1975
Oct. 30

NATIONAL BANK OF GREECE

v.

N. I. DROUSHIOTIS (IMPORTS-EXPORTS) CO. LTD.

[TRIANTAFYLLIDES, P., STAVRINIDES, MALACHTOS, JJ.]

NATIONAL BANK OF GREECE,

Appellants-Plaintiffs,

v.

N. I. DROUSHIOTIS (IMPORTS-EXPORTS) CO. LTD.,

Respondents-Defendants.

(Civil Appeal No. 5118).

Bill of Exchange—Notice of dishonour—Waiver—Drawers knew all along that bill dishonoured—And they were aware of the circumstances in which it had not been paid—Not complained about absence of notice of dishonour in their letter to plaintiffs in which they put forward a number of other complaints—Trial Court ought to have inferred from drawers' conduct implied waiver on their part of the requirement of notice of dishonour—Sections 48 and 50(2)(b) of the Bills of Exchange Law, Cap. 262.

Waiver—Meaning of.

Bill of Exchange—Notice of dishonour—Waiver—Very slight evidence may suffice for waiver of notice of dishonour to be implied.

The appellants complain against the dismissal of an action in which they claimed £2,000 from the respondents, on the basis of a bill of exchange.

The said bill was made payable on September 3, 1968, and was drawn by the respondents on an English Company (to be referred to hereafter as "Joel Ltd.") on March 4, 1968, pursuant to an export agreement.

The bill was discounted by the respondents with the appellants, at one of their branches in London. When the bill was presented for payment it was dishonoured, and four months later Joel Ltd. went into liquidation.

On September 11, 1968, the appellant's branch in London wrote a letter to the respondents informing them of the fact that the bill had been returned unpaid and asking for their instructions; to this letter there was

attached a copy of letter dated September 9, 1968, which had been written by Joel Ltd. to a branch of the Midland Bank Ltd. in London; in such letter it was stated that the refusal to honour the bill on maturity was justified because, allegedly, the said export agreement had not been duly implemented, and it was proposed that the payment off of the bill should be postponed till December 31, 1968.

As for about two years there was no reply from the respondents, on July 30, 1970, the appellants' London branch wrote both to Joel Ltd. and to the respondents demanding payment of what was due under the bill and threatening legal proceedings. To this letter a reply was given by the respondents, on August 19, 1970, in which they put forward a number of a complaints (such as that no proceedings had been taken by the appellants against Joel Ltd.); but they did not complain that no notice of dishonour had been given to them, nor did they contend that on this ground they had been discharged of their relevant liability.

The issue on which the outcome of the appeal depended was whether or not, since no notice of dishonour of the bill was given, as required under section 48 of the Bills of Exchange Law, Cap. 262, the respondents have been, for this reason, discharged from their liability to pay the amount due to the appellants under the bill.

Appellants' contention was that the respondents ought to have been found by the trial Court liable to pay the said amount, because the failure by the appellants to give them notice of dishonour of the bill was impliedly waived, under section 50(2)(b) of Cap. 262 (*supra*).

Held, 1. Very slight evidence may suffice for waiver of notice of dishonour to be implied. (See *Lombard Banking Ltd.* v. *Central Garage and Egineering Co., Ltd., and Others* [1962] 2 All E.R. 949 at pp. 955, 956 and Byles on Bills of Exchange, 23rd ed. p. 152).

2. As the respondents knew, all along, right from the beginning, that the bill in question had not been honoured, being aware, also, of the exact circumstances in which it had not been paid, and as they, nevertheless,

by their letter of August 19, 1970, in which they put forward a number of other complaints (such as that no proceedings had been taken by the appellants against Joel Ltd.), did not complain that no notice of dishonour had been given to them, nor did they contend that on this ground they had been discharged of their relevant liability, the trial Court ought to have inferred from their conduct implied waiver on their part of the requirement for notice of dishonour, and ought, consequently, to have found them liable to satisfy the claim of the appellants on the basis of the bill.

Appeal allowed.

