1979 July 27

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

LOIZOS VONIATIS,

Appellant–Plaintiff,

v.

1. NICOLAOS S. KOUREAS,
2. SAKIS N. KOUREAS,

Respondents–Defendants.

(*Civil Appeal No.* 5422).

Practice—Evidence—Admissibility—Admitting all evidence available —Sifting same at a later stage and deciding about its admissibility —Whether permissible in law.

Partnership—Partners—Doctrine of holding out—Prerequisites—Section 17 *of the Partnership and Business Names Law, Cap.* 116.

By a written agreement entered into on the 31st March, 1965 the respondents–defendants purported to have sold to the appellant a piece of land at the price of £10,000. The said agreement was stated to be an agreement entered into between "Nicolaos S. Koureas and Son, land owners", and "Loizos Voniatis, animal breeder and land owner". The signature appearing thereon was that of respondent 2 and the appellant, but there were no indications signifying the capacity under which respondent 2 signed the said document. In an action for specific performance of the agreement the appellant contended that the respondents were in partnership and/or holding* themselves out as such

* The relevant statutory provision is section 17 of the Partnership and Business Names Law, Cap. 116 which reads as follows:

"17. Every one who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made:

Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death".

and, therefore, the signature of the one binds the other as well. In support of this contention the appellant produced certain receipts bearing the letter head "Financial Bureau N.S. Koureas and Son, Nicosia, Cyprus". This was the old partnership of the respondents which was never registered and ceased for many years to exist. Some of the receipts in question were signed by respondent 2 and the amounts received were against a judgment debt where respondent 1 was the only plaintiff. The remaining receipts were signed by respondent 2 with no particulars about the debt for which the payments were effected.

The trial Court having held that "these receipts might have affected the mind of any other person having dealings with the defendants for the first time, but certainly not the plaintiff who knew the defendants very well and what is more, he knew that the debt for which the receipts or most of them were issued, was due by him to defendant No. 1 personally"; and that the doctrine of holding out speaks of giving credit to the partnership, rejected the appellant's allegation that he was misled to believe that he was dealing with a partnership and dismissed the action against respondent 1.

In the course of the trial the Court below, in view of the nature of the case and the complicated issues involved, considered it more appropriate to let all the evidence available to be introduced and sift same at a later stage so as to be in a better position to decide one way or the other about the admissibility of each particular piece of evidence.

Upon appeal counsel for the appellant-plaintiff mainly contended:

(a) That the trial Court erred in deciding to let in all the evidence available and sift same at a later stage;

(b) That the trial Court was wrong in finding that there was no holding out by the respondents that they were a partnership.

Held, (1) that the course pursued by the trial Court in admitting evidence, and deferring the determination of the objections made to a later stage, was indeed a rather unorthodox way but permissible in law; that it was obviously done for the purpose of avoiding unnecesary delay in view, in particular, of the complexity of the issues which were made more complex

by the repeated amendments of the pleadings; that there is nothing to suggest that the trial Court has been affected in deciding the material issues in these proceedings by evidence which was otherwise inadmissible; and that, accordingly, contention (a) must fail.

(2) That there did not exist a partnership in which respondent 1 could be treated as a partner or as having been held out to be so; that, moreover, respondent 1 could not be faced with liability on the ground that he has been held out as a partner unless first the alleged act of holding out must either have been done and knowingly suffered by him and secondly it must have been known to the person seeking to avail himself of it; that the first prerequisite has not been established; that in the absence of the first of these prerequisites whatever else may have been done same cannot be imputed to respondent 1; and that, accordingly, contention (b) must, also, be dismissed.

Appeal dismissed.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Papadopoulos, S.D.J.) dated the 22nd March, 1975, (Action No. 2590/70) whereby his claim for specific performance of a contract and of the declaration of settlement in Action No. 4952/67 was dismissed.

G. Ladas with *G. Constantinides*, for the appellant.

A. Emilianides with *C. Adamides*, for the respondents.

Cur. adv. vult.

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

A. LOIZOU J.: This is an appeal against the judgment of the Full Court of Nicosia by which the action of the appellant-plaintiff was dismissed with costs.

The facts of the case as appearing in the judgment of the trial Court are as follows:

The appellant is the owner of plots 823, 663 and 272 of sheet XXI plan 62W1W2 plot "J" at Strovolos. The respondent-defendant No. 2 who is the son of respondent-defendant 1, is the owner of plot 662 sheet XXI plan 62W1W2 of sheet XX, plan 62W1 which is adjoining plots 663 and 272.

