1981 January 23

[A. LOIZOU, DEMETRIADES AND SAVVIDES, JJ.]

KIER (CYPRUS) LTD.,

Appellants-Defendants,

v.

TRENCO CONSTRUCTIONS LTD.,

Respondents-Plaintiffs.

(*Civil Appeal No.* 5770).

Practice—Trial of action—Adjournment—Discretion of trial Court—Principles applicable—Application for adjournment to enable defendants procure a witness—Repeated opportunities given to defendants to make arrangements for presentation of their case—No wrong exercise of discretion by trial Court in refusing the adjournment—Article 30.2 *of the Constitution and Article* 6(1) *of the European Convention on Human Rights of* 1950.

Constitutional Law—Human rights—Right to a fair hearing within a reasonable time—Article 30.2 *of the Constitution and Article* 6(1) *of the European Convention on Human Rights of* 1950.

Contract—Building contract—Impossibility of performance—Section 56(2) *of the Contract Law, Cap.* 149—*Construction not completed owing to Turkish invasion—Contract terminated by contractor due to inability to proceed to site and complete the undertaken work—Claim for retention money and increase of labour cost—Employer still owing to contractor large sum of money representing extra work by far exceeding the retention money—Section* 56(2) *above applicable—Contract having become void restitution could be claimed under section* 65 *of Cap.* 149—*Claim sustained.*

Under a written agreement dated the 3rd May, 1972 the respondents, a building construction Company, undertook to construct for the appellants two main blocks of flats at Kyrenia at the agreed price of C£198,630. The completion of the work was agreed to be done in 22 months for certain of the blocks and in 16 months for the remaining blocks, from the commencement of the building operations. None of the buildings were

completed on the agreed date and when the Turkish invasion and occupation of Kyrenia took place the above constructions, although near in completion, were neither fully completed nor delivered to the appellants. By means of a letter dated the 24th October, 1974 the respondents terminated the said contract on the ground that their workers and site supervisors were unable to proceed to the site of the works or to continue work at the area as a result of the events that started in Cyprus on the 15th July, 1974 and the subsequent military Turkish invasion on the 20th July, 1974. In the meantime the appellants claimed payment of an amount of C£12,924 on the basis of the architect's payment certificate dated the 25th June, 1975, the details of which were as follows:

Retention under certificate No. 139/26	£9,918.–	
Less down payment for purchases of materials	2,762,–	£ 7,156.–
Increase in labour costs for period 1.4.74–30.6.74		5,758.–
Balance		£12,924.–

In an action by the respondents for the recovery of the above amount the trial Court decided the case on the provisions of section 65* of the Contract Law, Cap. 149 and gave judgment in favour of the respondents for the above amount, having held that because of the conditions prevailing in Kyrenia since 1974 the contract was impossible of performance. The trial Court further held that the fact that not a complete restitution was claimed but only partial and in particular with regard to a specific item, did not change the situation; that it was abundantly clear that the appellants owed considerable money to cover, if necessary, the purpose for which the retention money was provided for in the contract, namely, as a guarantee for any failure by the contractor; that the rest of the accounts remained outstanding and the rights of the parties in them were not affected

* Section 65 reads as follows:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it".

by these proceedings; and that "when accounts are taken as provided by the contract any part of the retention money which ought not to have been paid over to the plaintiffs may easily be deducted from their future claim for extracts".

The action was filed on the 30th July, 1975 and after the close of the pleadings it has been on the hearing agenda of the Court since March, 1977; and for various reasons adjournments were given on three occasions at the request of the appellants. Eventually the hearing commenced on the 5th July and it continued on the 8th July, 1977; and after the conclusion of plaintiffs' case the hearing was adjourned to continue on the 7th August, 1977. On that date counsel for the appellants applied for adjournment on the ground that upon exchange of views with his clients it was decided that the only witness that they could call was a certain Felix Reding who was the Director of the appellants and was handling the whole matter on their behalf at all relevant times; and that this witness could not be traced; and, also, on the ground that they intended to adduce evidence from Kyrenia regarding damages to the building between the Turkish invasion and the termination of the agreement. The trial Court refused the application for adjournment having held that the time that intervened was sufficiently long for the appellants to prepare their case and procure all the witnesses that they would have.

