1982 May 29

[DEMETRIADES, J.]

ANGELO SCUDERIE,

Plaintiff.

v.

1. SHOHAM (CYPRUS) LIMITED,
2. ZIM ISRAEL NAVIGATION COMPANY LTD.,
3. VESSEL C/V NEERLANDIA,

Defendants.

(*Admiralty Action No.* 209/81).

Practice—Stay of proceedings—"Foreign jurisdiction clause"—Carriage of goods by sea—Bill of lading issued in Cyprus by agents on behalf of foreign ship-owners—Providing that all disputes thereunder to be determined by foreign Court—Action in Cyprus against the agent and the ship-owners for damages for destruction of cargo—All parties except agents foreigners living abroad—Agents not in a position to help the Court regarding destruction of cargo—Most, if not all, material witnesses living abroad—Ship-owners may not be able to properly defend their case if case proceeds in Cyprus because Court has no power to summon witnesses living abroad—Dispute in no way connected with Cyprus—Proceedings stayed.

Practice—Writ of summons—Setting aside issue and service thereof—Action, arising from contract of carriage of goods by sea, against agent and foreign Corporation—Service on agent—Fact that bill of lading issued by agent on behalf of foreign Corporation and fact that corporation's name appears on window of agent's office cannot justify one to hold that corporation is, for the purpose of service, residing in Cyprus.

The first defendants were shipping agents carrying on their business in Cyprus and the second defendants were ship-owners and ship agents with their head offices in Haifa, Israel. On October 8, 1981 a bill a lading for the carriage of a quantity of fish, belonging to the plaintiff, from Cyprus to Italy was issued

by the first defendants, at their office in Cyprus on behalf of the second defendants. Clause 20* of the bill of lading contained an "exclusive jurisdiction clause" which provided that disputes arising under the bill of lading shall be determined, unless the parties expressly agree on both the choice of another Court and the law to be then applicable, at the place the carrier had its head office, namely Haifa, Israel. As the cargo in question never reached Italy because it went bad and it was destroyed the plaintiff brought an action against the defendants for damages. Copy of the writ of summons was served on defendants 1 by leaving it with one of their Directors who, was, also, served with a copy for the second defendants. The third defendants, the carrier, were not served with copy of the writ.

Following service as above the first and second defendants applied for an order setting aside the issue and/or the service of the writ of summons and for an order staying all proceedings against them, on the ground that the first defendants were not authorised to accept service on behalf of the second defendants and on the ground that the bill of lading contained an "exclusive jurisdiction clause".

Counsel for the plaintiff submitted that and service on the second defendants was a good one in view of the provisions of rule 21** of the Cyprus Admiralty Jurisdiction Order, 1893 because the second defendants were carrying on business in Cyprus. Plaintiff's assertion that the second defendants were carrying on business in Cyprus was based on the fact that their name appeared on the window of the offices of the first defendants at Limassol, Nicosia and Larnaca and on the issue of the bill of lading.

Held, (1) (*after stating the principles governing the question of stay of proceedings—vide pp.* 390–3 *post*) that since all the parties except the first defendants, are foreigners living abroad; that since the first defendants, who are a Cyprus Company, signed on behalf of the second defendants the Bill of Lading and they are not in a position to say why the cargo went bad, and therefore, they will not be in a position to help the Court; that since there is ample evidence that most, if not all material witnesses, are in Israel and that the second defendants, if the case

* Clause 20* of the bill of lading is quoted at p. 389 *post*.

** Rule 21 is quoted at pp. 393–4 *post*.

proceeds in Cyprus, may not be able to properly defend their case, as this Court has no power to summon witnesses living abroad, because they will be outside its jurisdiction and cannot force them to attend the Court and give evidence; and that since it is clear from the evidence that the dispute is in no way connected with Cyprus, this is a proper case in which this Court can exercise its discretion and order a stay of proceedings.

(2) That from the evidence one cannot reach the conclusion that the authority exercised by the first defendants is so extensive as to justify one to hold that the second defendants are, for the purpose of service, residing in this country and, therefore, amenable to the jurisdiction of the Courts; accordingly, the service of the writ of summons in the present case, on the first defendants, should be set aside.

Application granted.

Cases referred to:

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

Cubazucar and another v. *Camelia Shipping Company Ltd.* (1972) 1 C.L.R. 61;

Sonco Canning Limited v. "*Adriatica*" (1972) 1 C.L.R. 210;

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

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

Trendtex Trading Corporation and Another v. *Credit Suisse* [1980] 3 All E.R. 721 at pp. 734–35;

Tanagba v. *Pipinos Shipping Co. Ltd.* (1981) 1 C.L.R. 255;

Westcott & Lawrence Line v. *The Mayor, Deputy Mayor, Councillors and Townsmen of Limassol*, 22 C.L.R. 193.

