PHOTOS PHOTIADES & CO.,

Plaintiffs,

v.

JADRANSKA SLOBODNA PLOVIDBA, Yugoslavia,

Defendants.

(Admiralty Action No. 6/62).

Admiralty—Jurisdiction of the High Court—Practice—Contract of carriage by sea--Breach of— Action for damages—Writ of summons—Filing, and service abroad—Conditional appearance—Application to set aside proceedings and service—The Civil Procedure Rules, Order 6, *Order* 16, *rule* 9*—The question of jurisdiction in this case is governed, under the provisions of section* 19 (*a*) *of the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960), *by Part I of the* (*English*) *Administration of Justice Act,* 1956, *section* 1 (1) (*g*) *and* (*h*)*—Discretion of the Court in setting aside service of writ—Balance of convenience—Order* 16, *rule* 9 (supra).

Admiralty—Bill of Lading—Clauses printed on the back of the bill in such a small type that they can hardly be read without the help of a magnifying glass—Effect.

The plaintiffs., a firm of importers, residing and carrying on business in Nicosia acquired a consignment of five thousand cartons of tinned boiled beef (240,000 tins) at Eritrea for shipment to Cyprus. The Messagerie Africa S/A, a firm at Asmara, appear to have instructed the Messagerie Eritree S/A, presumably another firm of Asmara, to ship the goods in question on defendants' ship " Zenica " for Famagusta, Cyprus. The instructions for shipment were in writing.

The Messagerie Eritree S/A, shipped the goods at the port of Massawa, obtaining a bill of lading issued by defendants' agents Contomichalos Sons Red Sea Ltd., on 14th January, 1960. According to this bill of lading, the goods were put on board the " Zenica " at Massawa, for transport to Cyprus and discharge at Famagusta/Limassol (at ship's option), consigned to the National Bank of Greece, Nicosia, for the plaintiffs who were to be duly notified as well. The goods were to be carried under deck, on " LINER TERMS ", freight prepaid at Asmara. In addition to these terms which were clearly

typed on the face of the bill together with a full description of the goods there appear printed on the back of the bill, under the heading "Company's Standard Conditions" seventeen different clauses in such a small type, that they can hardly be read without the help of a magnifying glass. One of these clauses (clause 3) reads :—

"3. Jurisdiction. Any dispute arising under this Bill of Lading to be decided in Yugoslavia according to Yugoslavian Law."

And another (clause 6, last part, about the middle of the page) provides :—

"The cargo shall be forwarded as soon as practicable but the carrier shall not be liable for any delay."

The goods reached Cyprus about the middle of March, 1960, when the season for the sale of these goods had passed. The plaintiffs allege that the defendants through their agents undertook to transport the goods to Cyprus within a reasonable time which meant until end of January, 1960 ; and they claim £12,330 damages for the delay.

The plaintiffs after obtaining leave of this Court, served the defendants in Yugoslavia, through the appropriate consular authorities, with notice of the writ and other documents. The defendants after entering conditional appearance filed on the same day an application under Order 16, r. 9, and Order 6 for an order to set aside the proceedings and the service of the notice.

The grounds on which counsel for the defendants argued his clients' case may be summarised in three parts :—

(1) That the courts of Cyprus have no jurisdiction to entertain the claim. The contract between the parties embodied in the bill of lading, was made abroad ; the alleged breach (the delay), if any, must have occurred outside Cyprus ; and the defendants, who are a foreign firm, do not reside or carry on business within the jurisdiction.

(2) The plaintiffs have not shown a probable cause of action and the order under which service was effected, out of jurisdiction, should not have been granted. The bill of lading contains express provisions to the effect that any dispute thereunder shall be decided in Yugoslavia, according to Yugoslavian Law. It also provides that the shipowners shall not be liable for any deviation during the voyage and that so long as the cargo was forwarded, as soon as practicable, the carrier is not to be held liable for any delay.

(3) On the balance of convenience, considering all circumstances of the case, especially the attendance of witnesses from Eritrea and Yugoslavia, the Court, exercising its discretionary powers under the rule (0. 16, r. 9) in favour of the defendants, should discontinue the proceedings.