On the 31st March, 1965 the plaintiff signed a bond in favour of respondent 1 for £27,988.916 mils with 9% interest per annum payable forthwith. With regard to this bond there was a dispute.

On the 15th April, 1965, respondent 1 gave to the appellant an undertaking in writing to the effect that no steps would be taken for the collection of the money due under the aforesaid bond, provided the appellant paid yearly the accrued interest and part of the capital.

On the 7th December, 1967, Action No. 4952/67 was filed by respondent 1 against the appellant, claiming the amount due under the aforesaid bond, plus accrued interest. On the 28th December, 1967, a settlement was reached recorded in writing and signed by the litigants.

In furtherance of the settlement, judgment was entered against the appellant for £35,223.000 mils payable by instalments. The right to lodge a memo on plots 383 and 296 at Strovolos belonging to the appellant was reserved. It was also agreed that in case the appellant would sell any building sites and paid to respondent 1 the sum of £2,000 for every building site sold, and this in addition to the stipulated, under the settlement, instalments, then respondent 1 would give any necessary consent for the division of the property into building sites for the issue of titles.

On the 31st March, 1965 another written agreement, (*exhibit* 1) appears to have been signed by respondent 2 and the appellant for the sale of a piece of land 40 x 3,200 ft. plot No. 662 S/P XXI/62W1, Block "J", which, as the trial Court described it was the pivot around which the present case resolved and with which it inevitably had to deal extensively and in detail.

On the 19th May, 1970 the present proceedings were instituted in the District Court of Nicosia. By this action the appellant claims:

"(a) Specific performance of the contract and of the declaration of settlement in Action No. 4952/67.

(b) Order directing the defendants or either of them to transfer in the name of the plaintiff the property subject matter of the contract of sale and of settlement in Action No. 4952/67.

(c) Order directing the Director of Lands and Surveys to register in the name of the plaintiff the property in question.

In the alternative, the plaintiff claims:-

(a) The return of £10,000.—with interest.

(b) Damages for breach of the contract and of the settlement.

(c) Legal interest and costs."

The contract referred to in the prayer for relief is *exhibit* 1 earlier mentioned.

By this document the two respondents are purported to have sold to the appellant the said piece of land by debiting the latter's account with £10,000.—.Under the said document the appellant had the option to give to the respondents in satisfaction of the purchase price five specified building sites on the date title-deeds would be obtained. It further provided that the "purchase price of £10,000.— be consolidated with the old debt of the plaintiff for £17,977.916 mils and a new bond for £27,977.916 mils be executed forthwith with four years grace, on condition that the interest and part of the capital be paid yearly".

The trial Court summed up the situation regarding the respective contentions of the appellant and the respondents.

" The plaintiff's contention is that *exhibit* No. 1 was executed on the 31st March, 1965, at the same time as the bond for £27,977.916 mils, in the presence only of himself and of the defendants. The said document bears only the signature of the plaintiff and of defendant No. 2 and it is the allegation of the plaintiff that the defendants were in partnership and/or holding themselves out as such and, therefore, the signature of the one binds the other as well.

The defendants on the other hand, allege that this document never came into existence, it is invalid and it is not binding for the following reasons:-

(a) It does not bear the signature of defendant 1 and, therefore, it does not bind him, the allegations of partnership and of holding out being denied.

(b) It was not executed on the 31st March, 1965, but much later and after the institution of the 1967 action.

(c) It is void for uncertainty and for want of consideration in that—

(i) The amount mentioned therein as due by the plaintiff to the defendants from an old debt is not correct, the plaintiff owing to defendant No. 1 in March, 1965, twenty-seven thousand odd pounds, as per statement of account initialled by the plaintiff (*exh.* 12), and not seventeen thousand odd pounds as stated in *exhibit* No. 1.

(ii) The debt was due to defendant No. 1 personally and not to himself as a member of any partnership.

(iii) The description of the property sold does not exist and the object for the purchase of the land as stated does not make sense because the plaintiff had access to his property".

