[A. LOIZOU, J.]

SONCO CANNING LIMITED,

Plaintiffs,

v.

" ADRIATICA "
(SOCIETE PER AZIONI DI NAVIGAZIONE),

Defendants.

(Admiralty Action No. 48/71).

Reference of disputes to a foreign Court—Carriage by sea—Claim for damages—Bill of lading—Agreement to refer disputes arising thereunder to a foreign Court—Application by foreign defendant to stay proceedings—Principles to be applied by the Court in deciding whether to grant such application for stay—Discretion—Defendants having long links with Cyprus where they are permanently represented—No prejudice will result for them in refusing the application for stay—And a lot of expenses will be saved—Court's discretion exercised in the present case in favour of allowing case to proceed.

Admiralty—Carriage by sea—Agreement to refer disputes to foreign Court—Application for stay of proceedings—Discretion of the Court—Principles upon which the Court will act—See supra.

Carriage by sea—Bill of lading etc. etc.—See supra.

Stay of proceedings—Reference by agreement of certain disputes to foreign Court—Application for stay—Discretion of the Court—Principles applicable—Application dismissed—The case allowed to proceed.

The facts sufficiently appear in the ruling given by the learned Judge, who exercising his discretion in favour of the plaintiffs, dismissed this application by the defendants for stay of proceedings and allowed this action to proceed.

Cases referred to :

Crooks v. *Allan* [1879] 5 Q.B.D. 38, at p. 40 ;

The Ardennes [1951] 1 K.B. 55 ;

Jadranska Slobodna Plovidba v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58 ;

Cubazucar and Another v. *Camelia* (reported in this Part at p. 61, *ante*) ;

Fehmarn [1958] 1 All E.R. p. 333 ;

The Eleftheria [1969] 2 All E.R. 641.

Application.

Application by defendants for an order that an admiralty action for £14,259, damages representing value of damaged fruit, be stayed on the ground that the plaintiffs and the defendants have by their agreement embodied in and/or evidenced by two Bills of Lading for the carriage of goods agreed to refer and submit all disputes arising under and in connection with the said Bills of Lading for determination and adjudication in Venice.

G. Economou, for the applicant.

R. Stavrakis with *V. Sarris*, for the respondent.

Cur. adv. vult.

The following ruling was delivered by :—

A. LOIZOU, J. : This is an application whereby the applicants-defendants apply for an order that the action be stayed on the ground that the plaintiffs and the defendants have by their agreement " embodied in and/or evidenced " by two Bills of Lading for the carriage of goods agreed to refer and submit all disputes arising under and in connection with the said Bills of Lading for determination and adjudication in Venice.

The action by the plaintiffs is for " £14,259.000 mils damages representing value of damaged fruit of which they were the consignees and consequential loss due to the aforesaid damage which was due to negligence and/or breach of contract and/or on the part of the servants or agents while carrying the fruit in question in their capacity as carriers with m.v. ' BONMAR ' from Italy to Famagusta of two consignments of 75 tons each which consignments arrived at Famagusta on 4.10.1970 and 7.11.1970, respectively ".

The two Bills of Lading are identical and one of them has been produced as *Exhibit* 1. Clause 26 thereof, as translated in English, appears in paragraph 7 of the affidavit filed in support of the application, and it is provided therein that " ..... Failing a friendly agreement legal action must be instituted before the competent authorities of Venice within the prescribed period of six months from the day

of delivery of the goods, or in case of total loss, from the date that the goods shipped were due to arrive at destination. The shipper as well as the receiver or any other interested party renounce expressly the competency of any other judicial authority. For all that is not incorporated in the present conditions of transport are deemed to be valid the Articles of the Maritime Laws in force in the Italian Republic ".

Relying on the aforesaid clause, the defendant Company entered on the 6th March, 1972, a conditional appearance without prejudice to the filing of an application, to set aside the writ. The time limit for applying to set aside the writ, was 40 days and on the 15th April, 1972, the Defendants filed the present application.

The plaintiffs-respondents claim that on or about the 7th day of September, 1970, their Company entered into a contract with the Italian fruit exporters " Nino Bertelli e Figlio " for the supply of 150 tons of pears by two instalments of 75 tons each at f.o.b. price of £50 per ton, the said instalments to be shipped in Venice on board a ship to be named by their Company in September and October, of the year 1970, respectively.

It is also claimed that in consequence of the aforesaid contract their company entered into a contract with the defendants, through their sole and permanent agents in Cyprus, Messrs. A. L. Mantovani & Sons Ltd. for the carriage of their goods from Venice to Famagusta, with m.v. " BONMAR ", on the 22nd day of September, 1970 and the 29th day of October, 1970, respectively, for a consideration of 62 dollars per ton, freight prepaid.