Application.

Application by defendants 1 and 2 for an order setting aside the issue and/or the service of the writ of summons and/or for an order staying all proceedings against them.

M. Montanios with *P. Panayi* (*Miss*), for the applicants.

D. Zavallis, for the respondent.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. This is an application by the first and the second defendants by which they

pray for an order setting aside the issue and/or the service of the writ of summons and/or for an order staying all proceedings against them, on the ground that the first defendants were not authorised to accept service on behalf of the second defendants and that the bill of lading contains an "exclusive jurisdiction clause", which provides that disputes arising under the bill of lading shall be determined, unless the parties expressly agree on both the choice of another Court and the Law to be then applicable, at the place the carrier has its head office, namely, Haifa, Israel.

The application was opposed by the plaintiff. The plaintiff is a merchant carrying on his business in Italy.

The first defendants are shipping agents carrying on their business in Limassol, Larnaca and Nicosia. The second defendants who are ship-owners and ship agents with their head offices in Haifa, have vessels calling regularly at the ports of Limassol and Larnaca for the transportation of goods from and to Cyprus. The third defendants is a container ship owned by a German company and is registered in the Federal Republic of Germany.

By his action the plaintiff claims damages which he allegedly suffered on a quantity of fish which had been stuffed by him at Limassol in a container, which was then loaded on the vessel (at Limassol) for Trieste, Italy, via Haifa or Ashdod, Israel. In respect of this container a bill of lading, with the name of the second defendants printed on the top of the face page was issued on the 9th June, 1981. Photocopy of this bill of lading is attached as exhibit "A" to the affidavit of Miss Persephoni Panayi, dated 8th October, 1981, which accompanies the application. Copy of the writ of summons of the action was served on defendants (1) by leaving it with one of their Directors, who was, also, served with a copy for the second defendants. Copy of the writ was not served on the third defendants.

On the face of the said bill of lading the following clause appears:

> "In accepting this Bill of Lading the Merchant expressly accepts and agrees to be bound by all the stipulations, exceptions, limitations, liberties and conditions stated herein, whether written, printed, stamped or otherwise

incorporated on the front and/or reverse side hereof as fully as if they were all signed by the Merchant".

Paragraph 20 of the said bill of lading, which appears at the back side of it and which is headed "Law and Jurisdiction", provides:

"Disputes arising under this Bill of Lading shall be determined at the option of the Merchant, and subject to Paragraph (1) of Clause 3 hereof, by the courts and in accordance with the law at

(a) the place where the Carrier has its Head Office, namely Haifa–Israel, or

(b) if the cargo originates in or is destined for the U.S.A. by the United States District Court for the Southern District of New York, N.Y. U.S.A.

No proceedings shall be brought before other courts unless the parties expressly agree on both the choice of another court and the law to be then applicable".

The bill of lading was issued by the second defendants at Limassol and bears on the face of it the stamp of the first defendants. On the 2nd January, 1982, Mr. Prodromos Papavassiliou, the Managing Director of the first defendants, swore a supplementary affidavit in support of the application, in which he denies the allegations contained in the affidavit accompanying the opposition and says that the second defendants are an Israeli company incorporated and carrying on their business in Haifa; that they do not and did not have an office in Cyprus and that his company has for many years been acting in Cyprus as the agents of the second defendants.

Mr. Papavassiliou was cross-examined by counsel for the plaintiff/respondent and though he admitted that on the window of his company's offices the name of the second defendants is written —a thing which is very usual, as he said, for all shipping agencies, to expose or show the names of the companies they represent—he alleged that they have no authorisation to accept service of writs of summons on behalf of the second defendants, though as their agents they are authorised to sign on their behalf bills of lading.

As no pleadings have been filed the case for the plaintiffs

appears in paragraph 10 of the affidavit which accompanies the opposition and it is briefly as follows:

> "On 8th October, 1981, a bill of lading was issued at the offices of the first defendants for the carriage of the goods earlier mentioned; that in breach of the terms of the said bill of lading the defendants failed to protect and/or conserve the load of fish which was placed in the container; that they failed to supervise diligently and constantly the said load and/or to keep it under continuous freezing conditions and that they failed to inspect in time and find out that there was slight leakage (flowing through), and/or the non-existence of freezing in the cold stores before the departure of the vessel and/or immediately after it departed, and/or whilst the load was on the ship, and as a result the load went bad".

