1989 February 28

(A. LOIZOU, P., SAVVIDES AND KOURRIS, JJ.)

SEFECON LTD.,

Appellant-Defendant,

v.

ELXANO LTD.,

Respondent-Plaintiff.

(Civil Appeal No. 7014).

Contract — Consideration for the manufacture and delivery of goods for export in a foreign country expressed in foreign currency (US Dollars) — Whether illegal as being contrary to The Currency Law, Cap. 197, section 5 — Question determined in the negative.*

Judgments and Orders — Whether judgment could be given in foreign currency, if debt or consideration expressed in foreign currency — Question determined in the affirmative — The fact that the trial Judge added «to be converted in equivalent Cyprus currency» does not render the Judgment impeachable, despite the fact that there was no reference to Cyprus currency in the pleadings.

The Currency Law, Cap. 197 — Its purpose is not to control dealings in foreign currency.

Contract — Gold clauses — Distinction between a gold coin clause and a gold-value clause — There is nothing in the Cyprus Law rendering such clauses illegal.

The trial Judge gave Judgment for the plaintiffs for 500 US Dollars «to be converted in the equivalent in Cyprus pounds» damages for breach of contract whereby the plaintiffs, in consideration of US Dollars 3,000, agreed to manufacture and deliver to the defendants certain goods for export.

The defendants appealed. Two questions were raised. First, whether the contract between the parties was illegal in that, contrary

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* *Quoted at p. 139 post.*

to section 5 of Cap. 197, the consideration was expressed in foreign currency; and second, whether the trial Judge could enter, without prior amendment of pleadings, the clause about the «equivalent in Cyprus money».

Held, *dismissing the appeal:* (1) The intention of the legislator as manifested by the clear and unambiguous words of section 5 is not to render a contract such as the present illegal but to provide that a stipulation for the payment of any money «in the absence of any express agreement to the contrary» shall be held to be made in the current and legal tender of the Republic.

(2) The Exchange Control Law, does not prohibit clauses in a contract for payment of the consideration or damages for breach on the basis of foreign currency but restricts dealings with gold and foreign currency by dealers in gold and currency who are not authorized by the Minister of Finance.

(3) Though dealings in gold or gold coins without a permit by dealers in gold has been prohibited, «gold clauses», as commonly known, in contracts were never held illegal. A so called «gold clause» is the usual type of protective clause, in an attempt to avoid the nominalistic principle.

(4) In the recent years in a series of cases it has been established that the Courts may enforce contracts expressed in foreign currency and give judgment in such foreign currency and also award damages for breach of contract or tort in foreign currency. The effect of such judgments was not to force the parties to effect payment in the foreign currency defined in the judgment but in the equivalent of such currency with the coins or notes of the country in which the judgment is delivered.

(5) The fact that in this case the Judge added in his judgment the words «to be converted in the equivalent in Cyprus pounds» does not in any way render the judgment impeachable as such words were necessary in the judgment only for the purpose of aid in execution should such aid be required and particularly in view of the provisions of s.5 of The Curreny Law, Cap. 197.

Appeal dismissed with costs.

Cases referred to:

Treseder-Griffin v. Co-operative Insurance Society Ltd. [1956] 2 Q.B. 127; [1956] 2 All E.R. 33;

Feist v. Societe Intercommunale Belge d' Electricite [1934] A.C. 161;

Ottoman Bank v. Dascalopoulos (No.1). 14 C.L.R. 100;

Ottoman Bank v. Dascalopoulos (No.3), 14 C.L.R. 176;

Re United Railways of the Havana and Regla Warehouses Ltd., [1960] 2 All E.R. 332;

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

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

Barclays Bank v. Levin Bros. [1976] 3 All E.R. 900;

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

Ferderal Commerce v. Tradax Export S.A. [1977] 2 All E.R. 41;

The Despina R. [1977] 3 All E.R. 874 and on appeal [1979] 1 All E.R. 421;

The Folias [1978] 2 All E.R. 764 and on appeal [1979] 1 All E.R. 421;

George Veflings Rederi A/S v. President of India [1978] 3 All E.R. 838 and on appeal [1979] 1 All E.R. 380;

Kouloumbis and Others v. The Ship «MARIA» (1984) 1 C.L.R. 285;

Papavasiliou and Tsangarides and Others v. East Mediterranean Line and Another (1974) 1 C.L.R. 183;

Trade Development Bank v. The Ship «ARIADNI PA» (1981) 1 C.L.R. 653;

Lamaignere v. Selene Shipping Agencies Ltd. (1982) 1 C.L.R. 227.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Laoutas, S.D.J.) dated the 3rd June, 1985 (Action No. 4425/83) whereby he was adjudged to pay to the plaintiff the sum of U.S. $ 500 (to be converted into Cyprus pounds) damages for breach of an agreement.