By paragraph 7 of the affidavit filed in support of the notice of opposition, " the terms of the Bills of Lading issued by defendants in respect of the carriage of the above two instalments were not known to our company, the said bills having never been read or signed by our company and having been received while the goods were in transit with a view to obtaining delivery thereof at Famagusta. In any event the said bills were in the Italian language in toto ".

Argument has been heard and reference to authorities has been made as to whether the two Bills of Lading in question are the contract for the carriage or not, the ultimate purpose being to show that clause 26 was not binding on the plaintiffs. It is a well settled principle that a Bill of Lading is not the contract, but only the evidence of the contract and it does not follow that one who accepts a Bill

of Lading necessarily and without regard to circumstances binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them or is not informed in the course of the shipment that the Bill of Lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms and to require a Bill of Lading which shall express those terms. (See *Crooks* v. *Allan* [1879] 5 Q.B.D. 38, 40 and the *Ardennes* [1951] 1 K.B. 55). As stated in Carver Carriage by Sea, 12th Edition, Vol. 1, p. 52, paragraph 63, the true view of the authorities may be that it depends on the facts of each case whether the Bill of Lading contains the actual contract. I do not think that for the purposes of the present ruling I should enter into the legal effect of the two Bills of Lading in question. In fact, not all material available for such determination which to a certain extent depends on the factual aspect of the matter, is before me.

I propose, therefore, to approach the case as one where it is a question of exercising my discretion for or against the granting of the stay.

The legal position governing this issue has been dealt with in the case of *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.* (1965) 1 C.L.R. p. 58 and in *Cubazucar & Another* v. *Camelia Shipping Co. Ltd.* (reported in this Part at p. 61, *ante*) in which cases the judgments of the English Courts on the matter, such as the *Fehmarn* case [1958] 1 All E.R. p. 333 and the *Eleftheria* case [1969] 2 All E.R. p. 641 were considered and the principles enunciated therein were followed and applied.

It is now well settled that the burden of showing strong cause why an agreement to refer disputes to a foreign Court should not be observed, and why the Court's discretion should not be exercised in favour of such a stay, is upon the plaintiff. In exercising such discretion, the Court must take into account all the circumstances of the particular case, including in what country the evidence on the issue of facts is situated or more readily available and the effect of that on the relative convenience and expense of trial as between Cyprus and foreign Courts.

Another fact to be considered is whether the law of the foreign Court applies and if so, whether it differs from the Cypriot law in any material respects. On this last point, it may be observed that there has been no evidence to show what is the foreign law and in the absence of such evidence, it should be taken as being similar to our law. The only thing that has been mentioned was that by the

Italian Laws the claim is statute barred, but counsel for the applicants has stated that if the proceedings are stayed and new proceedings instituted in Italy, they are prepared to waive this statute bar issue.

A point which has to be examined is also with what country either party is connected and how closely. Of course the plaintiffs are a Cyprus Company with business here, but the defendants are not a company which has no links in Cyprus. They have been represented for many years by the firm A. L. Mantovani & Sons Ltd. and their ships call regularly in Cyprus ports. There is no question and it has not been argued that the defendants are not genuinely desiring trial in their country or that they are only seeking procedural advantages. The issue does not arise that the plaintiffs would be prejudiced by having to sue in the foreign Court, because they would be deprived of security for that claim or be unable to enforce any judgment obtained or be faced with a time bar not applicable here or for political, racial, religious or other reasons be unlikely to get a fair trial.

Apart from what has been said about the issue of limitation, the last considerations do not arise in this case.

According to the plaintiffs-respondents, trial in this country is claimed, because the contract of carriage was entered into between them and the firm of A. L. Mantovani & Sons Ltd. in Cyprus, and because the bulk of the evidence as to the quality of the goods upon arrival is in this country, and it will be more convenient for both sides to have the trial held in this country than in Italy.

I have weighed the facts and circumstances of this case in the light of the principles enunciated in the aforesaid authorities as summed up hereinabove, and I have come to the conclusion that I should not exercise my discretion in favour of the stay, as I cannot say that the defendants with their long links with Cyprus and their permanent representation through the firm of Messrs. A. L. Mantovani & Sons Ltd. are not connected with this country ; on the contrary a lot of expense will be saved and no prejudice will result to them.

For all the above reasons I exercise my discretion in favour of allowing the present case to proceed rather than be stayed.

Therefore, the application is dismissed, but in the circumstances the costs should be costs in cause.

Application dismissed.
Costs in cause.