It is an undisputed fact that the cargo never reached Trieste and that when it arrived at Haifa having been found that it went bad it was destroyed.

Having summarised the background of the application I propose to see what is the legal position governing the issues raised by it.

It is clear from the authorities that once the party moving for a stay has shown that the dispute is within a valid and a subsisting Exclusive Jurisdiction Clause, the burden of showing cause why effect should not be given to the agreement is upon the party opposing the application for stay. His obligation is not to persuade the Court that such a party has a right to continue, but that he ought to be allowed to continue.

With regard to this issue useful reference may be made to the cases of *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.*, (1965) 1 C.L.R. 58, *Cubazucar and another* v. *Camelia Shipping Company Ltd.*, (1972) 1 C.L.R. 61, and *Sonco Canning Limited* v. "*Adriatica*" (*Societe Per Azioni Di Navigazione*), (1972) 1 C.L.R. 210, in which judgments of the English Courts, such as The *Fehmarn*, [1958] 1 All E.R. 333 and The *Eleftheria*, [1969] 2 All E.R. 641, were considered and the principles enunciated therein were followed and applied.

In the very recent case of *Trendtex Trading Corporation*

and another v. *Credit Suisse*, [1980] 3 All E.R. 721, Robert Goff J. summarises the law applicable to issues called to be decided on the "inherent jurisdiction of the Court" and the "exclusive jurisdiction clause" and states the following (at pp. 734–735), which I fully adopt:

"As I understand it those principles are as follows:

(1) '..... the real test of stay depends on what the court in its discretion considers that justice demands' (see [1978] 1 All E.R. 625 at 636, [1978] A.C. 795 at 819 per Lord Salmon).

(2) The court must first consider whether there is another jurisdiction which is clearly more appropriate than England for the trial of the action. (a) Such a jurisdiction has been called the 'natural or appropriate forum' (see [1978] 1 All E.R. 625 at 631, [1978] A.C. 795 at 812 per Lord Diplock) or the 'natural forum' (see [1978] 1 All E.R. 625 at 636, [1978] A.C. 795 at 818 per Lord Salmon). The court looks for another forum which is clearly more appropriate, because the court will not lightly stay an action properly commenced in this country (see [1978] 1 All E.R. 625 at 629, 636, [1978] A.C. 795 at 810, 818 per Lord Diplock and Lord Salmon), the reason being that, since the jurisdiction of the English court has been completely invoked, a stay should not be granted without good reason (see [1978] 1 All E.R. 625 at 642, [1978] A.C. 795 at 826 per Lord Keith). (b) The burden rests on the defendant to prove the existence of such other jurisdiction. (c) In considering whether there is another jurisdiction which is clearly more appropriate the court will consider all the circumstances of the particular case, including, for example, where the cause of action arose, the connection of the parties with any particular jurisdiction, the applicable law, the availability of witnesses and the saving of costs.

(3) If the court concludes that there is another clearly more appropriate jurisdiction, then two slightly different tests have been adumbrated. (a) A stay will be granted unless the plaintiff shows that a stay would deprive him of a legitimate personal or juridical advantage available to him in England (see [1978] 1 All E.R. 625 at 630, 639,

[1978] A.C. 795 at 812, 822, per Lord Diplock, approved generally by Lord Fraser). (b) The burden of proof remains on the defendant. If he can show that trial in England would afford the plaintiff no real advantage, it would be unjust to refuse a stay. But, if trial in England would offer the plaintiff a real advantage, then a balance must be struck and the court must decide in its discretion whether justice demands a stay (see [1978] 1 All E.R. 625 at 636, 645, [1978] A.C. 795 at 819, 829 per Lord Salmon and Lord Keith).

On either test the court will only consider advantages to the plaintiff which are read, i.e. objectively demonstrated. (It is not clear which of these two approaches enjoyed the support of Lord Russell; but from the general tenor of his speech I infer that he preferred the latter).

(4) If the court concludes that there is no other clearly more appropriate jurisdiction, then only Lord Keith appears to have considered that a stay might be granted. Such a case must surely be very rare ——————

It will at once be apparent that the principles now applicable are not far different from those applicable in the case of an exclusive jurisdiction clause. But there are important differences. First, in the case of an exclusive jurisdiction clause, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff, because the parties have chosen the foreign jurisdiction. But in other cases, where no such choice has been made, the burden of proof (including the burden of proving that there is another clearly more appropriate forum) rests on the defendant. There is another important point of difference. If the parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court it is difficult to see how either can in ordinary circumstances complain of the procedure of that court; whereas the mere fact that there exists another more appropriate forum should not of itself preclude the plaintiff from seeking to obtain the benefit of a procedural advantage in the English jurisdiction".