E. Lemonaris, for the appellant.

Chr. Mitsides, for the respondent.

Cur. adv. vult.

A. LOIZOU P.: The judgment of the Court will be delivered by His Honour Savvides, J.

SAVVIDES J.: This is an appeal from a judgment of the District Court of Nicosia whereby the appellant was adjudged to pay to the respondent the sum of U.S. $500 (to be converted in the equivalent in Cyprus pounds).

The appellant is a company of limited liability carrying on the business of imports and exports with the place of business in Nicosia.

The respondent is also a company of limited liability and it carries on the business of shampoo manufacturers, with their place of business in Nicosia.

The respondent Company brought action No. 4425/83 in the District Court of Nicosia claiming damages for breach of an agreement between the appellant and the respondent for the manufacture and delivery of 500 boxes of shampoos at the agreed price of U.S. $3,000.- The said goods were ordered by the appellant for exportation to Kuwait and the currency of the agreement was fixed at U.S. Dollars. As a result of the failure of the appellant to comply with the said agreement the respondent-plaintiff in the action claimed the value of the goods manufactured by it and amounting to U.S. $3,000.- This is the amount which was claimed by the respondents as damages for breach of contract.

The appellant raised an objection to the claim in that it was illegal being in violation of the Currency Law and further alleged that there was a breach of the agreement on the part of the respondent. The learned trial Judge rejected the contention of counsel for the appellant that the agreement was tainted with illegality and found that the counterclaim was untenable and awarded U.S. $500.- as damages for breach of contract and at the same time dismissed the counterclaim of the appellant.

We need not embark at more length on the facts of the case as the part of the appeal directed against such award was abandoned in the course of the hearing. The questions raised and argued in this appeal were the following:

1. That the trial Judge misdirected himself in holding that the agreement between the parties was not illegal and void ab initio as being contrary to the provisions of s.5 of the Currency Law, Cap.

197 and s.23 of the Contract Law, Cap. 149, by stipulating the consideration of the agreement in a foreign currency;

2. That the trial Judge misdirected himself in entering judgment for the plaintiff for the equivalent in Cyprus money of a foreign currency without prior amendment of the pleadings.

In arguing the said grounds counsel for the appellant contended that once the agreement entered into provided for payment in a foreign currency it was illegal as contravening the Currency Law, Cap. 197, and the Contract Law, Cap. 149, in view of the fact that the consideration stipulated therein was illegal. He further argued that once in the Statement of Claim there was no alternative claim for the conversion of the U.S. Dollars into Cyprus pounds the trial Court was wrong in providing in its judgment for payment for the equivalent of the 500 U.S. Dollars in Cyprus money without the prior amendment of the pleadings.

Counsel for the respondents, on the other hand, submitted that there was nothing illegal in contracting that the payment was to be calculated on the basis of U.S. Dollars or any other foreign currency as this is not a matter prohibited by the law. It was within the contemplation of the parties that the goods were to be exported to Kuwait and this is manifested by the fact that the invoice issued by the appellant to the buyers was in U.S. Dollars. Also the labels fixed on the bottles were printed both in English and in Arabic and were packed in such a way as to comply with the order and in the wish of the purchasers. Counsel for respondent made extensive reference to decided cases of this Court adopting in this respect the recent English Case Law that a judgment may be given in foreign currency and that at the same time the Court may make provision for its equivalent in Cyprus currency.

Section 5 of The Currency Law, Cap. 197 on which counsel for appellant sought to rely, provides as follows:

> «Every contract, sale, payment, bill, note, instrument and security for money, and every transaction, dealing, matter, and thing whatever relating to money or involving the payment of, or the liability to pay, any money, shall, in the absence of express agreement to the contrary, be held to be made, executed, entered into, done and had in the Republic according to the coins or currency notes which are current and legal tender in the Republic by virtue of this Law.»