Upon appeal by the appellants it was mainly contended:

(a) That the decision and/or order of the Court on the 17th August, 1977 for the non-adjournment of the hearing of the case was given in wrong exercise of its discretionary powers caused injustice to the appellants and amounted in fact to a denial of justice and miscarriage of justice; and violated the right to a fair hearing safeguarded by Article 30 of the Constitution.

(b) That the trial Court was wrong in concluding that the claim of the respondents could succeed.

Held, (1) *on the question of adjournment:*

That the question whether an adjournment will be granted or not is undoubtedly a matter of judicial discretion; that as such

it has to be examined on the particular facts of each case and not in abstracto; that whether an adjournment will be granted or not must always be considered in the light of the right to a hearing within a reasonable time as provided by Article 30, para. 2, of the Constitution and Article 6, para. 1, of The European Convention of Human Rights of 1950, ratified by The European Convention on Human Rights (Ratification) Law 1962 (Law No. 39 of 1962); that the attendance of the witnesses sought to be brought before the Court could not be compelled by means of the Court's procedure and therefore matters should be delayed for the process to operate; that on the facts of the present case and taking into consideration the repeated opportunities—more than what anyone would expect—given to the appellants to make arrangements for the presentation of their case, there has been no wrong exercise of the Court's discretion.

(2) *On the merits of the appeal:*

That impossibility of performance was due to changes in circumstances beyond the control of the parties; that, therefore, the legal situation created thereby comes within the ambit of subsection 2 of section 56* of Cap. 149, that is, by reason of such events which the parties could not prevent, the performance of the acts agreed to be done under the contract became impossible and therefore the contract as such became void and so restitution could be claimed under section 65; that the legal foundation for such restitution are the provisions of subsection 2, of section 56 of Cap. 149 which are satisfied by the factual findings of the trial Court; accordingly the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

International Bonded Stores Ltd. v. *Minerva Insurance Co. Ltd.*, (1979) 1 C.L.R. 557;

Kranidiotis v. *Ship "Amor"* (1980) 1 C.L.R. 297 at pp. 299–300.;

Tofas and Another v. *Agathangelou* (1980) 1 C.L.R. 560;

Diminion of India v. *Preety Kumar Ghosh* (1958) A.P. 203, 207.

* Section 56(2) of Cap. 149 reads as follows:

"56(2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Orphanides, S.D.J.) dated the 26th October, 1977 (Action No. 3339/75) whereby they were ordered to pay to plaintiffs the sum of £12,924.— for work done and materials suplied in relation to the construction of two blocks of flats.

M. Christofides, for the appellants.

G. Pelaghias, for the respondents.

Cur. adv. vult.

A. LOIZOU J. read the following judgment of the Court. This is an appeal against the judgment of the Full District Court of Nicosia whereby the appellants were adjudged to pay to the respondents the sum of C£12,924.— with interest thereon at 4% p.a. as from 26.12.1977 to the date of payment and costs.

The respondents are a building construction Company which has undertaken to construct for the appellants under a written agreement dated the 3rd May, 1972 (*exhibit* 1) and on the terms contained in the document described as The Conditions of the Contract (*exhibit* 2) two main blocks of flats at Kyrenia and to provide the necessary materials at the agreed price of C£198,360.— plus external work which, according to the respondents, was agreed at C£18,945.— and according to the appellants at C£17,580.— The completion of the work was agreed to be done in 22 months for blocks known as D, E, G, and 16 months for blocks A & D, from the commencement of the building operations. None, however, of the buildings were completed on the agreed date for which there is a dispute as to who was responsible, and when the Turkish invasion took place this construction, although near in completion, was neither fully completed nor delivered to the appellants.

