentation and that the appellants knew what was the nature and character of the document which they were signing and that their mind accompanied their signature.

Held, II. As to the question of damages or penalty:

(1) We have reached the conclusion that this case can only be upheld if it can be brought within the ambit of

section 74 of the Contract Law Cap. 149 (*supra*).

(2) Now, looking at clause 1(*b*) of the contract (*supra*) we are of the view that that clause names a sum as the amount to be paid in the case of breach of the contract. In the present case there is a finding of fact that the supply would have been made available by the Authority but it was prevented by the appellants, so that the provisions of the said clause 1(*b*) come into play; and that clause provides that in such an eventuality the sum of £18 per year minimum is payable for a period of five years in the case of the first appellant, and the sum of £9 per year in the case of the other two appellants.

(3) As to the question whether any evidence was led to prove the damage or loss sustained, section 74 provides that the party complaining of the breach is entitled to compensation "whether or not actual damage or loss is proved to have been caused thereby", and the compensation payable is "reasonable compensation", not exceeding the amount named in the contract, as may be assessed by the Court.

(4) Having regard to the obligations undertaken by the appellants and the express provisions of clauses 1(*b*) and 3 of the contract (*supra*), read in the light of section 74 of the Contract Law, we are of the view that in the circumstances of this case the compensation awarded in each case was reasonable and for these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.

Appeal.

Appeal by defendants against the judgment of the District Court of Paphos (Papadopoulos D.J.) dated the 30th December, 1967 (Action Nos. 296/67, 297/67, and 298/67 - consolidated) whereby damages were awarded to the plaintiff authority for breach of contract by the defendants.

L. Papaphilippou, for the appellants.

G. Cacoyiannis, for the respondents.

The judgment of the Court was delivered by:

JOSEPHIDES, J.: This is an appeal by the defendants in

three consolidated actions in which the District Court of Paphos awarded damages to the plaintiff Authority for breach of contract by the defendants.

The sums awarded were £90 in the case of the defendant in Action No. 296/67 (first appellant), £45 in the case of the defendant in Action No. 297/67 (second appellant), and £45 in the case of the defendant in Action No. 298/67 (third appellant). The plaintiff-respondent is the Electricity Authority of Cyprus, a body corporate established under the provisions of the Electricity Development Law, Cap. 171, who are the suppliers of electricity in Cyprus. The defendants-appellants in the three actions are residents in the village of Letymbou in the district of Paphos. By virtue of contracts signed on the 5th March, 1964, the Electricity Authority of Cyprus agreed with each of the appellants as follows:-

"(1) In consideration of the Authority agreeing to extend their distribution system to make available a supply of electricity for connection to the premises described in the Schedule hereto, the Guarantor (i.e. the appellant) hereby undertakes.....

"(b) That if in any of the first FIVE YEARS commencing from the first routine meter reading taken after the date when the said supply is made available at the said premises or would have been so made available, if not prevented by any act or omission of the Guarantor.... the annual revenue received by the Authority in respect of the said supply of electricity is less than C£18.000 mils ..... the Guarantor will pay to the Authority in respect of that year such sum (hereinafter called 'the deficiency sum') as may be necessary to bring the revenue so received by the Authority in that year to the guaranteed sum, provided that:....."

By clause 3 it was further provided that -

"If a receiving order in bankruptcy shall be made against the Guarantor (i.e. the appellant) or if he shall call a meeting of his creditors or if he shall execute any assignment for the benefit of or compound with his creditors or if the Guarantor being a Limited Company shall enter into compulsory or voluntary liquidation

(not being a voluntary liquidation only for the purposes of re-construction) or if any execution or distress shall be levied against the Guarantor or if the Guarantor shall allow any judgment against him to remain unsatisfied or if he shall cease to have an interest in the premises before the aforesaid period of 5 years expires (unless any third party acceptable to the Authority takes over the unexpired liability under this Agreement before the Guarantor ceases to have an interest in the premises) there shall become due and payable to the Authority by the Guarantor the sum arrived at by deducting from C£90.000 mils the amount aggregated of the Authority's charges for electricity already paid by the Guarantor and of any deficiency payment already made at the date of the happening of any of the eventualities set out above, and upon payment of such sum together with any sum already due and unpaid as aforesaid being made the liability of the Guarantor under clause (1) hereof shall determine".

