1982 April 15

[PIKIS, J.]

J.Y.A. LAMAIGNERE,

Plaintiffs.

v.

SELENE SHIPPING AGENCIES LIMITED,

Defendants.

(*Admiralty Action No.* 46/80).

Contract—Principal and agent—Principles relevant to determining the capacity in which a party contracts—Question essentially one of construction of the agreement of the parties—Prima facie a party to an agreement personally liable—To avoid liability he must clearly specify that he is entering into it in a representative capacity on behalf of somebody else—Contract for securing by plaintiffs of cargo for boats of the defendants who always represented themselves as the persons who had authority and control over the boats—Defendants entered into the contract as principals and acted throughout in that capacity.

Judgment—Foreign currency—Jurisdiction to order payment of sum expressed in foreign currency.

Civil Procedure—Practice—Counterclaim—Claim for commission—Not properly raised and no evidence to support it—Dismissed.

By means of an agreement between the parties to the above action, in consideration of the plaintiffs receiving 7.5% commission, they agreed to secure cargo for three boats of the defendants due to call at Spanish ports on various dates specified in the agreement. Two of the boats duly called, as agreed, at Spanish ports but one of them failed to call at the agreed time or at any time thereafter. In an action by the plaintiffs for recovery of the expenses they incurred for procuring the cargo for the defendants and of the commission they lost, the defendants denied liability, contending that they were not personally liable under the agreement reached between the parties, as they entered into it in a representative capacity as agents of the ship-owners.

They, also, raised a counterclaim for U.S. dollars 10,000 as commission owing by plaintiffs to defendants for the introduction of trade.

From the evidence it emerged that the defendants always represented themselves as the persons who had authority and control over the boats in question.

Held, that the question whether a party to an agreement is personally liable thereunder is essentially one of construction of the agreement of the parties; that, prima facie, a party to an agreement is personally liable; that to avoid liability he must clearly specify that he is entering into it in a representative capacity on behalf of somebody else; that applying these principles to the facts of this case the inescapable inference is that defendants entered into the agreement with plaintiffs as direct participants and that they in no way limited liability thereunder; that they entered into the agreement as principals and acted throughout in that capacity; that, therefore, they are liable for the breach of the agreement and answerable for the damage suffered by the plaintiffs agreed upon, at 2.658.873 Spanish Pesetas.

Held, further, that a series of fairly recent English decisions established that judgment may, in an appropriate case, be given in a foreign currency (see, inter alia, *Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 3 All E.R. 801); that the development of English Law along its present lines was dictated not by any problems peculiar to English Society but by the need to facilitate international trade and keep the avenues of commerce open, considerations relevant to the policy of the law in every country; that the solution is a just one and in the absence of any legislative restrictions it should be followed in Cyprus with equal benefit; that, therefore, judgment will be given for the plaintiffs for 2.658.873 Spanish Pesetas.

Held, on the counterclaim, that the counterclaim for the recovery of commission has not been properly raised nor was there any evidence to support it; accordingly it should be dismissed.

Judgment for plaintiffs for 2.658.873 Spanish Pesetas.

Cases referred to:

Hough v. *Manzanos* [1879] 4 Ex D. 104;

Brandt v. *Morris* [1917] 2 K.B. 784;

Miliangos v. *George Frank (Textiles) Ltd.* [1975] 3 All E.R. 801;

Jean Krant A.G. v. *Albany Fabrics Ltd.* [1977] 2 All E.R. 116;

Jugoslavenska Oceanska Plovidba v. *Castle Investment Co. Inc.* [1973] 3 All E.R. 498;

Schorsch Meier GmbH v. *Hennin* [1975] 1 All E.R. 152;

Havana Railways [1960] 2 All E.R. 332;

The Despina R [1979] 1 All E.R. 421;

Trade Development Bank v. *Ship "Ariadni Pa"* (1981) 1 C.L.R. 653 at p. 655.

Admiralty Action.

Admiralty action for the expenses incurred by plaintiffs in procuring cargo for defendants in consequence of the delay of their ship "Poceidon" to call at Spanish ports and collect the cargo.