The respondents by their letter dated the 24th October, 1974, terminated the said contract. The reason given for such termination was the inability for their workers and site supervisors to proceed to the site of the works or to continue work at the area as a result of the events that started in Cyprus on the 15th July, 1974, and the subsequent military Turkish invasion on the 20th July, 1974. It was also stated therein that the unfortunate situation had continued up to the date of the writing of that letter and it did not appear that the prevailing conditions would improve in the near future.

They further said that following the termination of the contract, the architect of the appellant, his quantity surveyors and the respondents should work together to prepare a final bill in accordance with the relevant articles of the aforesaid Conditions of the Contract.

In the meantime, however, they claimed payment of the aforesaid sum on the basis of the architect's payment certificate No. 13/260/39A/2. The details contained in this certificate issued by Mr. Alecos Gavrielides, the Supervising Architect, on the 25.6.1975 were as follows:

Retention under certificate No. 139/26	£9,918.–	
Less down payment for purchases of materials	2,762.–	£ 7,156.–
Increase in labour costs for period 1.4.74—30.6.74		5,758.–
Balance		£12,924.–

The appellants failed to pay the aforesaid amount, hence the present proceedings.

At this stage it is convenient to examine the first ground of appeal, that is, "that the decision and/or order of the Court on the 17th August 1977, for the non adjournment of the hearing of the case and/or the dismissal of the application of the appellant company for adjournment of the hearing—

(a) was given in wrong exercise of its discretionary power;

(b) caused injustice to the appellant company and amounted in fact to a denial of justice and miscarriage of justice, and

(c) violates the rights to a fair hearing safeguarded by Article 30 of the Constitution".

The relevant facts on this point are the following: This action was filed on the 30th day of July 1975, by a specially endorsed writ under Order 2, rule 6, of the Civil Procedure Rules. An appearance was entered by the appellants—as defendants—on the 19th August, 1975. An application then was filed by them *ex parte* for leave to issue and serve a third

party notice on "J. L. Kier & Co. Ltd., Tempsford Hall, Sandy, Bedfordshire, U.K.," which was granted on the same day. On the 27th November, 1975, an application for judgment against the defendants in default of defence was filed which was withdrawn and leave was granted to file the defence on the 21st January 1977, by their present advocates who in the meantime had been appointed to act as such in lieu of the original counsel who had appeared for the defendants. On the 2nd October 1976, an application was filed to fix a date for trial and the case was fixed for mention on the 22nd November, 1976, when the case was adjourned for hearing to the 7th and 8th March 1977. The two consecutive days given by the Court being obviously an indication that the case was to be really heard on those days being given preference in that way to other litigants whose cases could have been fixed on these two days instead. On the 7th March 1977, counsel for the appellants stated to the Court that he had informed his clients who were abroad since November 1976, but so far he had no instructions from them and under the circumstances he felt bound to apply for an adjournment. Counsel for the respondents-plaintiffs did not object to a short adjournment but he made it clear that he would strongly object to any other adjournment based on the same ground. The case was then fixed for hearing once more on the 6th April, 1977, counsel for the appellants applied once more for an adjournment as he had not until then received any reply from his clients and the case was adjourned to the 29th April 1977, for mention and for a date of hearing to be given, with costs against the appellants. A date of hearing was then given on the 9th May 1977, and the case was fixed in the presence of both counsel on the 22nd June 1977, for hearing, when once more counsel for the appellants—applied for another adjournment as he was still awaiting further instructions. The case was once more adjourned for hearing to the 5th July 1977, with costs against the appellants.

The hearing commenced, the Court heard two witnesses and as the cross-examination of the Architect, Alecos Gavrielides (P.W.2) would be long, adjourned the case for hearing to the 8th July 1977, when the case for the plaintiffs was concluded by the cross-examination and re-examination of this witness. The time being 12.45 the case was adjourned to be continued on the 17th August 1977. On that date counsel for the appel-

lants felt once more bound to apply for an adjournment. The reasons he gave were that upon exchange of views with his clients it was decided that the only witness that they could call was a certain Felix Reding who was the Director of the appellants and was handling the whole matter on their behalf at all relevant times. He could not, however, be traced and the last country they had looked for him was Belgium where, according to their information, he was staying but he could not be found there also.