The respondents filed their defence and counterclaim by which they prayed for a declaration of the Court that *exhibit* 1 was void and or voidable. The hearing of the case was not an uneventful one. The defence and counterclaim were amended upon an application filed on behalf of the respondents, which was contested by the appellant. Then, in the course of the hearing of the action a dispute arose as to the authenticity of the bond and the respondents were accused of forging it. This led to another application for the amendment of the reply to the amended defence and counterclaim. It was likewise contested and an order for amendment was granted, which was appealed from but this appeal was later withdrawn. After the filing of the amended reply, whereby the respondents are charged with effecting changes to the bond and of other practices amounting to fraud and/or forgery, the defendants filed a rejoinder. During the hearing of the action objections were taken at various stages by both sides regarding the admission of extrinsic evidence on the ground that same tended to vary, add to, or contradict written documents. The trial Court in view of the nature of the case and the complicated issues involved at certain points also interwoven with each other, considered it more appropriate at the time to let all the evidence available to be introduced and

sift same at a later stage so as to be in a better position to decide one way or the other about the admissibility of each particular piece of evidence. It pursued, it said, this rather unorthodox procedure with a view to avoiding injustice to the parties or either of them by excluding prematurely evidence which might, at a later stage, prove to be both relevant and for a specific purpose admissible.

It also pointed out that the respondents, on their part, denied the validity and existence of *exhibit* No. 1, whereas the appellant accused the respondents of deceitfully altering the bond, referred to in the said *exhibit*.

The numerous grounds of appeal may be grouped into four categoties:

(a) Matters of admissibility of evidence and mode of determining same.

(b) The alleged holding out of respondents to be a partnership.

(c) The date *exhibit* 1 was made, its construction and validity.

(d) The amount of damages which would arise only had the plaintiff been successful.

Examining the first ground of Law as against the factual background of the case and the approach of the trial Court to which we have already referred, and without going into a detailed exposition of each piece of evidence objected to, we have come to the conclusion that the course pursued by the trial Court in admitting evidence, and deferring the determination of the objections made to a later stage, was indeed a rather unorthodox way but permissible in law. It was obviously done for the purpose of avoiding unnecessary delay in view, in particular, of the complexity of the issues which were made more complex by the repeated amendments of the pleadings.

We have not found, in examining the case as a whole, anything to suggest that the trial Court has been affected in deciding the material issues in these proceedings by evidence which was otherwise inadmissible.

Having decided as above we proceed now to examine the

grounds of Law by which the appellant complains that the trial Court was wrong in finding that there was no holding out by the respondents that they were a partnership. If the appellant was successful on this point he could bring in respondent No. 1, who did not sign *exhibit* 1 as responsible on the principle of holding out. *Exhibit* No. 1 was stated to be an agreement entered into between "Nicolaos S. Koureas and Son, land owners", and Loizos Voniatis, animal breeder and land owner", The signature appearing on *exhibit* 1 is that of respondent No. 2 and there is no dispute about it. There are, however, no indications signifying the capacity under which respondent 2 signed the said document or in any way modifying his personal capacity. The appellant contended that he was under the impression that the respondents were operating in partnership and were holding themselves out as partners.

He produced, in support of this proposition 13 receipts which the trial Court grouped in two bundles. They were all bearing the letter head "Financial Bureau N. S. Koureas and Son, Nicosia, Cyprus". The first bundle (*exhibits* 2—2(g)) was issued during 1969 and the second one (*exhibits* 2(h)—2(o)) was issued in and prior to 1965. The receipts in the first group were signed by respondent 2 and the amounts received were against the judgment debt in the 1967 action where respondent No. 1 was the only plaintiff. The signatures in the second group appear to be those of respondent 1 with no particulars about the debt for which the payments were effected.

On the question of these letter heads on the receipts the trial Court said:

> " In view of what we have already pointed out above, the plaintiff could not possibly have been misled or influenced by the letter heads in question. He knew that the debt, subject matter of the bond and of the 1967 action, was due to defendant No. 1 personally and any receipt in whatever form or by whomsoever signed would not have changed the position or create any doubts in his mind. He knew the defendants personally and the dealings he had with each one of them separately. If we even suspect that at any time the plaintiff confused the dealings, or the persons involved, or their capacity, we would be underestimating the plaintiff's intelligence.

Having considered the evidence in its totality, we entertain no doubt whatsoever that the plaintiff knew perfectly well each dealing, the persons he was dealing with and in what capacity they were acting. However, the main question is not whether the plaintiff was mistaken, but whether the defendants, by their conduct induced him in this belief."