D. Demetriades, for the plaintiffs.

P. Sarris, for the defendants.

Cur. adv. vult.

PIKIS J. read the following judgment. The plaintiffs are ships' agents in Spain with headquarters at Alicante and a branch at Valencia. The defendants are a Cypriot firm carrying on business as shipowners, charterers, ships' agents and ships' managers. Seacarriers Shipping Company Limited is a Piraeus company of ship-brokers who brought the parties together in an effort to promote business between them. By a telecommunication dated 25.9.1979, they introduced the defendants to the plaintiffs as a liner company interested and ready to undertake carriage by sea, of cargo from Spanish ports. (See exhibits 20 and 21). Following this introduction, the parties exchanged a number of telexes resulting in an agreement, whereby, in consideration of the plaintiffs receiving 7.5% commission, that is, 5% for themselves and 2.5% for the brokers, they agreed to secure cargo for three boats of the defendants due to call at Spanish ports on various dates, specified in the agreement, notably, motor vessels "Bella", "Alasia" and "Poceidon C". The agreement was negotiated by the defendants but the capacity under which they entered into it is a matter of dispute.

Things progressed well at first and the boats Bella and Alasia

duly called, as agreed, at Spanish ports and collected cargo as the plaintiffs prearranged. But things went badly with Poceidon that failed to call at the agreed time, notably, between 14th and 15th of October, 1979, or at any time thereafter. At first, the defendants tried to excuse the delay as a temporary setback, attributing it to bad weather, but, eventually, on 7th November, 1979, they notified the plaintiffs that Poceidon would be unable to honour her commitments because of the manifestation of faults. In fact, they were informed that she was being towed to the Piraeus for repairs.

The plaintiffs claim from defendants the loss and damage suffered in consequence of the delay, whereas the brokers expressed to the defendants their consternation fearing the loss of the custom of plaintiffs to whom they refer as a highly reputable Spanish firm in the field of shipping. In the meantime, the defendants kept on pressing the plaintiff to remit the freight for the cargo shipped on and carried by Bella and Alasia. The plaintiffs assured the defendants that the money was being despatched. (See exhibits 18,20 and 25). The defendants were very anxious to receive the money and threatened to stop the voyage of Poceidon to Spanish ports unless the money was first received (exhibit 41), though it must have been known to the defendants that the trip was impossible.

By the present action the plaintiffs seek to recover the expenses they incurred for procuring cargo for the defendants and the commission they lost in consequence of the failure of Poceidon to call, and the breach resulting therefrom. The defendants denied liability, contending they were not personally liable under the agreement reached between the parties, as they entered into it in a representative capacity as agents of the shipowners. Also, they raised a counterclaim couched, it must be said, in the vaguest of terms, claiming a sum in the region of U.S. dollars 10,000.—as commission owing by plaintiffs to defendants, apparently for the introduction of trade.

At the commencement of the hearing the parties submitted, by consent, cable exchanges between them, as well as exchanges originating from or addressed to the brokers. (See exhibits 1–41). Further, an agreement was reached upon the damage recoverable by the parties in the event of being successful in their respective claims. The plaintiffs' damage was agreed at

2.658.873 Spanish Pesetas, and defendants' damage at U.S. dollars 10,291.75. Apart from the production of documentary evidence, two witnesses gave oral testimony, notably, Campos Perez, the manager of plaintiffs' branch at Valencia, and Pambos Psaras, the managing director of defendants. I have carefully examined their evidence and studied in detail the documentary evidence submitted. The main issue revolves round the capacity in which the defendants contracted. It is not in dispute that Poceidon C failed to call at Spanish ports in breach of the agreement between the parties and that, in consequence, plaintiffs suffered the damage agreed. No suggestion was made, nor for that matter was any evidence adduced to justify the breach, either on grounds of frustration or on any other ground.