Also they intended to adduce evidence from Kyrenia regarding damages to the buildings between the Turkish invasion and the termination of the agreement. Regarding this evidence it was obvious that they were facing "a physical impossibility".

Counsel for the respondents/plaintiffs objected once more to the adjournment, argued that the first ground upon which the adjournment was asked was not valid as they had ample time to prepare their case, they knew who would be needed as witnesses and they should have seen that they were available on the date of the hearing. On the other hand he stressed that this action was not for extras but for the retention money and the cost of the increase of labour and went on to point out that in any event the matters for which they intended to call evidence were irrelevant to the issues before the Court.

The ruling of the Court was as follows:

"This case has been on the hearing agenda since March, 1977, and for various reasons adjournments were given at the request of the defendants. Eventually the hearing commenced on the 5th July, 1977, and it continued on the 8th July, 1977. At the end of the case for the plaintiff, the case was adjourned to continue during the Court vacations, on the 7th August, 1977, that is, to-day.

It has been stated by learned counsel for the defendant that priority has been given to this case. On this we must make it quite clear that no priority whatsoever was given. The case was fixed for hearing and once it started, it was better to finish it as soon as possible and to avoid a long interval between hearings and this is the main reason why the case was fixed during Court vacations. The time, however, that intervened, was sufficiently long for the

defendants to prepare their case and procure all the witnesses that they would have, with the exception of course of evidence from Kyrenia and this in any event is not based on something concrete.

We have considered all the aspects of the application for adjournment made by the defendant and we are of the opinion that another adjournment is not justified and, therefore, we refuse the application".

Upon that counsel for the appellants said that under the circumstances he had no witnesses to call, he had no other evidence except the documents which were produced; a short adjournment was granted to him in order to go through the exhibits and then the hearing was resumed when certain documents were produced by consent and one *exhibit* already produced was withdrawn, whereupon both counsel addressed the Court.

The principles that should govern the exercise of a Court's discretion in granting or refusing an adjournment have been reviewed recently and at length by Savvides, J., in the cases of *International Bonded Stores Ltd.* v. *Minerva Insurance Co. Ltd.* (1979) 1 C.L.R. p. 557, and reiterated in the case of *Manolis Kranidiotis* v. *Ship "AMOR"* (1980) 1 C.L.R. p. 297, where the position is summed up as follows (pp. 299–300):

"It has been repeatedly stressed by our Supreme Court in a number of cases that delays in the hearing of a case are highly undesirable and that adjournments should be avoided as far as possible and that only in unusual circumstances they must be granted. The reason for this, is that it is in the public interest that there should be some end to litigation and, furthermore, the right of a citizen to a fair trial within a reasonable time according to the Constitution and the Courts should comply with these constitutional provisions with meticulous care. The discretion of the Court in granting an adjournment should be exercised in a proper judicial manner and an order for an adjournment should not be made if there is danger that the rights of a party before the Court will be prejudicially affected by such adjournment".

Reference may also be made to the judgment of this Court

in the case of *Michael Hjipanayi Tofas & Another* v. *Aglaia Agathangelou* (1980) 1 C.L.R. p. 560, where the authorities on the principles governing the question of the Court's discretion with regard to adjournments were reviewed.

The question whether an adjournment will be granted or not is undoubtedly a matter of judicial discretion. As such it has to be examined on the particular facts of each case and not in abstracto; whether an adjournment will be granted or not must always be considered in the light of the right to a hearing within a reasonable time as provided by Article 30, para. 2, of our Constitution and Article 6, para. 1, of The European Convention on Human Rights of 1950, ratified by The European Convention on Human Rights (Ratification) Law 1962 (Law No. 39 of 1962).