Section 19 of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) provides :

" The High Court shall, . , have exclusive original jurisdiction.—

(*a*) as a Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day " (*i.e.* the 16th August, 1960).

The High Court in its Admiralty Jurisdiction in considering whether it had jurisdiction to entertain the action and whether it was a proper case for determination in Cyprus and for service on the defendants out of jurisdiction :—

Held, (1) the Admiralty Court of the Republic, is vested with the powers prescribed in section 19 (*a*) of the Courts of Justice Law, 1960, that is to say, the powers exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day. These are the powers in Part I of the Administration of Justice Act, 1956, section 1 (1) (*g*) and (*h*) of which, cover precisely this kind of claims.

(2) I, therefore, take the view that the case referred to by learned counsel for the defendants, relating to claims on contract in the King's Bench Division of the High Court, have no bearing on the question of jurisdiction in this case. And, with all respect, I find it unnecessary to deal with them.

(3) Regarding the question whether it is a proper case for determination in Cyprus and for service on the defendants, out of the jurisdiction, I have here a claim by a merchant, living and trading within the jurisdiction of this Court, who, having acquired goods of considerable value abroad, arranges for their transport to this country. The defendants' shipowners through their agents abroad, agree and undertake to carry the goods on one of their ships from the country of the goods' origin to that of their destination. Presumably this was to be done in defendants' ordinary business as sea-carriers,

handling part of this country's trade. The goods are carried on defendants' ship and are eventually delivered in Cyprus to plaintiffs' order.

(4) In connection with that carriage, the plaintiffs as cargo-owners make the claim in this action and have the defendants served with notice of the claim. The defendants now appearing under protest, apply that the service of notice upon them be set aside mainly on the ground that their contract with the plaintiffs takes the claim out of the Court's jurisdiction ; and that in any event, it is not convenient for them to have this claim heard and determined in Cyprus.

(5) As to the first part of the defendants' contention, on the material on record, it seems to me that it is rather a matter of defence than one of jurisdiction. The plaintiffs make their claim on a contract which the defendants dispute, alleging a different contract, part of which, they say, is that the claim must be decided in Yugoslavia, according to Yugoslavian Law ; the plaintiffs deny that such was the agreement. It is not for me in this application to determine the dispute on this point. Nor is it necessary for me to say, at this stage, that, subject to relevant legal considerations, the Courts are generally inclined to pin litigants to their contracts in due course.

(6) If the plaintiffs have in fact knowingly agreed that disputes arising from their contract should be referred to arbitration ; or to a foreign tribunal ; or shall be determined according to the law of a foreign country, " there is no indisposition on the part of the courts in this country (To use Lord Hodson's words in the *Fehmarn's* case, *infra*) to give effect to such a bargain ". But, before doing so, the Court must be satisfied that that was indeed the parties' bargain. If it can be shown, for instance, that the words " LINER TERMS " on the bill of lading in this case, which were obviously made part of the contract, mean in the usage of trade known to both parties, what the defendants allege to be their contract, the resulting position may be different to that resulting from one of the small type conditions printed on the back of a bill of lading never actually brought to the notice of the parties ; a bill of lading intended to embody a contract already made without any such condition. I must not be taken as actually dealing with the dispute in this case by the reference I have just made to exhibit 1 by way of example. As I have already said, it is

for the trial Judge to deal with these matters in due course in the light of the evidence before him and of the submissions made thereon ; and not for me to deal with them at this stage.

(7) As to the part of the defendants' contention regarding convenience, I have no hesitation, in the circumstances of this case, as to the direction where I should exercise my discretion. The judgments of the three eminent Lord Justices of the Court of Appeal in *Fehmarn's* case ((1958) 1 All E.R. p. 333) are so lucid and helpful on this point if I may say so with all respect, that my task becomes, in this case, much easier. *Fehmarn's* case governs, in my opinion, the substance of the matter for decision now before me. And I have already stated the reasons for which I am inclined to the view that the plaintiffs have an arguable cause in this action.

