1979 July 26

[STAVRINIDES, L. LOIZOU, MALACHTOS, JJ.]

VEB SCHWERMASCHINENBAU-KOMBINAT
"ERNST THALMAN" MAGDEBURG G.D.R.,

Appellants-Defendants.

v.

PANERKA COMPANY LTD.,

Respondents-Plaintiffs.

(Civil Appeal No. 5134).

Conflict of Laws—Stay of proceedings—Contract of sale—Foreign jurisdiction clause—Action for damages for breach of contract commenced in Cyprus—Principles to be applied by Cyprus Court in deciding whether to stay action—Alleged breach committed in Cyprus—More convenient that case be tried in Cyprus—Doubtful whether plaintiffs will be able to recover amount of their claim if successful—Discretion of trial Court rightly exercised against stay.

By a contract in writing made in Cyprus on the 28th August, 1969, between the appellants, a foreign company established in the German Democratic Republic and the respondent, a company carrying on business in Larnaca, the respondent company agreed to purchase from the appellants a primary crusher at the agreed price of £25,000. After the said crusher had been delivered to the respondents at Larnaca and installed in their factory it was found out that its throughput was not exceeding 20 cubic metres though, according to the respondents, the said contract of sale provided expressly that the crusher in question would have a throughput of about 40 to 60 cubic metres. The respondents instituted legal proceedings against the appellants and joined as defendant 2 in the action the National Bank of Greece and at the same time applied and obtained an injunction against the bank restraining them from remitting the balance of the purchase price to the appellants. The appellants applied to the District Court for an order setting aside the issue

and service of the writ on them on the ground of a foreign jurisdiction clause* contained in the contract of sale.

The trial Court took the view, in the exercise of its discretion, that this was a case to be decided by the Cyprus Courts on the following main grounds: 5

(a) It is more convenient that the case be tried in Cyprus in view of the fact that the allegation of the plaintiffs is that the crusher machine is defective and this machine is now in Cyprus;

(b) It is doubtful, if plaintiffs are successful, whether they 10 will be able to recover the amount of their claim, against a firm situated in a country which is not recognised by the Republic of Cyprus and there are no diplomatic representatives, and therefore, the plaintiffs may be prejudiced in suing in the Berlin Court". 15

Upon appeal by defendants it was contended that there were no facts to support the findings of the trial Court and so it wrongly exercised its discretion in not granting the order applied for.

Held, that though the Court will insist to uphold the sanctity 20 of an agreement, regarding a foreign jurisdiction clause, it has a discretion whether or not to set aside service of the writ of summons and/or stay the proceedings; that this discretion should be exercised by granting the setting aside of service of the writ of summons and/or stay of proceedings, unless a strong cause 25 for not doing so is shown: that the burden of proving such strong cause falls on the plaintiffs; that in exercising its discretion the Court should take into account all the circumstances of the particular case; (after referring to the matters which may be regarded in such cases—vide pp. 487–89 *post*); that having gone 30

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* The relevant clause reads as follows:

"Differences between the contracting parties will be decided at the plaintiff's option either by the Court of Arbitration of the Chamber of Foreign Trade of the German Democratic Republic or by the Court of competent jurisdiction, at the principal place of business of the defendant.

If the seller is the defendant, the Court of competent jurisdiction will be the Stadtbezirks-gericht Berlin-Mitte or the Stadgericht Berlin.

The relations between the contracting parties will be governed by the valid law of the German Democratic Republic".

through the record of the proceedings and the relevant affidavits this Court is satisfied that there is ample evidence justifying the trial Court in reaching the conclusions they did; that, therefore, there is no ground for interfering with the discretion exercised by 5 the trial Court in dismissing the application; and that, accordingly, the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

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

10 *The Eleftheria* [1969] 2 All E.R. 641;

Jadranska Slobodna Providba v. *Photiades* (1965) 1 C.L.R. 58.

Appeal.

Appeal by defendants No. 1 against the order of the District Court of Larnaca (Georghiou, P.D.C. and Orphanides, S.D.J.) 15 dated the 27th November, 1972 (Action No. 501/71) whereby their application to set aside the order granting leave to seal and serve the writ of summons and/or notice thereof on the ground that the District Court of Larnaca had no jurisdiction to entertain the action, was dismissed.

20 *B. Vassiliades*, for the appellants.

K. Michaelides, for the respondents.

Cur. adv. vult.

STAVRINIDES J.: The judgment of the Court will be delivered by Mr. Justice Malachtos.