On the facts of the present case and taking into consideration the repeated opportunities—more than what anyone would expect—given to the appellants to make arrangements for the presentation of their case, we find that there has been no wrong exercise of the Court's discretion. One should not also lose sight in this case of the fact that the attendance of the witnesses sought to be brought before the Court could not be compelled by means of the Court's procedure and therefore matters should be delayed for the process to operate.

This disposes of the first ground of appeal.

The next ground of appeal turns on the issue by the Supervising Architect of a payment certificate in respect of the retention money and whether the correct procedure provided for in the agreement between the parties was followed or not. The power and authority of the Supervising Architect who was nominated under the contract to issue certificates for payment, are stated in Article 13 of *exhibit* 2. The certificate which has been produced as *exhibit* 4 is in respect of an amount of C£12,924.—which is made up of two items, the first one relates to the refund of retention money and the second to payment of increases of labour cost. With regard to the payment of retention money, the relevant provision is Article 13, para.(z) which reads:

" 'Ο ἐργολάβος θέλει τηρουμένων τῶν προνοιῶν τοῦ Ἄρθρου 9(β) τοῦ παραρτήματος, δικαιοῦται εἰς πιστωτικὴν πληρωμὴν

τῆς κρατήσεως κατὰ τὴν ἔμπρακτον συμπλήρωσιν τῶν ἐργασιῶν, μεῖον ποσοῦ ὡς καθορίζεται εἰς τὸ παράρτημα (μὴ ὑπερβαίνοντος τὸ 2% τοῦ ποσοῦ τοῦ συμβολαίου)".

("The contractor shall, subject to the provisions of article 9(b) of the appendix, be entitled to payment of the retention money on the practical completion of the works, less the sum fixed in the appendix (not exceeding 2% of the amount of the contract").

And para. (b) of Article 9 reads as follows:

" 'Αποζημίωσις διὰ μὴ ἀποπεράτωσιν: 'Εὰν ὁ ἐργολάβος παραλείψη νὰ συμπληρώση τὰς ἐργασίας κατὰ τὴν ἡμέραν τὴν καθοριζομένην εἰς τό παράρτημα ἢ ἐντὸς οἱασδήποτε παραταθείσης προθεσμίας συμφώνως πρὸς τὴν παράγραφον (ε) τοῦ παραρτήματος, ὁ ἀρχιτέκτων πιστοποιήσει ἐγγράφως ὅτι κατὰ τὴν γνώμην του αὗται ὤφειλον νομικῶς νὰ εἶχον συμπληρωθεῖ, τότε ὁ ἐργολάβος θὰ πληρώση ἢ θὰ παραχωρήση εἰς τὸν ἐργοδότην τὸ ἀναφερόμενον ποσὸν ἄνω, τὴν καθοριζομένην περίοδον εἰς τὸ παράρτημα ὡς χρέος καὶ ὡς ἐκτιμηθεῖσαν ἀποζημίωσιν διὰ τὴν περίοδον διαρκούσης τῆς ὁποίας αἱ ρηθεῖσαι ἐργασίαι θέλουσι οὕτως παραμείνουν ἢ ἤδη παρέμεινον ἀποτελείωτοι καὶ ὁ ἐργοδότης δύναται νὰ ἀφαιρέση τὰς τοιαύτας ἀποζημιώσεις ἀπὸ οἱαδήποτε ποσὰ ὀφειλόμενα εἰς τὸν ἐργολάβον.

("*Damages for non-completion*: If the contractor fails to complete the works by the date for completion stated in the appendix or within any extended time fixed under clause (e) of these conditions and the architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the contractor shall pay or allow to the employer a sum calculated at the rate stated in the said appendix as liquidated and ascertained damages for the period during which the works shall so remain or have remained incomplete, and the employer may deduct such sum from any monies due or to become due to the contractor under this contract").

