[HALLINAN, C.J., AND ZEKIA, J.]

(January 9, 1954)

PAPA IOANNIS ZOGRAPHAKIS, *Appellant*,

v.

EFTYCHIA AGATHOCLEOUS, *Respondent.*

(*Civil Appeal No.* 4049)

Limitation of Actions—Contract Law, section 63—*Verbal agreement to extend time for performance—Effect on operation of Limitation of Actions Law.*

On 1st June, 1942, the appellant sold a building plot to the respondent; part of the price was paid and part was to be paid within two years. Because of difficulties with various public authorities the appellant was unable to transfer the land to the respondent; on several occasions the respondent agreed to postpone the execution of the contract by the appellant; finally in 1953 he transferred the land to his daughter; whereupon the respondent sued for breach of the contract.

The trial Court held that the claim was not statute barred and gave judgment for the respondent.

Upon appeal,

Held: A verbal agreement to extend the time for performance made before the time for performance had arrived (and therefore before the right to sue accrued) would, under section 63 of the Contract Law, have postponed the right to sue and prevented the Limitation of Actions Law from running against the respondent; but a verbal agreement after the right to sue had accrued would not stop the statute from running. The respondent had not proved that such verbal agreement was made before the right to sue accrued; her right was therefore statute barred.

Appeal allowed.

Appeal by defendant from the judgment of the District Court of Limassol (Action No. 176/53) in favour of plaintiff.

G. Cacoyannis for the appellant.

A. Anastassiades with *A. Myrianthis* for the respondent.

Judgment was delivered by the Chief Justice.

A separate judgment was delivered by ZEKIA, J.:

HALLINAN, C.J.: On the 1st June, 1942, the appellant in this case agreed to sell a building plot at Polemidhia to the respondent for the sum of £30. Respondent paid part of the purchase price and, according to the terms of the agreement, she was to pay the balance within two years; upon such payment the appellant was to transfer the property to respondent. The respondent was at all times willing and ready to pay the balance but the appellant for various reasons was unable to proceed with the sale. The trial Court found

on sufficient evidence that the parties on several occasions between the date of the agreement and the commencement of these proceedings had agreed that the date by which the agreement should be performed be extended, but all these agreements were made orally. Finally, at the beginning of 1953, the appellant informed the respondent that, because he could not get permission to divide up the land part of which he had sold to the respondent, he had transferred the land to his daughter. If it can be held that an enforceable agreement was in existence between the parties at the beginning of 1953 then the action of the appellant had clearly constituted a breach of that agreement.

The appellant however contends that the respondent's claim is statute barred. He submits that the respondent's right of action accrued in 1944 by which time the contract of 1942 was due to be performed. Against this contention it is submitted by the respondent that the original contract was varied as to the time for performance by additional agreements which (although they would not be enforceable under English law for lack of consideration) are enforceable under section 63 which follows section 63 of the Indian Contract Law and which is a notable departure from the English Law of Contract. This section provides that a promisee, *inter alia*, may extend the time for the performance of a contract. By agreeing to extend the time for performance, it is submitted that the parties have agreed that the right of action shall not accrue until the time for performance has arrived.

In English law where a promisee allows the promisor to delay the performance of the promise, this does not prevent the promisee from revoking his concession and suing on the contract; his right of action has accrued and he is not stopped from enforcing it since he has not given an enforceable promise. Indeed according to Anson on Contract (18th Edition) p. 321 " a mere postponement of performance for the convenience of one of the parties, does not either discharge or vary the contract ".

Having regard to section 63 of our Contract Law, we agree with the respondent's submission that an agreement to extend the time for performance postpones the right of action accruing and consequently postpones the statute running against the promisee. But the result is not the same if the time is extended after the right of action has accrued. The Limitation of Actions Law will then continue to run unless there is an acknowledgment of this right of action so as to satisfy the provisions of section 6 of that Law.

The fact that in Cyprus agreements under section 63 of the Contract Law can be made without consideration should make the Courts regard the evidence of such agreements with caution and require strict proof from the party on which

the burden lies. For the object of the Limitation of Actions Law (which is to prevent litigation brought to enforce stale claims) would in many cases be defeated if a promisee could lightly set up a parole agreement to extend the time for performance so as to prevent the right of action accruing. In the present case the burden of proving this oral agreement was on the respondent as promisee. In her evidence she alleges that the first request by the appellant to defer performance was " in May or June, 1944 ". Now the right of action accrued on 1st June, 1944, and it cannot be said that the respondent has discharged the burden of proof that lay on her to show that the agreement to extend the time for performance was made before the right of action accrued.