25 MALACHTOS J.: This is an appeal from the judgment of the Full District Court of Larnaca dismissing the application of the appellants that the order granting leave to seal and serve the writ of summons and/or notice thereof in action No. 501/71, the writ of summons issued persuant thereto, the service thereof, 30 and all subsequent proceedings be set aside on the ground that the District Court of Larnaca has no jurisdiction to entertain the action.

The facts shortly put are the following:

The appellants are a foreign company established in the 35 German Democratic Republic and are manufacturers of machinery. By a contract in writing made in Cyprus on the 28th August, 1969 between the appellants and the respondent company which is carrying on business in Larnaca in connection

with general constructions, the respondent company agreed to purchase from the appellants a primary crusher at the agreed price of £25,000.—. According to allegations of the respondents it was an express condition and/or term of the said contract of sale that the primary crusher would have a throughput of about 40 cubic metres to 60 cubic metres. The said crusher was delivered to the respondents at Larnaca and was installed in their factory sometime after the end of May, 1970 and was put into full operation on October, 1970 when it was found out that its throughput was not exceeding 20 cubic metres. It must be noted here that the National Bank of Greece S.A. Famagusta branch at the request of the respondents opened an irrevocable credit for the benefit of the appellants for the balance of the purchase price amounting to £9,940.—to be paid in six instalments as from the 27th June, 1971 to 27th September, 1972. On *the 25th June, 1971 the respondents instituted legal proceedings* against the appellants and joined as defendant No. 2 in the action the National Bank of Greece and at the same time applied and obtained an injunction against the bank restraining them from remitting the said amount to the appellants in East Germany.

On the 30th August, 1971 the appellants applied to the District Court for an order setting aside the issue and service of the writ on them on the ground of a foreign jurisdiction clause contained in the contract of sale. Clause 19 of the contract, which contract consists of two parts and which was produced as *exhibit* 1A and 1B at the hearing of the application, reads as follows:

> " Differences between the contracting parties will be decided at the plaintiff's option either by the Court of Arbitration of the Chamber of Foreign Trade of the German Democratic Republic or by the Court of competent jurisdiction, at the principal place of business of the defendant.
>
> If the seller is the defendant, the Court of competent jurisdiction will be the Stadbezirks-gericht Berlin-Mitte or the Stadgericht Berlin.
>
> The relations between the contracting parties will be governed by the valid law of the German Democratic Republic."

So the question posed before the trial Court, as they very

rightly put it in their judgment, was whether clause 19 stipulated in the contract between the appellants and the respondents, deprives the respondents from instituting legal proceedings in Cyprus claiming damages for breach of contract. Had it not been for this clause there would be no difficulty in deciding that the Cyprus Courts have jurisdiction to entertain the action as the case falls within the provisions of Order 6, rule 1, of the Civil Procedure Rules, since the contract was made in Cyprus and the alleged breach was committed in Cyprus.

In considering the legal position in this case the trial Court referred to the *Fehmarn* case, [1958] 1 All E.R. 333, the *Eleftheria* case, [1969] 2 All E.R. 641 and the *Jadranska Slobodna Plovidba v. Photos Photiades*, (1965) 1 C.L.R., p. 58 where at p. 69 Josephides, J. referred to the *Fehmarn* case and said:

"On the authorities, there is a prima facie presumption that the Court will insist on the parties honouring their bargain in cases where they have agreed that all disputes arising under a contract should be determined by a foreign Court. The Court will, however, consider whether there are sufficient grounds for displacing this prima facie presumption so as to entitle the parties to take advantage of the jurisdiction of the Court. Such a presumption may be displaced on good and sufficient reasons (*The Fehmarn*, ibid, at p. 337). It should be observed that in the Fehmarn case the shipowners moved the Court (a) to set aside the writ for want of jurisdiction; and (b) alternatively, to stay the proceedings, on the ground that by the contract the parties had agreed that all disputes arising under it should be judged in the U.S.S.R. and it was held that (a) the Admiralty Court had jurisdiction; and (b) the Court should not exercise its discretion to stay proceedings".