Cases referred to :

Ross T. Smyth & Co. Ltd. v. *T. D. Bailey, Son & Co.* [1940] 3 All E.R. 60 at p. 70;

Banning v. *Wright (Inspector of Taxes)* [1972] 2 All E.R. 987 at pp. 998, 1000;

Lombard Banking Ltd. v. *Central Garage and Engineering Co. Ltd. and Others* [1962] 2 All E.R. 949 at pp. 955, 956;

Loucaides v. *C. D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134, at p. 140.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Famagusta (Georghiou, P.D.C. and S. Demetriou, D.J.) dated the 18th September, 1972, (Action No. 588/71) dismissing their action for the sum of £2,000.- with interest thereon at 9% as from 3.9.1968 due under a bill of exchange.

P. Cacoyiannis, for the appellants.

Chr. Demetriades, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by :

TRIANTAFYLLIDES, P. : This is an appeal against the judgment dismissing an action in which the appellants claimed from the respondents £2,000, with interest at

9% as from September 3, 1968, on the basis of a bill of exchange.

This bill, which was made payable on September 3, 1968, was drawn by the respondents on an English company, L.B. Clarke and R. Joel Ltd. (to be referred to hereafter as "Joel Ltd."), on March 4, 1968, pursuant to an agreement between the respondents and the English company for the export from Cyprus to England of melons.

The bill was discounted by the respondents with the appellants, at one of their branches in London; and this branch of appellants wrote in this connection a letter to the respondents on March 6, 1968; the letter was addressed to them c/o Messrs. A. Phylactou Ltd., a company in London which had acted as the intermediary for the conclusion of the said agreement for the export of melons.

When the bill was presented for payment it was dishonoured, and four months later Joel Ltd. went into liquidation.

On September 11, 1968, the appellants' branch in London wrote to the respondents a letter, again through Phylactou Ltd., informing them of the fact that the bill had been returned unpaid and asking for their instructions; to this letter there was attached a copy of letter dated September 9, 1968, which had been written by Joel Ltd. to a branch of the Midland Bank Ltd. in London (which, apparently, had acted as the collecting bank); in such letter it was stated that the refusal to honour the bill on maturity was justified because, allegedly, the aforementioned export agreement had not been duly implemented, and it was proposed that the payment off of the bill should be postponed till December 31, 1968. Joel Ltd. had attached to their said letter of September 9, 1968, a copy of the agreement which was concluded between them and the respondents in relation to the melons.

On September 16, 1968, Phylactou Ltd. informed the appellants' branch in London that the said letter of September 11, 1968, had been forwarded to the respondents for their comments and instructions.

As for about two years there was no reply from the respondents, on July 3, 1970, the appellants' London branch wrote both to Joel Ltd. and to the respondents (again through Phylactou Ltd. in London) demanding payment of what was due under the bill of exchange concerned and threatening legal proceedings. To this letter a reply was given by the respondents, on August 19, 1970, which it is useful to set out in full in this judgment; it reads as follows :-

"Your letter of the 30th July, 1970 has just been received by us through Messrs. A. Phylactou Ltd. This letter of yours refers to the above matter and we are much surprised of its contents and your information that the said draft is still unpaid.

We cannot understand the reason why, after the refusal by the acceptors to pay this draft on the 3rd September, 1968 you did not proceed against them for collection of the money due to you, but contrary you gave faith to their allegations as these have been outlined in their letter to the Midland Bank Ltd., dated the 9th September, 1968, and by which letter the acceptors have been suggesting that this draft be left over until the 31st December, 1968, although they knew that their company was destined for liquidation in a months time after the date of their letter to the Midland Bank.

If on the other hand you should have insisted at maturity of the draft to collect the amount due, and before the acceptors company be winded up, then you could urge payment so avoiding further complications and are nowadays being known to us after the lapse of nearly two whole years.

We also wonder about the fate of this draft on the date that assets and liabilities of the firm L.B. Clarke & R. Joel Ltd., were taken over by Messrs. Rowe & Company (Cornwall) Ltd., Cardew, Redruth, Cornwall, and are of the opinion that this matter should have been taken up as well and the draft settled.

Since such a long time has elapsed, we now request you to investigate in this matter and let us know

the reasons why the liquidators and or the new buyers of the acceptors' company did not take up this matter for settlement of the draft in question. At the same time we would like to know of the steps taken by you for the recovering of the drafts amount."

It is quite obvious from the contents of the above letter that the letter of the appellants' London branch, of September 11, 1968 (with the documents attached thereto, as aforesaid), which has been addressed to the respondents through Phylactou Ltd., had been duly received by the respondents.