Counsel appearing in these proceedings very rightly submitted

that what I have to decide is whether I should exercise my discretion to stay the proceedings in view of the provision of the "exclusive jurisdiction clause" provided in the Bill of Lading.

In considering the various matters raised by the exclusive jurisdiction clause, Robert Goff J. followed the same order as Brandon J. did in *The Eleftheria* case (supra) and I propose to do the same as I did in the case of *Tanagba* v. *Pipinos Shipping Co. Ltd.* (1981) 1 C.L.R. 255, to the extent that the present case requires.

From the evidence adduced it appears that all the parties except the first defendants, are foreigners living abroad; that the first defendants, who are a Cyprus Company, signed on behalf of the second defendants the Bill of Lading and they are not in a position to say why the cargo went bad, therefore, they will not be in a position to help the Court; that there is ample evidence that most, if not all material witnesses, are in Israel and that the second defendants, if the case proceeds in Cyprus may not be able to properly defend their case as this Court has no power to summon witnesses living abroad, because they will be outside its jurisdiction and cannot force them to attend the Court and give evidence. Further, it is clear from the evidence that the dispute is in no way connected with Cyprus.

In the light of the particular circumstances of this case as I found them to be and the legal position earlier stated, I find that this is a proper case in which I can exercise my discretion and order a stay of proceedings.

The second issue that calls for decision is whether the service of the writ of summons effected on one of the Directors of the first defendants, for and on behalf of the second defendants, is a good one. Learned counsel for the respondents submitted that the service on the second defendants is a good one in view of the provisions of rule 21 of the Cyprus Admiralty Jurisdiction Order, 1893, which provides:

"21. Where no such provision exists, a writ of summons against a corporation may be served by leaving an office copy of the writ with the President or other head officer, or the clerk, treasurer, or secretary of the corporation, and a

srit of summons against a public company may be served by leaving with the secretary, manager or other person authorized to transact the business of the company in Cyprus an office copy of the writ or by leaving the same at the office of the company".

The words "other person authorized to transact the business of the company in Cyprus" appearing in the above rule have never been judicially interpreted but I feel that useful guidance may be derived from the case of *Westcott & Lawrence Line* v. *The Mayor, Deputy Mayor, Councillors and Townsmen of Limassol*, 22 C.L.R. 193, where it was held:

"(1) that the great similarity between the English Rules of the Supreme Court and the Cyprus Civil Procedure Rules indicated forcibly that the underlying principles in both sets of rules were similar, and, unless an express provision or the context led to a contrary view, in interpreting the Cyprus Civil Procedure Rules, preference should be given to a construction more consonant with the corresponding English Rules of the Supreme Court;

(2) that the words 'any person in Cyprus who appears to be authorised', in Order 5, rule 7, meant 'a person who is obviously or manifestly authorised to transact business etc.;' and that the words 'to transact business' in the same rule meant nothing more and nothing less than 'carrying on business';

(3) that Order 9, rule 8, of the English Rules of Supreme Court, in its judicially interpreted and enlarged form, was substantially similar to our Order 5, rule 7, and, since both rules in material parts were in pari materia, the English authorities were necessarily binding on the Cyprus Courts;

(4) that the dominant factor in the English authorities was the nature and character of the authority of the local agent conferred on him by his foreign principal corporation. If the authority exercised by the agent was so extensive as to justify one to hold that the foreign principal was for the purpose of service resident in the country of the agent and therefore amenable to the jurisdiction

of such country, then the service of a writ of summons or other legal process on the agent for his principal would be considered good; and

(5) that the service of the writ in the present case on the local agent was bad and ought to be set aside".

In the present case, the only evidence adduced by the respondent that the second defendants carry on business in Cyprus, is that of Mr. Georghios M. Michaelides, an advocate practising in Nicosia, who is the affiant of the two affidavits that accompany the opposition to this application. He said that the name of the second defendants appears on the window of the offices that the first defendants have in Limassol, Nicosia and Larnaca. This fact coupled with the issue of the bill of lading, the witness said, led him to the conclusion that the second defendants do carry on business in Cyprus. I do not think that from this evidence one can reach the conclusion that the authority exercised by the first defendants is so extensive as to justify one to hold that the second defendants are, for the purpose of service, residing in this country and, therefore, amenable to the jurisdiction of the Courts.

For this reason I hold that the service of the writ of summons in the present case, on the first defendants, should be set aside.

For all the above reasons this application succeeds. The respondent shall pay the costs of these proceedings.

Application granted with costs.