1984 February 28

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

COSMO-PLAST LTD.,

Appellants-Defendants.

v.

CHEMIE LINZ AG, OF AUSTRIA,

Respondents-Plaintiffs.

(*Civil Appeal No.* 6351).

New trial—Claim by virtue of bills of exchange issued by way of payment for the sale of goods—And counterclaim for damages suffered because of the defective quality of the goods—Judgment on the claim, in foreign currency, or its equivalent in Cyprus pounds, on the date of the delivery of the judgment—And dismissal of counterclaim—In making order about conversion trial Court has overlooked the currency clause in the relevant agreement—And determined and dismissed the counterclaim on a wrong basis—No necessary material before Court of Appeal in order to pronounce on the issue of conversion of the judgment debt and on the counterclaim—New trial ordered.

The respondents sued the appellants claiming 54,000 U.S.A. dollars by virtue of two bills of exchange which were issued by the respondents and accepted by the appellants by way of payment for the sale by the respondents to the appellants of 100 tons of polyethelene raw material.

The appellants as defendants, admitted the acceptance by them of the said bills of exchange, but they counterclaimed for the sum of 52,000 U.S.A. dollars as damages suffered by them because, inter alia, of the defective quality of the type "1840 D" polyethelene raw material which was supplied to them by the respondents.

The trial Court dismissed the appellants' counterclaim and gave judgment in favour of the respondents and proceeded to order that the judgment debt would be payable in U.S.A. dollars

or its equivalent, on the date of the delivery of its judgment, in Cyprus pounds. Regarding the counterclaim the trial Court found that the respondents had sufficiently warned the appellants, by means of a leaflet entitled "Daplen 1840 D" that when manufacturing polyethelene films for greenhouses, which would be exposed to solar irradiation, it was necessary to add to the raw material type "1840 D" another element known as "U.V. masterbadge" and that as the appellants had failed to do this the films which were processed by their factory for greenhouses deteriorated and were destroyed very soon due to their own fault.

Upon appeal by the defendants and cross-appeal by respondents:

Held, (1) that though the respondents were entitled to judgment on the basis of the said two bills of exchange the trial Court in making the order about the conversion of the judgment debt into Cyprus pounds appears to have overlooked the "currency clause" which was part of the "General Conditions of Sale and Delivery" appearing at the back of the "order confirmation" sent by the respondents to the appellants; and that as this Court does not have before it all the necessary material in order to pronounce now, in this appeal, on the issue of the conversion of the judgment debt due by the appellants to the respondents a retrial of this issue will be ordered.

(2) That the finding of the trial Court about the warning regarding the need to add "U.V. masterbadge" while processing the raw material type "1840 D" does not emerge from the contents of the aforesaid leaflet and in view of this error of the trial Court in relation to what seems to be a very vital aspect the counterclaim was determined and dismissed on a wrong basis; that as this Court is not in a position, on the basis, of the arguments advanced and of the evidence now before it, to determine the fate of the counterclaim as if the said erroneous finding had not been made by the trial Court a new trial must be ordered as regards the counterclaim.

Appeal allowed. Retrial ordered.

Appeal and cross-appeal.

Appeal by defendants and cross-appeal by plaintiffs against the judgment of the District Court of Paphos (Hadjitsangaris, P.D.C. and Papas, D.J.) dated the 11th December, 1981 (Action

No. 144/79) whereby the defendants were adjudged to pay to the plaintiffs the sum of 54,000 U.S.A. dollars and their counterclaim was dismissed.

L. Papaphilippou, for the appellants.

A. Lados, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The respondents were the plaintiffs in action No. 144/79 before the District Court of Paphos. They sued the appellants claiming 54,000 U.S.A. dollars, plus interest at the rate of 9% per annum, by virtue of two bills of exchange which were issued by the respondents and accepted by the appellants by way of payment for the sale by the respondents to the appellants of 100 tons of polyethelene raw material.

The appellants, as defendants, have admitted the acceptance by them of the said bills of exchange, but they counterclaimed for the sum of 52,000 U.S.A. dollars as damages suffered by them because, allegedly, of the defective quality of the type "1840 D" polyethelene raw material which was supplied to them by the respondents and because part of the type "2425 K" polyethelene raw material, which was also supplied to them by the respondents, did not correspond to sample.

The trial Court dismissed the appellants' counterclaim and gave judgment in favour of the respondents and proceeded to order that the judgment debt would be payable in U.S.A. dollars or its equivalent, on the date of the delivery of its judgment, in Cyprus pounds.

We have had no difficulty in arriving at the conclusion that the respondents were entitled to judgment on the basis of the aforementioned two bills of exchange, but as regards the order about the conversion of this judgment debt into Cyprus pounds we are of the opinion that the trial Court, in making such order, appears to have overlooked the "currency clause" which was part of the "General Conditions of Sale and Delivery" appearing at the back of the "order confirmation" sent by the respondents to the appellants; and as we do not have before us all the necessary material in order to pronounce now, in this appeal, on the issue of the conversion of the judgment debt due by the

appellants to the respondents we have to order a retrial of this issue; and this disposes, also, of the cross-appeal.

As regards the counterclaim of the appellants we are of the view that the trial Court, in dismissing it, has erred in finding that the respondents had sufficiently warned the appellants, by means of a leaflet entitled "Daplen 1840 D" (exhibit 12 at the trial) that when manufacturing polyethelene films for greenhouses, which would be exposed to solar irradiation, it was necessary to add to the raw material type "1840D" another element known as "U.V. masterbadge" and that as the appellants had failed to do this the films which were processed by their factory for greenhouses deteriorated and were destroyed very soon due to their own fault.

The above finding of the trial Court about the warning regarding the need to add "U.V. masterbadge" while processing the raw material type "1840 D" does not emerge from the contents of the aforesaid leaflet and in view of this error of the trial Court in relation to what seems to be a very vital aspect we are bound to find that the counterclaim was determined and dismissed on a wrong basis.

We do not feel that we are in a position, on the basis of the arguments advanced and of the evidence now before us, to determine the fate of the counterclaim as if the said erroneous finding had not been made by the trial Court; and, therefore, we find that we should order a new trial as regards the counterclaim.

We think that it is necessary that both the new trial in respect of the counterclaim as well as the new trial which we have already ordered in relation to the issue of the conversion into Cyprus pounds of the U.S.A. dollars in which the sum payable by bills of exchange was expressed, should take place before a differently constituted bench.

Having upheld the judgment in favour of the respondent as regards the sum payable by the appellants to them by means of the said two bills of exchange we order, in the interests of justice, that there should be stay of execution of such judgment until the outcome of the new trial and, if there is an appeal, until determination of the appeal.

As regards the costs of the first trial they should be costs in the cause in the new trial. As regards the costs of this appeal and cross-appeal they should, also, be costs in the cause in the new trial, but in any event not against the appellants. Any specific order for costs which we have made during the proceedings before us on appeal, and prior to delivering this judgment, remains in force.

Appeal allowed.
Retrial ordered.