The issues to be resolved are two:

First, whether the defendants contracted as principals, in which case they would be held liable, or as agents, whereupon plaintiffs would have to look elsewhere, to the owners of the boats, for recovery of the loss and damage suffered. The second question turns on the existence of liability, if any, on the part of the plaintiffs to pay commission to defendants for the business introduced, respecting vessels Bella and Alasia.

The evidence of Mr. Perez is that defendants never qualified their liability as contracting parties in any way and that plaintiffs looked throughout to them as the other contracting party. Information as to the ownership of the vessels was obtained at the request of the cargo owners, mainly in order to identify the ships and ascertain the flag under which they were sailing. The fact that the owners were persons other than the defendants, in no way qualified or limited the obligations of the defendants who represented themselves as the persons who had authority and control over the boats; in fact, information supplied as to the ownership of the ships was conflicting. (See exhibits 7 and 26). The belief of plaintiffs that defendants were effectively the charterers or carriers, was strengthened by the conduct of the defendants, particularly the authorisation they gave to plaintiffs to sign all necessary certificates for the shipment, on their behalf, including the bills of lading. (See exhibit 24A). That the freight would be paid to the defendants, was one other indication of their direct involvement in the agreement under consideration (exhibit 25). In brief, it is the case for

the plaintiffs that they looked exclusively to the defendants for the discharge of the obligations of the agreement between them and that nothing went on between them to make them look elsewhere, or put any different complexion on their relationship, other than the one they placed themselves. In fact, it is common ground that there was no communication between plaintiffs and the owners of the vessels.

On examination of the correspondence of the parties, it emerges that defendants never represented themselves as anything other than the company having control over the management of the boats (exhibit 6), a fact also implicit from their description by the brokers who regarded themselves as a go-between the contracting parties, the plaintiffs and defendants. (See exhibits 20, 21, 23 and 27).

Mr. Psaras maintained in evidence that their company, in their relations with plaintiffs, acted in a representative capacity as agents for the owners. However, he was unable to point to any communication specifying their representative capacity, except to whatever extent this may arise from the fact that they were not the owners of the boats.

The correspondence between the parties and their conduct subsequently, far from supporting the version of the defendants, affirmed, one may say, conclusively the case for the plaintiffs that defendants acted as principals. Mr. Psaras admitted that they negotiated the freight for the carriage of the cargo, as well as authorised the plaintiffs to sign the necessary documents on their behalf, acts highly consistent with their entering into the agreement as principals. Their invitation to plaintiffs to remit, as mentioned, the freight to them, is another piece of evidence illustrating their direct participation in the agreement. The liner service was conducted, as Mr. Psaras admitted, by the company without, it seems, any intervention from the owners. He was constrained to admit in cross-examination that he never endeavoured to specify that they acted on behalf of the shipowners.

The Counterclaim: It rests, as I comprehend, on the existence of an agreement for the payment of commission by the plaintiffs to the defendants, apparently for the introduction of trade. There is no averment either in the defence or in the counterclaim

of the material facts giving rise to the claim. The prayer, detailed though it may be, is no substitute for the body of the pleading and details disclosed therein cannot found a valid claim. Nor is there any evidence to support the existence of the agreement proclaimed by the defendants. Indeed, it would be difficult to envisage the existence of such agreement in the context of the relationship of the parties. What evidence there is, suggests that the freight would be paid to the defendants, a state of affairs incompatible with the existence of any agreement of the kind suggested by the defendants.

It emerges from the documentary evidence that plaintiffs repeatedly promised to remit the freight to the defendants, something they evidently failed to do. (See exhibits, 18, 28 and 35). Conceivably, this failure could ground a case for the recovery of the freight but that does not arise and I should not speculate on it. In answer to a question in cross-examination, Mr. Psaras, rather surprisingly, stated that he knew not whether the freight had been paid to the owners or the brokers. In my judgment, the claim for the recovery of commission is not properly raised nor is there any evidence to support it. It is dismissed.