In *Eleftheria* case, decided in 1969, the principles which the Court should take into consideration in exercising its discretion, were elaborately stated, by Brandon J. as follows:

"In exercising its discretion, the Court should take into account all the circumstances of the particular case. In particular, but without prejudice to taking into account all the circumstances of the particular case, the following matters, where they arise, may properly be regarded:-

(i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts;

(ii) whether the law of the foreign Court applies, and if so, whether it differs from English law in any material respects; 5

(iii) with what country either party is connected and how closely;

(iv) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; 10

(v) whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would—

(a) be deprived of security for that claim; 15

(b) be unable to enforce any judgment obtained;

(c) be faced with a time-bar not applicable in England; or,

(d) for political, racial, religious or other reasons be unlikely to get a fair trial." 20

In *Fehmarn* case as well as in *Jadranska* case, the Court, in view of the special circumstances of each case, exercised its discretion against the stay of proceedings. In the *Fehmarn* case the relevant part reads as follows:

"The Court should not exercise its discretion to stay the proceedings because: 25

(a) a stipulation that all disputes should be judged by the internals of a foreign country, although a matter to which the English Court will pay much regard and to which it will normally give effect, is subject to the overriding principle that no one by his private stipulation can oust the English Courts of their jurisdiction in a matter properly belonging to them; 30

(b) This dispute properly belonged to the English Court because, being a dispute between English cargo-owners and German shipowners, it was more closely 35

connected with England than with Russia and because the facts showed that the shipowners did not object to the dispute being decided in England but wished to avoid giving security".

5 The above authorities establish the general principles (a) that the Court will insist to uphold the sanctity of an agreement in that the parties should honour their bargain in cases where they have agreed that all disputes arising under a contract should be determined by a foreign Court; (b) that the Court has a 10 discretion whether or not to set aside service of the writ of summons and/or stay the proceedings, and that this discretion should be exercised by granting the setting aside of service of the writ of summons and/or stay the proceedings, unless a strong cause for not doing so is shown. The burden of proving 15 such strong cause falls on the plaintiffs.

The trial Court after stating the legal position in the light of the above authorities, that a Court in exercising its discretion must take into account the special circumstances of the case under consideration, proceeded and made their findings on the 20 affidavit evidence as no oral evidence was adduced by the parties at the hearing. At p. 30 of the record they say:

" It is evident that the defendants 1 have no agents in Cyprus and their interests are represented in Cyprus by the Commercial Attaché of the German Democratic Republic 25 and in fact all affidavits sworn for their account, were sworn by Mr. Peter Schreiber, of Nicosia, the Commercial Attaché of the German Democratic Republic. We are inclined to believe that in entering into the present agreement (*exhs.* 1A and 1B) the defendants genuinely desired 30 any dispute to be tried in their own country by a Court at the main place of their business, because apparently they are acquainted with the law and procedure of their country and they can be best advised and protect their interests. All the facts go to show that the agreement between the 35 parties was to oust the Cyprus Courts of jurisdiction in litigation between the parties arising out of the contract (*exhs.* 1A and 1B) and the proper Court which may try it was the German Court described in clause 19.

Nevertheless, this Court before deciding finally the matter,

must give regard to the 'forum conveniens'. The crusher machine, alleged by the plaintiffs to be defective, in that it had a much smaller throughput, is now in Cyprus (in the District of Larnaca), and therefore, it is probable that the evidence may have to be collected in Cyprus, and further the District Court of Larnaca will have the opportunity to inspect the crushing machine. Moreover, defendants 2, through whom the irrevocable credit in favour of defendants 1 was opened (*exh.* 2) are in Cyprus:"

and the trial Court concluded their judgment with the following appearing at p. 32 of the record:

"Weighing carefully all the circumstances of the present case, and applying the legal principles expounded above, we take the view in exercise of our discretion admittedly with some hesitation, that this is a case to be decided by the present Court, on the following main grounds believing that thereby we do not just give a lip service to an agreement:

(a) It is more convenient that the case be tried in Cyprus in view of the fact that the allegation of the plaintiffs is that the crusher machine is defective and this machine is now in Cyprus;

(ii) It is doubtful, if plaintiffs are successful whether they will be able to recover the amount of their claim, against a firm situated in a country which is not recognized by the Republic Cyprus and there are no diplomatic representatives, and therefore, the plaintiffs may be prejudiced in suing in the Berlin Court."

Counsel for the appellants argued before us that there were no facts to support the findings of the trial Court and so they wrongly exercised their discretion in not granting the order applied for.

We must say that we entirely disagree with this submission of counsel. Having gone through the record of proceedings and the relevant affidavits we have been satisfied that there is ample evidence justifying the trial Court in reaching the conclusions

they did. We, therefore, see no ground for interfering with the discretion of the trial Court that they exercised in dismissing the application of the appellants.

In the result we dismiss the appeal with costs.

5 *Appeal dismissed with costs.*