We find it unnecessary to embark at length on the question of whether illegality renders a contract void under s 23 of The Contracts Law, Cap 149, it suffices to say that if a contract is found to be forbidden by law then it becomes void and unenforceable

The language of s 5 of Cap 197 is clear and unambiguous A reading of its provisions cannot lead to construction suggested by counsel for the appellant that it renders illegal any contract embodying a provision for payment in foreign currency The intention of the legislator as manifested by the clear and unambiguous words of section 5 is not to render such a contract illegal but to provide that a stipulation for the payment of any money «in the absence of any express agreement to the contrary» shall be held to be made in the current and legal tender of the Republic The inclusion of the words «absence of any agreement to the contrary» strengthens the inference that a contract may be concluded with a stipulation for payment in any foreign currency when there is «express agreement» for such payment otherwise it will be held that payment will be effected in the currency of the Republic

The Currency Law, Cap 197 is not a law enacted for the purpose of controlling dealings in foreign exchange The relevant legislation for such dealings is the Exchange Control Law, Cap. 199 as amended by Law 53 of 1972 The object however of the Exchange Control Law is not to prohibit clauses in a contract for payment of the consideration or damages for breach on the basis of foreign currency but to restrict dealings with gold and foreign currency by dealers in gold and currency who are not authorized by the Minister of Finance

Though dealings in gold or gold coins without a permit by dealers in gold has been prohibited «gold clauses» as commonly known, in contracts were never held illegal. A so called «gold clause» is the usual type of protective clause, in an attempt to avoid the nominalistic principle, that is when payment is expressed in a foreign currency and has to be discharged in such currency, ar d creditors have adopted such clause to protect themselves against the risk of depreciation of the currency The principle of «nominalism» has been explained by Denning, L J in *Treseder-Griffin v Co-operative Insurance Society Ltd.* [1956] 2 Q B 127, 144 [1956] 2 All E R. 33, 36 as follows. «A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth as that time»

Other methods adopted against the risk of depreciation have been the adoption of clauses for payment in more stabilized currencies such as the Deutch mark or the Swiss Franc. The validity, meaning and effect of such clauses are determined by the proper law of the contract. A «gold clause» or a clause for payment in a strong foreign currency does not impose an obligation to pay gold or gold coins or foreign currency but is used to ascertain or measure the amount of the debt, so that the debtor is obliged to pay in legal tender of the chosen currency the amount necessary at the date of payment to purchase gold or gold coins or foreign currency to the nominal amount of the debt. The construction imports a special standard of measure of value which may be described sufficiently, though not with precise accuracy as being the value which the specified unit of account would have if the currency were on a gold basis.

The construction of a gold clause as a gold value clause is known as the Feist construction, following the decision of the House of Lords in *Feist v. Societe Intercommunale Belge d' Electricite* [1934] A.C. 161 in which it was held that the holder of a bond for £100 repayable «in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September, 1928» was entitled to receive such sum in sterling (i.e. English legal tender) as should represent the gold value of the nominal amount of each respective payment.

In Cheshire & North, Private International Law, Tenth Ed., on the topic of Gold Clauses we read the following at pp. 245, 246:

> «In these days of monetary instability contracting parties sometimes protect themselves against a depreciation of currency by adopting what is called a 'gold clause' which links the money payable to gold, allegedly the most stable of all commodities. If such a clause is explicitly contained in a contract, it may take either of two forms.
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> (a) A gold-coin clause, which is an agreement that a certain sum of money shall be paid in gold coins. This may not be an effective protection to the creditor, for it will be impossible for him to demand gold if a system of inconvertible paper money has been adopted in the country where performance is due.
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> (b) A gold-value clause. This is an agreement, not to pay in gold coin or to deliver gold in specie, but to pay at the due

date a sum equal to the then value of the gold coin specified. For instance, it fixes the value of a loan at, say, £10,000, but provides that this shall be redeemed by the delivery of a quantity of paper or other money which would be equivalent to 10,000 British gold coins of the standard weight and fineness existing at some specified date. Under such a provision the nominal amount of the loan is constant, but the amount of currency required for its repayment may vary. The clause specifies not a mode of payment, but a measure of liability.»

The statutes, however, of many foreign countries declare gold value clauses to be illegal. (Dicey and Morris «The Conflict of Laws» pp. 887-888-891). Such situation however exists neither in England nor in Cyprus (relevant in this respect are the cases of *Ottoman Bank v. Dascalopoulos* (No. 1), 14 C.L.R. 100 and *Ottoman Bank v. Dascalopoulos (No.3)*, 14 C.L.R. p.176).

The construction of s.5 of the Currency Law, as above, is further strengthened by the recent practice of the Courts in enforcing contracts where payment is expressed in foreign currencies.

In the recent years in a series of cases it has been established that the Courts may enforce contracts expressed in foreign currency and give judgment in such foreign currency and also award damages for breach of contract or tort in foreign currency. The effect of such judgments was not to force the parties to effect payment in the foreign currency defined in the judgment but in the equivalent of such currency with the coins or notes of the country in which the judgment is delivered.