Once the right of action accrued in June, 1944, any subsequent agreement short of an acknowledgment in writing could not prevent the period of limitation from running against the promisee. For the respondent is not suing on the subsequent agreement, but on the original contract. The subsequent agreement does not constitute the cause of action; at the most it merely varies a term (*i.e.* the time for performance) in the original contract. Since any acknowledgment has to be in writing under section 6 (2) of the Limitation of Actions Law, the subsequent oral agreements were not an acknowledgment within that statute.

In my view the appellant's defence that the respondent's claim is statute barred is good. This appeal must be allowed and the respondent's claim dismissed.

No order as to costs.

ZEKIA, J.: The only point which falls for decision in this appeal is whether the claim of the respondent for damages is statute barred. The learned trial Judge does not expressly deal with this point in his judgment but apparently he considered January, 1953, as the date of the accrual of the cause of action. I read from his judgment: " he was putting her off from time to time until January, 1953, when he told her that he would not transfer to her any building site whereupon for the first time he broke the contract in question ". He continues: "No doubt the plaintiff every time when the defendant No. 1 was putting forward the plea for further time under the one or the other excuse consented to the postponement of the transfer ". The last quotation includes the reason why the Court found the right of the respondent to claim damages to be kept alive up to 1953.

The relevant section of our law is section 5 of the Limitation of Actions Law (Cap. 21) which reads: "No action shall be brought upon for or in respect of any cause of action not expressly provided for in this law .... after the expiration of six years from the date when such cause of action accrued ". So the date of the accrual of the cause of action is the only date material for the purpose of the limitation

of actions. In the present case the date of performance, that is the date on which appellant undertook to transfer the building site in the name of the respondent, was 1st June 1944; on that day if respondent was ready to pay the balance of the purchase price, and the Court appears to have found that she was ready, the vendor appellant had to effect the transfer. This he failed to do. The cause of action in favour of the purchaser had accrued therefore on that day. In her evidence she stated that in May or June, 1944, she agreed to a postponement of performance until the land which was to be divided into building sites was to be evacuated by the Army Authorities. The date of such agreement for postponement should be taken to be in the month of June, 1944, which was after the accrual of the cause of action: but if there is a doubt as to this and we take May, 1944, as the date of this agreement, that is some time before the accrual of the cause of action in June, 1944, then in the year 1946 the right to bring an action had definitely accrued. Because according to her own evidence, respondent was informed in 1946 by the vendor that the Army Authorities vacated the land in question but that he suggested to her to wait until the building regulations requiring the construction of a water depot, which would have cost a lot, were altered. To this with some reluctance she agreed. There is no doubt whatsoever that respondent had a complete cause of action in 1946 and her willy nilly consent to put off the time of transfer after that date was happening after the accrual of the cause of action.

The statute of limitation began to run either from June 1944 and or at any rate from the end of 1946 and the claim of the respondent was statute barred by June, 1950, or by December, 1952. The present action was brought some time in 1953 when respondent's right to claim damages was prescribed. With due respect I agree with the statement of the law relating to the limitation of actions made by the Chief Justice in his judgment just delivered. Once the cause of action has accrued the period of limitation starts to run and it appears that nothing can interrupt or suspend the operation of the statute in question save acknowledgment, fraud and mistake, disability and unsoundness of mind as provided in sections 6, 7 and 8 of the Limitation Law. I quote from an Indian case (*Jehandar* v. *Manroo*): "The operation of the law of limitation cannot be prevented by any act of the parties or arbitrators unless as provided by law, and a suit beyond time cannot be entertained by the Courts merely because the person entitled to assert the right was by some arrangement or negotiation prevented from asserting it within the statutable period". This is what happened in this case. I read also from Leak on Contracts, 8th Edition, page 760. "When the statute has once begun to run it is not stopped or suspended by any supervening disability or other circumstances preventing the creditor from bringing an action". This should be read

subject to section 8 of our Limitation Law. Section 63 of our Contract Law gave me considerable thought in view of the fact that extending time of performance without consideration is binding on the promisee and what is more such extension could be made verbally. After consideration I find myself in full agreement with the judgment just delivered. Verbal extension of time under section 63 has the effect of putting off the date of the accrual of a cause of action but such extension cannot have the effect of interrupting or suspending the operation of the Limitation of Actions Law after the cause of action has accrued and the period of limitation started to run.

I should like to touch another point which seems to me to be a source of confusion. This relates to the distinction to be drawn between the breach of a contract and the refusal to perform a contract.

In contracts the cause of action accrues at the date of the breach. For the purpose of the Limitation Law this date is the earliest date when a promisee is entitled to bring an action against the promisor. Refusal to perform the contract by a promisor might considerably be later in time than the date of the accrual of the cause of action in favour of the promisee. The date of the repudiation of the contract or the date of the express refusal to perform the contract by a promisor might very well be irrelevant for fixing the date from which the period of limitation begins to run in an action. Perhaps the Court below in finding the contract to have been broken for the first time in January, 1953, was not clear as to this distinction.

I agree that the appeal should be allowed without costs.