It is clear from the above and that was the approach of the trial Court that the contractor was entitled, upon the actual completion of the work, to the retention money less a certain percentage specified in the contract unless the contractor was

liable to pay damages to the owner–employer for delays according to an assessment to be made by the Architect. In such a case the owner–employer might deduct the amount of damages from the amount kept by him as retention money. The trial Court, however, pointed out that the situation has been affected and changed by the Turkish invasion and things turned out not to be so simple as would have been in normal circumstances and had this to say:

> "Firstly; although admittedly there was a delay, yet the contractor was not responsible for it and the architect did not make any assessment under paragraph (b) of Article 9 nor was he ever requested to do so by the owner/employer. Secondly; the completion of the work has been rendered impossible on account of the Turkish invasion and, therefore, the contingency rendering the payment of the retention money operative could not and cannot be performed. Thirdly; the contract has been rightfully terminated by the contractor without any word of protest from the owner/employer and, therefore, it is safe to assume that all provisions, conditions and terms of the terminated contract ceased to have any effect".

It then concluded that "the right of the contractor, if any, as to the recovery of the retention money, is not conditional on the issue of a relevant certificate by the architect. It is a right which arose after the termination of the contract and not during its subsistence". The trial Court further took it that perhaps if the contract was not terminated, the payment of that sum and the issue of the relevant certificate would undoubtedly be covered by the terms and conditions of the contract but not so after the contract itself with all its terms and conditions ceased to exist. And went on to say: "Nevertheless, the architect issued the said certificate and even if it might not per se create legal rights it contains a statement of his expert opinion which was verified by his own evidence in Court irrespective of the legal aspect of the case".

The procedure provided by the contract between the parties is to be found in para.(b) of Article 12 thereof. It reads as follows:–

> "(β) Διαδικασία λύσεως
>
> Κατόπιν τούτου χωρὶς νὰ παραβλάπτωνται τὰ συμφέ-

ροντα ἑκατέρων τῶν συμβαλλομένων μερῶν τὰ ἀμοιβαῖα των δικαιώματα καὶ εὐθύναι θέλουσι εἶσθαι ὡς ἀκολούθως, ἤτοι:

(1) Ὁ Ἐργολάβος θέλει μὲ πᾶσαν λογικὴν ταχύτητα ἀπομακρύνει ἐκ τοῦ τόπου τοῦ ἔργου ὅλα τὰ ἐμπορεύματά του, μηχανήματα καὶ ἐγκαταστάσεις καὶ εὐκολύνει τοὺς Ὑπεργολάβους του νὰ πράξουν τὸ αὐτό.

(2) Ὁ Ἐργολάβος θὰ πληρωθῇ ὑπὸ τοῦ Ἐργοδότου:

(I) Τὴν συμβατικὴν ἀξίαν τῶν ἀποπερατωθεισῶν ἐργασιῶν κατὰ τὴν ἡμέραν τῆς τοιαύτης λύσεως ὡς ἀνωτέρω ἐλέχθη συμφώνως τῷ ἄρθρῳ 8 τοῦ παρόντος.

(II) Τὴν ἀξίαν τῆς ἀρξαμένης καὶ ἐκτελεσθείσης ἀλλὰ μὴ ἀποπερατωθείσης ἐργασίας κατὰ τὴν ἡμέραν τῆς τοιαύτης λύσεως ἡ ἀξία αὕτη ἐκτιμηθεῖσα κατὰ τὸν τοιοῦτον ἑκάστοτε ἁρμόζοντα διάφορον τρόπον ὡς προνοεῖται εἰς τὸ ἄρθρον 8 τοῦ παρόντος.

(III) Τὴν ἀξίαν τῶν ὑλικῶν ἢ ἐμπορευμάτων δεόντως παραγγελθέντων καὶ παραδοθέντων διὰ τὰς ἐργασίας ἤδη πληρωθέντων ὑπὸ τοῦ Ἐργολάβου ἢ διὰ τὰ ὁποῖα ἔχει νομικῶς δεσμευθῇ νὰ δεχθῇ παράδοσιν καὶ τῆς τοιαύτης ἀξίας πληρωθείσης ὑπὸ τοῦ Ἐργοδότου ταῦτα θέλουσι καταστῇ ἀτομικὴ του περιουσία.