In the case of the first appellant the premises for which a supply of electricity would be made available were a flour-mill at Letymbou, and in the case of the other two appellants a carpenter's shop in each case. The Electricity Authority, as alleged in their statement of claim, incurred expenses in extending their distribution system, and on the 17th June, 1965, they were ready to make to the appellants available at their premises a supply of electricity; in fact, they so informed the appellants on the 18th June, 1965. The appellants refused to accept such supply and the Authority instituted the present actions against the appellants claiming compensation for breach of contract.

The appellants filed separate defences but in fact they are identical in every respect. The material part of their statement of defence is that each of the appellants is illiterate and is not conversant with the English language in which the contract was drawn up. In paragraph 1(2) of the defence it is contended that the servants of the respondent Authority untruly represented to the appellants the contents of the contract signed on the 5th March, 1964, which, as already stated, is drawn up in the English language. The untrue representation of the Authority's servants being that it was not a contract but a formal request by the appellants to the Authority to have them in mind whenever there was available

electricity for industrial purposes in the village, and that if the appellants did not consume any electricity there would be no claim against them. In paragraph 1(3) of the defence it is expressly averred that the appellants were by these "false and untrue representations" misled into signing the said contract.

It is finally contended in the defence that having regard to the circumstances in which the contract was signed it had no legal validity as there was no *consensus ad idem*.

The appeal before us was argued today by appellants' counsel on three main grounds:

(*a*) That the Authority was guilty of fraud through the misrepresentations of its servants; or (*b*) that the Authority was guilty of innocent misrepresentation through the same conduct of its servants; or (*c*) that the agreement was *non est factum*, in that the mind of the appellants did not accompany their signatures.

We need not go into great length regarding the three grounds argued, or analyse the legal aspect of the case which is well settled on these points, because none of these grounds can succeed if the findings of fact of the trial Court are warranted by the evidence as a whole.

The learned trial judge, after hearing three witnesses on behalf of the respondent Authority and four witnesses on behalf of the appellants, including one of the three appellants, gave his judgment, awarding damages as already stated. In the course of his judgment he said-

> "Defendants deny liability and allege that they were defrauded in signing the contracts which were not explained to them and when they signed they believed that they were merely signing an application for the supply of electricity".

Further down he said-

> "But even if I go as far as to accept that such defence is pleaded (i.e. fraud) this has not in any way been proved in Court".

And he concluded-

> "All the evidence adduced and the circumstances of the signing of the contracts do not leave any doubt to

me that the defendants well knew that they were signing an agreement with the plaintiffs".

He then went on to consider the question of damages.

Here we have to be satisfied whether his findings of fact are warranted by the evidence as a whole and whether his reasoning can be supported as satisfactory. We must say that the judgment is rather brief and we would have been happier if he had given more particulars and analysed the evidence more, which would have made our task easier.

We have been through the record of the evidence ourselves and have heard counsel address us today. There was before the learned trial Judge the evidence of the District Engineer of the Authority, Mr. Christos G. Anastassiades, and that of Mr. Chr. Papallas, another servant of the Authority, who was a drawing office Assistant. The version of the District Engineer (Anastassiades) was that he had seen the appellants both in his office and at the village and that he had explained to them the contents of the contract. This is what he said in his evidence:

"I saw the defendants myself. I saw them all at Letymbou village. I saw I. Charilaou and Lambrianides at my office. All 3 approached me and were interested in the supply of electricity, I explained to them the whole situation and how it could be supplied and under what conditions it could be done if they wanted 3-phase electricity..... I explained to the defendants the terms of the contract".

Then in cross-examination he said-

"I met them again in the village. I was with Papallas again. Lardos was not present this time. There were other people around but I do not remember who they were. I translated to them some paragraphs which needed to be translated and in particular 1(*b*), 3, 4, 5 only. As to para. 5 I explained to them that they would be liable to pay the agreed amount of so much even if they did not consume the electricity for whatever reason".