Furthermore, regarding the previous dealings of the parties the trial Court had this to say:

" It is in evidence that the plaintiff was borrowing money from defendant No. 1 over a number of years and according to his own evidence, he owed to defendant No. 2 only £400.—, the much larger debt being due to defendant No. 1 personally.

Despite the plaintiff's attempts to give the impression that his dealings with the defendants or either of them were dealings with members of a partnership, there is no escape from the fact that the amount due under the bond, even at the exclusion of the £10,000.—mentioned in *exhibit* No. 1, was due by him to defendant No. 1 personally and it was the produce of a debt contracted many years back, increased to the present levels by the accumulation of interest.

The bond was in favour of defendant No. 1 and the 1967 action was brought by defendant No. 1 against the plaintiff. Also, *exhibit* No. 5, the declaration whereby time for payment of the amount due under the bond was given to the plaintiff, is signed by defendant No. 1. It is to be noted that despite the fact that this document was issued in connection with a debt due personally to defendant No. 1, it is written on a piece of paper with printed letter heads bearing the name of defendant No. 2 without any reference to either the partnership or defendant No. 1."

On this factual background we propose to examine the doctrine of holding out. It is contained in section 17 of the Partnership and Business Names Law, Cap. 116, and is based on the principle of estoppel by conduct.

Section 17 reads as follows:-

" 17. Every one who, by words spoken or written, or by

conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made:

Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death."

It should be noted that s. 17 applies to everyone who represents himself or who knowingly suffers himself to be represented as a partner in a particular firm, and is liable as such a partner to anyone who has given credit to the firm. This section presupposes the existence of a particular firm, which is not our case, as here it was never registered and ceased to exist since a long time, as shown from the evidence adduced and to which reference has already been made. Moreover, there is a marked difference between the name on the letter heads and the name of the alleged firms mentioned in *exhibit* 1.

In *Lindley on Partnership*, 12th Edition, at p. 90, it is stated:

" Further, a person may hold himself or permit himself to be held out as a partner and yet conceal his name. He may be referred to as a person who does not wish to have his name disclosed; and if he is so referred to by his authority, he will incur liability as a partner to those who give credit to the first on the faith of such representations. But it follows from the principle above explained and the words of Section 14 of the Partnership Act 1890, that a person cannot be liable on a contract on the ground that he held himself out as a partner, unless he did so before the contract was entered into. It also follows that no person can be fixed with liability on the ground that he

has been held out as a partner, unless two things concur, viz., first the alleged act of holding out must either have been done or knowingly suffered by him and secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled."

There is evidence of a letter (*exhibit* No. 3) issued by the Registrar of Companies in response to an inquiry by one of the plaintiff's advocates that there has never been registered a partnership or a business name, under the name of "Nicolas S. Koureas and Son" and this was evidence adduced by the appellant himself. So in this case it has to be born in mind that there did not exist a partnership in which the defendant 1 could be treated as a partner cr as having been held out to be so. Moreover and apart from this he could not be faced with liability on the ground that he has been held out as a partner unless on the authoritative statement of the Law hereinabove given two things occurred: first "the alleged act of holding out must either have been done and knowingly suffered by him and secondly it must have been known to the person seeking to avail himself of it".

The first prerequisite in any event has not been established and in the absence of the first of these prerequisites, whatever else may have been done, same cannot be imputed to respondent 1 who is sought to be made liable.

The trial Court in fact very aptly summed up the situation on this issue as follows:

" In the present case, there is nothing in the conduct of the defendants capable of being construed as holding out themselves as partners. The only thing they may have done is the use of the receipts with the letter heads of their old partnership which was never registered and in any event ceased for many years to exist. These receipts might have affected the mind of any other person having dealings with the defendants for the first time, but certainly not the plaintiff who knew the defendants very well and what is more, he knew that the debt for which the receipts or most of

them were issued, was due by him to defendant No. 1 personally. Furthermore, the doctrine of holding out speaks of giving credit to the partnership and we wonder if the complicated and composite nature of the agreement *exhibit* No. 1 may fall within the ambit of the doctrine.

For all the above reasons, we reject the plaintiff's allegation that he was misled to believe that he was dealing with a partnership and in view of this, the action against defendant No. 1 cannot stand."

The trial Court then dismissed the action against respondent 1 and rightly so.