(8) Defendants' application to set aside the service of notice of the writ upon them, will therefore, be refused.

Application to set aside the service of the writ refused with costs in cause.

Cases referred to :

Westcott & Lawrence v. *The Municipality of Limassol* 22 C.L.R. 193 ;

The Metamorphosis (1953) 1 All E.R. 723 at p. 728 ;

The Carpantina S. A. v. *P. Ioannou & Co.* 18 C.L.R. 30 ;

Nivogosian v. *The Phoceenne SS. Co.* 7 C.L.R. p. 51 ;

Vittervice Horni etc. v. *Korner* (1951) A.C. 869 ; (1951) 2 All E.R. 334 ;

Ottoman Bank v. *Dascalopoulos* 14 C.L.R. 227 ;

The Fehmarn (1958) 1 All E.R., 333.

Admiralty Action.

Application for an order that the writ of summons issued in the action, the order giving leave for the issue and service thereof out of the jurisdiction (in Yugoslavia) and the service made out of the jurisdiction (in Yugoslavia) be set aside.

J. P. Potamitis for the applicant-defendant.

Chr. Mitsides for the respondent-plaintiff.

Cur. adv. vult.

The facts sufficiently appear in the judgment of VASSILIADES, J..

The defendants in this action, described in the summons as a shipping company, are Yugoslavian shipowners. Their advocate, Mr. J. Potamitis, described them as a Yugoslavian firm, carrying on business at Split. One of defendants' ships, the " Zenica ", carried goods belonging to the plaintiffs, from the port of Massawa in Eritrea to Cyprus. In connection with the transport of those goods, the plaintiffs claim against the defendants as carriers, £12,330 damages for delay ; and, in addition, they claim damages for misrepresentation.

By leave of this Court, obtained by the plaintiffs *ex parte* in July last year, the defendants were served with notice of the writ and other relevant documents, in November last, at their place of business in Yugoslavia, through the appropriate Consular Authorities. On the 5th January, 1963, they entered by leave obtained in due course, a conditional appearance through their advocate ; and on the same day the defendants filed an application under O. 16, r. 9 (and O. 6) for an order to set aside the proceedings taken under plaintiffs' writ, and the service of the notice effected upon them out of jurisdiction. Affidavits were filed on both sides, in support and in opposition of defendants' application ; and counsel were heard in due course on the merits of the application.

The grounds on which learned counsel for the defendants argued his clients' case may be summarised in three parts :

1. That the courts of Cyprus have no jurisdiction to entertain the claim. The contract between the parties embodied in the bill of lading, was made abroad ; the alleged breach (the delay), if any, must have occurred outside Cyprus ; and the defendants, who are a foreign firm, do not reside or carry on business within the jurisdiction.

2. The plaintiffs have not shown a probable cause of action and the order under which service was effected, out of jurisdiction, should not have been granted. The bill of lading contains express provisions to the effect that any dispute thereunder shall be decided in Yugoslavia, according to Yugoslavian Law. It also provides that the shipowners shall not be liable for any deviation during the voyage and that so long as the cargo was forwarded, as soon as practicable, the carrier is not to be held liable for any delay.

3. On the balance of convenience, considering all circumstances of the case, especially the attendance of witnesses

from Eritrea and Yugoslavia, the Court, exercising its discretionary powers under the rule (O. 16, r. 9) in favour of the defendants, should discontinue the proceedings.

In support of the application, learned counsel referred to a photostat copy of the bill of lading (put in by consent, as exhibit 1) ; and particularly to conditions 3, 5 and 6 printed on the back thereof. He also referred to a number of cases including *Westcott* & *Lawrence* v. *The Municipality of Limassol* (22, C.L.R., p. 193); *The Metamorphosis* case ((1953) 1 All E.R., p. 723 at p. 728); *The Carpantina S.A.* v. *P. Ioannou & Co.* (18, C.L.R., p. 30) ; and others to which I shall only refer, as far as necessary for deciding the present application.