Then there is the evidence of Papallas who says in cross-examination-

"I explained to them in a few words because Mr. Anastassiades had explained to them previously at

Letymbou";

and the Judge notes in his minute "witness gives a good resumé of the contract". The witness further on says-

> "Defendants also told me that Mr. Anastassiades had explained to them the contracts".

The main evidence on behalf of the appellants was that of the third appellant and of one Yiannis Lardos, a Land Registry Clerk. The third appellant denied that the whole contents of the contract were explained to him and he alleged that what was exchanged between Anastassiades and him was this-

> "I told him: 'I am a poor man. If when the electricity comes and I am not in a position to get the electricity shall I be obliged to pay?' He said: 'No'. Well, I said, if it is only formal to show that the village would need 3-phase electricity then I do not mind signing".

Lardos, who lives in the appellants' village, stated in evidence that he knows good English and that he heard Papallas say to the appellants that they would pay only when they were supplied with electricity. He further stated that he took the contracts to the appellants to sign and he went on-

> "They signed before me.....They know that I know English. If they asked me I would translate and explain it to them. They never asked me and I never translated this to them. I saw Mr. Anastassiades at the village....."

This was the material evidence before the trial Judge. The learned Judge, after giving due weight to the two conflicting versions, accepted the Authority's version and rejected that of the appellants. This being a matter of credibility, we have not been persuaded by the learned counsel for the appellants today that the trial Judge went wrong in any respect, and, consequently, we uphold his findings of fact to the effect that the contents of the contract were explained to the appellants, that they knew that they were signing a contract for the supply of electricity and that they were undertaking the obligations laid down in that document.

Considering that we have upheld the trial Judge on the findings of fact, the three grounds on which the appeal was

based cannot succeed, as we are of the view that, on the proved facts, (*a*) there was no fraudulent or innocent misrepresentation, and (*b*) that the appellants knew what was the nature and character of the document which they were signing and that their mind accompanied their signature.

The next question which we have to consider is the question of damages which we must say has given us some difficulty. Learned counsel for the appellants argued that the damages claimed were not liquidated damages nor penalty, that there was no evidence of pre-estimated loss, that no evidence was adduced before the trial Court as to the damage suffered, and that the compensation assessed by the Court was not a reasonable one. He further submitted that the respondent Authority should have adduced evidence as to the original costing, the maintenance costing for the supply of electricity for five years, and that the Court should not have awarded damages on the basis of clause 1(*b*) of the contract as penalty, but reasonable compensation under section 74 of the Contract Law, Cap. 149.

Learned counsel for the respondent Authority based his case on three alternative heads: (*a*) amount due under the contract by virtue of the provisions of clause 1(*b*) and clause 3; (*b*) although there was no express penalty stipulated, such penalty could be inferred from reading clauses 1(*b*) and 3 together; and that it was the intention of the parties that the sum of £90 or as the case may be would become payable if there was a breach or interruption; or (*c*) compensation for loss or damage for breach of contract, under section 73 of the Contract Law.

Having given the matter careful consideration, we have reached the conclusion that this case can only be upheld if it can be brought within the ambit of section 74 of the Contract Law, Cap. 149, which reads as follows:

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for".

Now, looking at clause 1(*b*) of the contract (quoted earlier in this judgment), we are of the view that that clause names a sum as the amount to be paid in the case of such breach. In the present case there is a finding of fact that the supply would have been made available by the Authority but it was prevented by the appellants, so that the provisions of clause 1(*b*) come into play; and that clause provides that in such an eventuality the sum of £18 per year minimum is payable for a period of five years in the case of the first appellant, and the sum of £9 per year in the case of each of the other appellants.

As to the question whether any evidence was led to prove the damage or loss sustained, section 74 provides that the party complaining of the breach is entitled to compensation "whether or not actual damage or loss is proved to have been caused thereby", and the compensation payable is "reasonable compensation", not exceeding the amount named in the contract, as may be assessed by the Court. Having regard to the obligations undertaken by the company and the express provisions of clauses 1(*b*) and 3 of the contract, read in the light of section 74 of the Contract Law, we are of the view that in the circumstances of this case the compensation awarded in each case was reasonable, and for these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.