One of the reasons for which the trial court dismissed the appellants' claim against the respondents was that it took the view that it had not been proved clearly that the bill of exchange had been presented for payment; but, at the hearing of this appeal, counsel for the respondents, acting fairly, and rightly, in our view, conceded that the relevant part of the judgment of the court below could not be supported as correct, because on the basis of the totality of the material on record, and in the absence of any evidence to the contrary, it ought to have been inferred that the bill was duly presented for payment on the date of its maturity.

The issue on which the outcome of this appeal depends is whether or not, since no notice of dishonour of the bill was given, as required under section 48 of the Bills of Exchange Law, Cap. 262, the respondents have been, for this reason, discharged from their liability to pay the amount due to the appellants under the bill; according to the appellants' contention the respondents ought to have been found by the trial court liable to pay the said amount, because the failure by the appellants to give them notice of dishonour of the bill was impliedly waived, under section 50(2)(b) of Cap. 262.

Our law on this point is the same as that of England; our own statutory provisions in Cap. 262, being, practically, identical in all material respects, with the Bills of Exchange Act, 1882 (see, further, Halsbury's Laws of England, 4th ed., vol. 4, para. 436, p. 194).

It has been contended by counsel for the respondents

that the alleged waiver was not duly pleaded; and reliance has been placed, in this respect, by him on *Loucaides* v. *C. D. Hay & Sons Ltd* (1971) 1 C.L.R. 134, 140.

Having perused the reply to the defence, filed by counsel for the appellants, we are of the view that there has been sufficiently pleaded a waiver of the notice of dishonour, to be implied from the letter of the respondent dated August 19, 1970; therefore, on the basis of the pleadings the appellants were entitled to contend that there was implied waiver.

Waiver has been dealt with in, *inter alia*, *Ross T. Smyth & Co. Ltd.* v. *T. D. Bailey, Son & Co.* [1940] 3 All E.R. 60, where (at p. 70) Lord Wright stated the following :-

> "The word 'waiver' is a vague term used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase, he claims in assumpsit and waives the tort. It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by laches."

The above dictum of Lord Wright was cited with approval in *Banning* v. *Wright (Inspector of Taxes)* [1972] 2 All E.R. 987, 998, 1000.

As it appears from Chalmers on Bills of Exchange, 13th ed., p. 165, and Byles on Bills of Exchange, 23rd ed., p. 152, very slight evidence may suffice for waiver of notice of dishonour to be implied.

Such view is based on *Lombard Banking, Ltd.* v. *Central Garage and Engineering Co. Ltd. and Others* [1962] 2 All E.R. 949, where (at pp. 955, 956) Scarman, J said the following :-

> "The authorities to which I have been referred show that the courts have been ready to infer waiver from very slight evidence. In the present case, the

evidence of waiver consists of conduct after action brought from which it is sought to infer waiver made before action brought. If there was a failure to give notice of dishonour in due time, every fact pertinent to that failure was known to the second defendant; he was also very well aware, even before the plaintiffs themselves knew, of the fact and of the reasons for dishonour. I find it inconceivable that, if he had not waived the requirement of due notice, on the facts of this particular case the merest technicality, he would not have taken the point when he was seeking, under legal advice, leave to defend the action. I have, therefore, reached the view that, if notice of dishonour was not duly given, the second defendant had on behalf of himself and his wife, before action brought, waived the requirement of due notice."

In the light of the foregoing we are of the opinion that, as the respondents knew, all along, right from the very beginning, that the bill in question had not been honoured, being aware, also, of the exact circumstances in which it had not been paid, and as they, nevertheless, by their letter of August 19, 1970, in which they put forward a number of other complaints (such as that no proceedings had been taken by the appellants against Joel Ltd.) did not complain that no notice of dishonour had been given to them, nor did they contend that on this ground they had been discharged of their relevant liability, the trial court ought to have inferred from their conduct implied waiver on their part of the requirement for notice of dishonour, and ought, consequently, to have found them liable to satisfy the claim of the appellants on the basis of the bill.

For the above reasons this appeal is allowed; and judgment is given in favour of the appellants as per their claim in the action, with costs both at the trial and in the appeal.

Appeal allowed with costs.