Learned counsel for the respondent-plaintiffs, on the other hand, contended that the jurisdiction of the Court, deriving from section 19 (*a*) of the Courts of Justice Law, 1960, must be sought in Part I of the Administration of Justice Act, 1956, as in force " on the day immediately preceding Independence Day ". And that plaintiffs' claim in this action, being a claim under section 1 (1) (*g*) and (*h*) of the Act, clearly falls within the jurisdiction of the Court. Counsel then, referring to the material in the affidavits filed in this proceeding, and particularly to the circumstances under which the goods were put on defendants' ship, contended that the plaintiffs were entitled to have recourse to this Court. And that having shown by their affidavits and the documents referred to therein, that they had " a good arguable case " the plaintiffs were justified in obtaining leave for service abroad ; and are now entitled to pursue their claim.

In support of his contention, counsel referred to several cases including *Nivogosian* v. *The Phocéenne SS. Co.* (7, C.L.R., p. 51) ; *Vitiervice Horni, etc.*, v. *Korner* (1951, A.C. 869; (1951), 2 All E.R. 334); *Ottoman Bank* v. *Dascalopoulos* (14 C.L.R., 227); *The Fehmarn* ((1958) 1 All E.R., 333). I shall likewise refer to these cases only as far as necessary for deciding defendants' application.

The material facts may be summarised as follows :

The plaintiffs, a well known firm of importers, residing and carrying on business in Nicosia, Cyprus, acquired a consignment of five thousand cartons of tinned boiled beef (240,000 tins) at Eritrea for shipment to Cyprus. The Messagerie Africa S/A, a firm at Asmara, appear to have instructed the Messagerie Eritrée S/A, presumably another

firm of Asmara, to ship the goods in question on defendants' ship " Zenica " for Famagusta, Cyprus. The instructions for shipment were in writing and they appear on the photostat copy of the form marked " A ", referred to in paragraph 7 of the affidavit filed on behalf of the plaintiffs on 19th January, 1963.

The Messagerie Eritree S/A, shipped the goods at the port of Massawa, obtaining a bill of lading issued by defendants' agents Contomichalos Sons Red Sea Ltd., on 14th January, 1960, a photostat copy of which was put in evidence by consent, as exhibit 1.

According to this bill of lading, the goods were put on board the " Zenica " at Massawa, for transport to Cyprus and discharge at Famagusta/Limassol (at ship's option), consigned to the National Bank of Greece, Nicosia, for the plaintiffs who were to be duly notified as well. The goods were to be carried under deck, on " LINER TERMS ", freight prepaid at Asmara. In addition to these terms which were clearly typed on the face of the bill together with a full description of the goods, there appear printed on the back of the bill, under the heading " Company's Standard Conditions " seventeen different clauses in such a small type, that it can hardly be read without the help of a magnifying glass. One of these clauses (cl. 3) reads :—

> " 3. Jurisdiction. Any dispute arising under this Bill of lading to be decided in Yugoslavia according to Yugoslavian Law."

And another (clause 6, last part, about the middle of the page) provides :

> " The cargo shall be forwarded as soon as practicable but the carrier shall not be liable for any delay."

According to paragraph 5 of the affidavit filed on behalf of the plaintiffs on the 4th July, 1962, in support of the application for service out of jurisdiction, the goods " reached Cyprus about the middle of March, 1960, when the season for the sale of these goods had passed ". There is no other evidence, so far, as to the exact arrival of the ship to Cyprus. The bill of lading, which was apparently sent to the consignee of the goods together with other relevant documents, was endorsed by the National Bank of Greece S/A, Nicosia, to the order of the plaintiffs, on the 31st March, 1960, and the goods were delivered to plaintiffs' clearing agents.

Upon the allegation that defendants, through their agents at Eritrea, agreed to carry the goods to Cyprus " within a reasonable time " which was understood to be " by the end

of January, 1960 ", and that the plaintiffs were induced to have the goods shipped on defendants' said ship on the representations made by the latter's agents at Eritrea, the plaintiffs' complain for breach of contract by the defendants causing the plaintiffs damage for which they now make the claim in the action.