The trial Court then proceeded to examine the legal effect of *exhibit* 1 "on the assumption that it was binding on the father, respondent No. 1." In that respect it examined:

(a) the date it came into being and under that heading the authenticity of the bond, *exhibit* No. 4 which was found to be the original, and *exhibit* No. 4(a) which was found to be executed only in the circumstances described by the respondents;

(b) the other evidence which was consistent with the date;

(c) the description of the property purported to have been sold, by *exhibit* No. 1;

(d) the consideration given for the settlement, in the 1967 action and the remedies sought.

It analysed extensively the evidence adduced, rejected the appellant's allegations and for quite valid reasons accepted the evidence of the respondents and their witnesses.

It concluded that the bond *exhibit* No. 4, dated 31st March, 1965, good for £27,997.916 mils, duly accepted by the appellant and signed in the presence of two witnesses was a genuine one and that the bond *exhibit* 4(a) was prepared 15 days later on the 15th April, 1965, when the appellant paid a visit to respondent No. 1 and requested the latter to give to him, an undertaking in writing not to claim the amount due under the bond for four years and a memo of the exact amount due under the bond. It was then that respondent No. 1 wrote out the undertaking contained in *exhibit* 5 to the effect that on condition the appellant paid

annually the interest and if possible part of the capital, no steps will be taken to enforce the payment and on a blank form, similar to the one used for *exhibit* No. 4, he recorded the exact amount due under the bond and the other details appearing thereon.

There are some differences between the two in that no witnesses appear on *exhibit* 4(a) nor is it duly stamped as *exhibit* 4 is and on which stamps the appellant signed. The most material, however, difference being that certain words which appear on *exhibit* 4, after the words "same received", as to how the amount of the bond was arrived at, do not appear on *exhibit* 4(a). These are the words "by renewal of a bond expiring 31st December, 1960, for the amount of £21,890.543 mils in accordance with copy of account". These words according to respondent No. 1, whose version is accepted by the trial Court were forgotten to be copied.

Regarding the other evidence adduced, the trial Court found that *exhibit* No. 1 was prepared elsewhere than *exhibit* No. 4, that the signatures of the witnesses appearing on it are different to those appearing on *exhibit* No. 4, a fact that ruled out the possibility that they were executed at the same time and place; furthermore that *exhibit* No. 1 was signed by the appellant and respondent No. 2 in the absence of respondent No. 1 and that *exhibit* No. 1 was executed much later than 1969, which strengthened generally the version of the respondent.

We need not say anything beyond what the trial Court said on this aspect of the case and with which we are in full agreement as these findings are duly warranted by the evidence adduced:-

> " In viewing the issue of date in the light of the evidence as a whole, one cannot help wondering—assuming that *exhibit* No. 1 was executed at the same time and place as *exhibit* No. 4—why *exhibit* No. 5 was issued 15 days thereafter, whereby time was given to the plaintiff to pay the amount due under *exhibit* No. 4, since there was ample coverage in *exhibit* No. 1 regarding the time of payment. Also, the inconsistencies contained in *exhibit* No. 1 regarding the amount of money due by the plaintiff at the time to defendant No. 1 with what was actually due, taken

together with the details set out in *exhibit* No. 4, render *exhibit* No. 1 very suspicious indeed. Last, but by no means least, the absence of any reference to the existence of this document in the 1967 Action, remains without any rational explanation and makes the probability of this document coming into existence after the 1967 Action so strong that all other probabilities are fading away."

Finally, with regard to the settlement of the 1967 action, the Court pointed out that no reference was made to *exhibit* 1 though in all other respects it was a very elaborate settlement. Moreover, from the subsequent conduct of the parties, namely, the applications made by the appellant for the division of his property into building sites, the property alleged to have been bought by him was not included. Had such a sale been agreed upon, for the purpose, as stated, of securing access to the property of the appellant, the property in question was only natural to be included with the one sought to be divided by the aforesaid applications. From this omission it could safely be concluded that no such property was sold and so the version of the respondents is the correct one.

On the totality of the evidence before the trial Court and for the reasons given by it, namely that *exhibit* No. 1 was not executed on the date it purports to have been executed, it was vague and uncertain, it had no consideration in it, as already mentioned, etc., we find that there are no sufficient reasons for us to interfere with all these findings. We agree with the trial Court that the document, *exhibit* No. 1 was not a binding agreement on the ground of uncertainty and lack of consideration and also because the parties never considered it as such. The appeal therefore is dismissed with costs.

Appeal dismissed with costs.