(IV) Τὴν λογικὴν δαπάνην τῆς ἀπομακρύνσεως συμφώνως τῇ παραγράφῳ (1) τοῦ παρόντος.

(V) Οἱανδήποτε ζημίαν ἢ βλάβην προξενηθεῖσαν εἰς τὸν Ἐργολάβον ὀφειλομένην εἰς τοιαύτην λύσιν ὡς ἀνωτέρω ἐλέχθη πλέον λογικοῦ κέρδους.

(3) Νοουμένου ὅτι ἐπιπροσθέτως ὅλων τῶν ἄλλων μέτρων ὁ Ἐργολάβος κατόπιν τῆς τοιαύτης λύσεως δύναται νὰ λάβῃ κατοχὴν καὶ νὰ ἔχῃ τὸ δικαίωμα κατασχέσεως ὅλων τῶν μὴ στηριχθέντων ὑλικῶν τῶν προοριζομένων διὰ τὰς ἐργασίας καὶ τὰ ὁποῖα ἠδύναντο νὰ εἶχαν καταστῇ ἰδιοκτησία τοῦ Ἐργοδότου συμφώνως τῷ παρόντι συμβολαίῳ μέχρις ὅτου γίνει πληρωμὴ ὅλων τῶν ὀφειλομένων χρημάτων εἰς τὸν Ἐργολάβον ἐκ μέρους τοῦ Ἐργοδότου".

(" (b) *Determination*

After this and without any prejudice to the rights of

the contracting parties the common rights and responsibilities will be as follows, i.e.

(1) The contractor shall with all reasonable dispatch remove from the site all goods and materials, machinery and installations and shall give facilities for his sub–contractors to do the same.

(2) The contractor shall be paid by the employer.

(I) The total value of work completed at the date of determination as stated above in accordance with article 8 of this contruct.

(II) The total value of work begun and executed but not completed at the date of the determination the value being ascertained in accordance with such proper manner as provided for in article 8 of this contract.

(III) The cost of materials or goods properly ordered for the works for which the contractor shall have paid or for which the contractor is legally bound to pay and on such payment by the employer any materials or goods paid for shall become the property of the employer.

(IV) The reasonable cost of removal under para (1) of this sub–clause.

(V) Any direct loss and/or damage caused to the contractor by the determination plus reasonable profit.

(3) Provided that in addition to all other remedies the contractor upon such determination may take possession of and shall have a lien upon all unfixed goods and materials, which may have become the property of the employer under this contract until payment of all monies due to be contractor from the employer").

This procedure provides for a method of liquidation and settlement of accounts without any reference at all to the retention money, and the trial Court rightly pointed out that the respondents were not claiming a final settlement of accounts or the payment for extra work which according to the evidence of the Supervising Architect represented a substantial sum of money by far exceeding the amount kept by the appellants

as security, but only the retention money and increases of labour costs.

The trial Court found that this procedure was impossible at present or in the near foreseeable future to follow in view of the situation created after the Turkish invasion and decided the case on the provisions of section 65 of our Contract Law, Cap. 149, which was found to be applicable and which reads as follows:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it".

After dealing with the legal position especially as to the meaning of the term "received any advantage" as interpreted and commented upon by reference to authorities in *Pollock & Mulla*, 6th Ed., p. 379, had this to say on the position:

> "With the above background in mind, we may say that in this case the retention money is an advantage the defendants are holding not under any proprietary right but as security or rather as a lever to exert pressure upon the contractor to put right certain minor breaches of the contract associated mainly with bad workmanship. Since the contracted work has not been completed and cannot be completed for as long as the political situation prevailing in the island persists and since the contract was rightly terminated by the contractor/plaintiffs, it would be unfair for the defendants to retain such a large sum of money which, according to the terms of the contract is payable upon a contingency unlikely to occur, and even if it does occur it will be too late as the contract had been terminated and, therefore, this matter would have to form the subject-matter of a new agreement. Moreover, the settlement of accounts and the liquidation of mutual rights and obligations, as provided by the procedure laid down in the contract, could not fully take place and according to the facts the defendants still owe to the plaintiffs a large sum of money for extra work which by far exceeds the amount claimed by the plaintiffs. We feel that the contractors are entitled to the amounts claimed which, more or less,

are liquidated, they are approved in a way by the supervising architect, and we consider it only fair and just that they should be returned to the plaintiffs. When accounts are taken as provided by the contract, any part of the retention money which ought not to have been paid over to the plaintiffs, may easily be deducted from their future claim for extras.

We have dealt in extenso by reference to the retention money alone and we have deliberately avoided any mention to the increase of labour for the simple reason that this part of the claim presents no problem being clearly payable to and recoverable by the plaintiffs".

Counsel for the appellants has submitted that the trial Court was wrong in concluding that the claim of the respondents could succeed under the provisions of section 65 of the Contract Law, Cap. 149

Section 65 contains the principle of restitution after benefit has been received and the agreement is later discovered to be void. (*Dominion of India* v. *Preety Kumar Ghosh* (1958) A.P. 203, 207). As stated also in *Pollock and Mulla, Indian Contract and Specific Relief Acts*, 9th Ed., 461:

"The basis of the section is the doctrine of restitio in integrum. It does not make a new contract between the parties but only provides for restitution of the advantage taken by a party under the contract. Unless the Court can, having regard to circumstances of the case, restore the parties to their original position, section 65 would not be applicable. The section is not wider in scope than the English doctrine of restitution. The obligation to pay compensation under section 65 is quite different from a claim under the contract itself and the two cannot co-exist. Restitutionary remedies, as quasi-contractual, only arise where the original contract is put an end to or contracts become ineffective due to mistake or impossibility or lack of writing or lack of capacity".

As to when an agreement becomes void because the original contract was put to an end or it became ineffective due to impos-

sibility one has to resort to section 56 of the Contract Law which provides as follows:

"56(1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

(3) Where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise".

As stated in *Mulla* (*supra*) at pp. 402-403:

"The doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of parties or the change in circumstances makes the performance of the contract impossible. In fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of contract impossible. In India, the law dealing with frustration must primarily be looked at as contained in sections 32 and 56 of the Contract Act. The rule in section 56 exhaustively deals with the doctrine of frustration of contracts and it cannot be extended by analogies borrowed from the English Common Law. The Court can give relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract has frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract".

In the present case the trial Court has concluded that because of the conditions prevailing in Kyrenia since 1974, the contract was impossible of performance. Obviously that impossibility of performance was due to changes in circumstances beyond the control of the parties. In our view, therefore, the legal situation created thereby comes within the ambit of subsection

2 of section 56 of Cap. 149, hereinabove set out, that is, by reason of such events which the parties could not prevent, the performance of the acts agreed to be done under the contract became impossible and therefore the contract as such became void and so restitution could be claimed under section 65. In other words, the legal foundation for such restitution are the provisions of subsection 2, of section 56 of Cap. 149 which are satisfied by the factual findings of the trial Court. The fact that not a complete restitution was claimed but only partial and in particular with regard to a specific item, does not change the situation. It was made abundantly clear that the appellants owed considerable money to cover, if necessary, the purpose for which the retention money was provided for in the contract, namely, as a guarantee for any failure by the contractor. The rest of the accounts remained, according to the trial Court, outstanding and the rights of the parties in them were treated by the trial Court as not affected by these proceedings. As it put it "When accounts are taken as provided by the contract any part of the retention money which ought not to have been paid over to the plaintiffs may easily be deducted from their future claim for extracts".

For all the above reasons this appeal is dismissed with costs.

Appeal dismissed with costs.