I must confess that at this early stage in the proceedings, I find it rather difficult to understand clearly the claim. But this does not matter now. There is a claim for over twelve thousand pounds damages, arising from the carriage of plaintiffs' goods on defendants' ship. The question for decision at this stage, in my opinion, is :

(*a*) Whether this Court has jurisdiction to entertain the action ; and

(*b*) if yes, whether this is a proper case for determination in Cyprus and for service on the defendants out of jurisdiction.

The answer to the first part of the question seems to me clear from the statutory provisions governing this Court's jurisdiction. As the Admiralty Court of the Republic, it is vested with the powers prescribed in section 19 (*a*) of the Courts of Justice Law, 1960, that is to say, the powers exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day. These are the powers in Part I of the Administration of Justice Act, 1956, section 1 (1) (*g*) and (*h*) of which, cover precisely this kind of claims.

I, therefore, take the view that the cases referred to by learned counsel for the defendants, relating to claims on contract in the King's Bench Division of the High Court, have no bearing on the question of jurisdiction in this case. And, with all respect, I find it unnecessary to deal with them.

As to the second part of the question, I have here a claim by a merchant, living and trading within the jurisdiction of this Court, who, having acquired goods of considerable value abroad, arranges for their transport to this Country. The defendant shipowners through their agents abroad, agree and undertake to carry the goods on one of their ships from the country of the goods' origin to that of their destination. Presumably this was to be done in defendants' ordinary business as sea-carriers, handling part of this country's trade. The goods are carried on defendants' ship and are eventually delivered in Cyprus to plaintiffs' order. In connection with that carriage, the plaintiffs as cargo-

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March 2,
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owners make the claim in this action and have the defendants served with notice of the claim. The defendants now appearing under protest, apply that the service of notice upon them be set aside mainly on the ground that their contract with the plaintiffs takes the claim out of the Court's jurisdiction; and that in any event, it is not convenient for them to have this claim heard and determined in Cyprus.

As to the first part of the defendants' contention, on the material on record, it seems to me that it is rather a matter of defence than one of jurisdiction. The plaintiffs make their claim on a contract which the defendants dispute, alleging a different contract, part of which, they say, is that the claim must be decided in Yugoslavia, according to Yugoslavian Law; the plaintiffs deny that such was the agreement. It is not for me in this application to determine the dispute on this point. Nor is it necessary for me to say, at this stage, that, subject to relevant legal considerations, the Courts are generally inclined to pin litigants to their contracts in due course.

If the plaintiffs have in fact knowingly agreed that disputes arising from their contract should be referred to arbitration ; or to a foreign tribunal ; or shall be determined according to the Law of a foreign country, " there is no indisposition on the part of the courts in this country (to use Lord Hodson's words in the *Fehmarn* case, *infra*) to give effect to such a bargain ". But, before doing so, the Court must be satisfied that that was indeed the parties' bargain. If it can be shown, for instance, that the words " LINER TERMS " on the bill of lading in this case, which were obviously made part of the contract, mean in the usage of trade known to both parties, what the defendants allege to be their contract, the resulting position may be different to that resulting from one of the small type conditions printed on the back of a bill of lading, never actually brought to the notice of the parties; a bill of lading intended to embody a contract already made without any such condition. I must not be taken as actually dealing with the dispute in this case by the reference I have just made to exhibit 1 by way of example. As I have already said, it is for the trial Judge to deal with these matters in due course in the light of the evidence before him and of the submissions made thereon ; and not for me to deal with them at this stage.

As to the part of the defendants' contention regarding convenience, I have no hesitation, in the circumstances of this case, as to the direction where I should exercise my

discretion. The judgments of the three eminent Lord Justices of the Court of Appeal in *Fehmarn's* (1958) 1 All E.R., p. 333 are so lucid and helpful on this point, if I may say so with all respect, that my task becomes, in this case, much easier. *Fehmarn's* case governs, in my opinion, the substance of the matter for decision now before me. And I have already stated the reasons for which I am inclined to the view that the plaintiffs have an arguable cause in this action.

Defendants' application to set aside the service of notice of the writ upon them, will, therefore, be refused. With costs in cause.

Application to set aside the service of the writ refused with costs in cause.