PRINCIPLES RELEVANT TO DETERMINING THE CAPACITY IN WHICH A PARTY CONTRACTS:

The legal principles relevant to deciding whether a party to an agreement is personally liable thereunder, are well settled and not difficult to apply. They emerge, inter alia, from the authorities cited by counsel. (*British Shipping Law, Vol. 2, Carriage by Sea, 12th ed., vol. 1, p. 338, to Scrutton on Charterparties, 18th ed.*, under the heading of "*Agency*", p. 30 et seq., and to a number of authorities, including those of *Hough* v. *Manzanos* [1879] 4 Ex. 104, and *Brandt* v. *Morris* [1917] 2 K.B. 784).

The question is essentially one of construction of the agreement of the parties. Prima facie, a party to an agreement is personally liable. To avoid liability he must clearly specify that he is entering into it in a representative capacity, on behalf of somebody else. Nothing short will do. This position is consonant with logic as well as common sense for it would be contrary to good sense to require a contracting party to enter

into an agreement with a person unknown to him and one about whom he had no opportunity to inquire about.

Applying these principles to the facts of the case, the inescapable inference is that defendants entered into the agreement with plaintiffs as direct participants and that they in no way limited liability thereunder. I unhesitatingly hold that they entered into the agreement as principals and acted throughout in that capacity; therefore, I find them to be liable for the breach of the agreement and answerable for the damage suffered by the plaintiffs agreed upon, at 2.658.873 Spanish Pesetas.

JUDGMENT IN A FOREIGN CURRENCY:

Counsel agreed damage in a foreign currency, evidently presuming there is no obstacle, substantive or procedural, to the award of damages in a foreign currency.

A series of fairly recent English decisions established that judgment may, in an appropriate case, be given in a foreign currency. *Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 3 All E.R. 801; *Jean Krant AG* v. *Albany Fabrics Ltd.* [1977] 2 All E.R. 116. The way for the emergence of the new practice was paved by two earlier decisions, notably, *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1973] 3 All E.R. 498, and *Schorsch Meier GmbH* v. *Hennin* [1975] 1 All E.R. 152. In *Miliangos*, there is a long discussion of the implications of judgment being given in a foreign currency and the untenability of the principles upon which courts, in the past, rested the view that judgment in a foreign currency is impossible under English law. (See, inter alia, *Havana Railways case* [1960] 2 All E.R. 332).

The decision in *Miliangos* is a species of judge-made law in response to the problems of our times, such as inflation and great fluctuations in the rate of exchange between various currencies. The internationalisation of trade and the use of more than one currencies, as a basis for exchange, were, on surmise, the basic reasons behind the recent evolution of the law.

In its most recent pronouncement on the subject, *The Despina R* [1979] 1 All E.R. 321, the House of Lords settled the jurisdical basis of the law, on the subject under consideration, sanctioning

the pronouncement of judgment in a foreign currency, where appropriate, as a legitimate application of the principle of restitutio in integrum. Damages, it was held, should normally be given in the currency of the country in which the plaintiff operates but the rule is not an inflexible one and the exercise must invariably aim at ensuring justice between the parties.

The new approach of English courts met with the approval of the Supreme Court in the exercise of its original jurisdiction on at least one occasion, notably, *Trade Development Bank* v. *Ship "Ariadni Pa"* (1981) 1 C.L.R. 653, 655. Section 31 of the Courts of Justice Law, regulating the power of the courts to issue judgment, places no restrictions on the power of the court to give judgment in any particular currency. On the contrary, it expressly empowers the court to issue judgment on "such terms and conditions as the court thinks just", a power wide enough, designed to enable the court to do justice, in this area, in the light of the merits of each case.

The development of English law along its present lines was dictated not by any problems peculiar to English society but by the need to facilitate international trade and keep the avenues of commerce open, considerations relevant to the policy of the law in every country. The solution is a just one and in the absence of any legislative restrictions, it should be followed in Cyprus with equal benefit.

I, therefore, give judgment for the plaintiffs for 2.658.873 Spanish Pesetas. This judgment, of course, is no authority for the export of Cyprus currency without prior approval from the Central Bank of Cyprus.

The counterclaim is likewise dismissed.

The defendants shall bear the costs of the proceedings.

Judgment for plaintiffs as above with costs. Counter-claim dismissed.