In England the question as to whether a judgment could be given in foreign currency appeared as settled by the decision in *Re United Railways of the Havana and Regla Warehouse Ltd.* [1960] 2 All E.R. 332 in which the House of Lords affirmed the proposition in r. 177 at p. 914 of the 7th Ed. Dicey's Conflict of Laws that an English Court cannot give judgment for the payment of an amount in foreign currency and that a debt expressed in foreign currency must be converted into sterling. The situation, however, as regards currency stability since 1960 has changed substantially. As Lord Wilberforce observed in the case of *Miliangos v. G. Frank (Textiles) Ltd.* [1975] 3 All E.R. 801 at p. 809:

«Instead of the main world currencies being fixed and fairly

stable in value, subject to the risk of periodic re- or de-valuations, many of them are now 'floating', i.e. they have no fixed exchange value even from day to day. This is true of sterling. This means that, instead of a situation in which changes of relative value occurred between the 'breach-date' and the date of judgment or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice».

This state of affairs becomes recognized in those commercial circles which are closely concerned with international contracts and this appears particularly in the field of arbitration where in 1965 two of the most experienced arbitratitors in the city of London made their awards expressed in terms of United States dollars. The validity of such award came to be tested in the Courts in the case of *Jugoslavenska Oceanska Providha v. Castle Investment Co. Inc.* [1973] 3 All E.R. 498. But the radical change in the old practice was brought about by *Miliangos* case (supra) which did not follow and departed from the previous decision of the House of Lords in the *Havana Railways* case (supra) and approved the Jugoslavenska case. The *Miliangos* case has been followed ever since by the English Courts and applied in the cases of *Barclays Bank v. Levin Bros* [1976] 3 All E.R. 900; *Jean Kraut A.G. v. Albany Fabrics* [1977] 2 All E.R. 116; *Federal Commerce v. Tradax Export S.A.* [1977] 2 All E.R. 41; *The Despina R.* [1977] 3 All E.R. 874 and on appeal [1979] 1 All E.R. 421; *The Folias* [1978] 2 All E.R. 764 and on appeal [1979] 1 All E.R. 421 and *George Veflings Rederi A/S v. President of India* [1978] 3 All E.R. 838 and on appeal [1979] 1 All E.R. 380 in which Lord Denning, M.R., described the effect of *Miliangos* case on the law on this subject as having been revolutionalized.

An extensive review of the English case law on the matter was made by me in the case of *Kouloumbis and Others v. The Ship «MARIA»* (1984) 1 C.L.R. 285 in which the principle that judgment may be given in a foreign currency or its equivalent in Cyprus pounds was followed.

In Cyprus prior to 1974 our Courts following the rule laid down in the *Havana Railways* case were reluctant to give judgment in foreign currency. As a result judgments were given in Cyprus

Currency (*Papavassiliou and Tsangarides and Others v. East Mediterranean Line and Another* (1974) 1 C.L.R. 183). Ever since however, the decision in *Miliangos* case our Courts adopted the new rule that judgments may be given in foreign currency (*Trade Development Bank v. The Ship «ARIADNI PA»* (1981) 1 C.L.R. 653; *Lamaignere v. Selene Shipping Agencies Ltd.* (1982) 1 C.L.R. 227; *Kouloumbis and Others v. the Ship «MARIA»* (supra) .

In view of our findings as above and the exposition of the law we find that the objection raised by counsel for the appellants that the agreement between the parties was illegal and void ab initio is untenable.

We come next to consider whether the judgment is wrong by expressing the amount in foreign currency or its equivalent in Cyprus pounds without a claim for its equivalent in Cyprus pounds appearing in the pleadings.

As we have already explained the Courts are entitled to give judgments in foreign currencies even without mentioning its equivalent in Cyprus pounds. In the present case in the light of the pleadings the respondent was entitled to judgment for the amount of U.S. Dollars 500. The fact that the Judge added in his judgment the words «to be converted in the equivalent in Cyprus pounds» does not in any way render the judgment impeachable as such words were necessary in the judgment only for the purpose of aid in execution should such aid be required and particularly in view of the provisions of s.5 of The Currency Law, Cap. 197.

Therefore, the contention that the insertion in the judgment of the said words renders the judgment invalid, in superfluous and cannot be accepted.

In the result the appeal is hereby dismissed with costs in favour of the respondent-plaintiff.

Appeal dismissed with costs.