[L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, JJ.]

LOUKIS G. LEONIDOU AND ANOTHER,

Appellants-defendants,

v.

OMIROS N. KOURRIS,

Respondent-Plaintiff.

(*Civil Appeal No.* 4929).

Contract—Performance—Impossibility—Section 56 of the Contract Law, Cap. 149—Nothing in our law preventing parties to a contract from effectively providing that a specific supervening event shall not frustrate the contract—Or expressly providing that the risk of supervening events shall be borne by one of them and not by the other—Contract for sale of land—Clause for payment of damages in case sub-division into building sites was not approved by the Appropriate Authority—To be narrowly construed—It includes the case where sub-division could not be approved on account of inadequate water supply—Seller liable in damages—Measure of damages.

Damages—Breach of contract for sale of land—Measure of damages.

By a written contract dated the 27th November, 1956 entered into between the parties to these proceedings, the appellants-defendants agreed to sell to the respondent-plaintiff at the price of £200, an approved building site which the latter would choose from the sites into which the appellants were intending to sub-divide a piece of land, belonging to them, at Strovolos. The appellants further agreed to take the necessary steps for the sub-division of the property and the issue of title deeds and to transfer and register the site chosen into the respondent's name within two years. Clause 4 of the contract provided that "in case the sub-division of the field into building sites is not approved by the appropriate authority, then the responsibility of the owners shall not cease to exist and they shall be obliged to pay to the buyer the sum of £200.- which he paid and also legal damages"; and clause 5 provided that if the owners refused to transfer the agreed building site after the issue of the title deeds within two years they were obliged

to pay to the purchaser legal damages in addition to the purchase price of £200.

As the division of the property in question into building sites could not be effected during the agreed period the validity of the original contract was extented on five occasions by agreements in writing. The last agreement was signed on the 31st October, 1967 and the validity of the contract was extended up to the 26th November, 1968.

In April, 1970 the appellants were informed that their property could not be sub-divided into building sites because it was situated outside the greater Nicosia Water Supply Area and the supply of water to them was impossible.

The respondent (purchaser) sued the appellants for damages and the trial Court awarded to him £3,500 being £3,300 as damages for breach of contract and £200 the purchase price. In determining the question of damages the trial Court proceeded on the basis that the appropriate measure of damages was the difference between the sale price and the market price of a building site in the area at the time fixed by the parties for the completion of the contract.

Upon appeal by the defendants (sellers) counsel appearing for them mainly contended:

(a) That the contract was *void ab initio* on the ground that it was impossible to perform as it was outside the greater Nicosia supply area where the contract was signed;

(b) that the contract was void as its performance became impossible after the first unsuccessful efforts were made by the appellants to secure the division of the property;

(c) that the respondent was not entitled to any damages and in any event, the damages should be calculated on the basis of £1000.- per donum, the price of land in the area undivided and without water in 1970.

Section 56(1) and (2) of the Contract Law, Cap. 149 provides as follows:

"56(1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

Held, (1) that the doctrine of frustration is not concerned with initial impossibility which may render a contract *void ab initio* as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement (see Chitty on Contracts, General Principles, 23rd ed. para. 1261).

(2) That looking at the contract in question, which related to property situated outside the Greater Nicosia Water Supply Area, it cannot be said that it was *void ab initio* being impossible to perform according to existing scientific knowledge and achievement.

(3) That there is nothing in our Law that prevents parties to a contract from effectively providing that a specific supervening event shall not frustrate the contract or expressly provide that the risk of supervening events shall be borne by one of them and not by the other; that in such cases a clause of such a nature should be narrowly construed; that however narrow a construction may be given to the said clause 4 it certainly includes the case where on account of not receiving adequate water supply the sub division of the property could not be approved; that the parties had made clear provision as to their rights and obligations in case the eventuality of the non-approval by the Appropriate Authority of the sub-division of the field into building sites would occur and that, accordingly, the contentions of counsel on this issue will be dismissed (pp. 268-270 *post*).

(4) That the measure of damages is the difference between the purchase price and the market price that an approved comparable building site fetches at the time of the breach and the existence of an approved building site presupposes, among other things provided by law, adequate water supply; and that, accordingly, the contention of counsel that damages should be calculated on the basis of £1,000 per donum the value of undivided land without water, will be dismissed.

Appeal dismissed.

Cases referred to:

Budgett & Co. v. Binnington & Co. [1891] 1 Q.B. 35;

Metropolitan Water Board v. Dick, Kerr & Co. [1918] A.C. 119.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Mavrommatis and Vakis, D.JJ.) dated the 27th June, 1970, (Action No. 860/69) whereby the defendants were adjudged to pay £3,500.- as damages for breach of a contract for the sale of a building site.

L. Papaphilippou, for the appellants.

Ch. Loizou, for the respondent.

Cur. adv. vult.

L. LOIZOU, J.: Mr. Justice A. Loizou will deliver the judgment of the Court.

A. LOIZOU, J.: This is an appeal from the judgment of the District Court of Nicosia, by which the appellants were adjudged to pay £3,500—being £3,300 as damages for breach of contract for the sale of a building site and £200 its purchase price—and the costs.

The uncontested facts of the case are as follows:-

The appellants were the owners of a piece of land under Reg. No. E4 F/B 21/53W2, Block 4, at Strovolos, locality "Ayidemetitika".

By a written contract dated the 27th November, 1956 entered into between the parties to the present proceedings, the appellants agreed to sell and the respondent purchased an approved building site which the latter would choose from the sites into which the appellants were intending to sub-divide the aforesaid property. The purchase price which was paid upon the signing of the contract, was £200. The appellants undertook thereby that they would take the necessary steps for the sub-division of the property and the issue of title deeds as soon as possible and to transfer and register the site chosen into the respondent's name. By term 3 of the said contract, a period of two years from the signing of the said contract was allowed to

appellants for the sub-division of the land, the issue of the title deeds and the transfer of the building sites. Its term 4, the meaning and effect of which has great significance for the purposes of this appeal, reads as follows:-

> "In case the sub-division of the field into building sites is not approved by the appropriate authority, then the responsibility of the owners shall not cease to exist and they shall be obliged to pay to the buyer the sum of £200.- which he paid and also legal damages".

Lastly, term 5 provided that if the owners refused to transfer the agreed building site after the issue of the title deeds within two years the specified period from the signing of the agreement, then they were obliged to pay to the respondent legal damages in addition to the purchase price of £200.-

As the division of the property in question into building sites could not be effected during the agreed period, by an agreement in writing dated the 23rd October, 1958, which the parties described as "an additional term of the agreement", the validity of the original contract was extended for another period of two years as from its expiration on the 26th November, 1958 and the appellants undertook to take all necessary steps for the sub-division of the property into building sites so that they would be able to transfer the property they sold not later than the 26th November, 1960.

The guarantor of the original agreement was aware of the said extension and agreed to continue being the guarantor of the owners until the transfer of the building side and/or payment of any sum by virtue of the said contract of sale.

By subsequent agreements dated 6.9.1960, 18.9.1962, 4.9.1964 and 31.10.1967, the performance of the contract of sale was extended up to the 26th November, 1968 the guarantor always agreeing to such extension of time.

The appellants on the 4th March, 1970, applied for the sub-division of their property, but the District Officer of Nicosia, as the appropriate officer under the Streets and

Buldings Regulation Law, Cap. 96, informed them by letter dated the 24th March, 1970, (*exhibit* 5), that he could not entertain their application for the sub-division of the property in question into building sites, unless and until a certificate by the Director of the Water Development Department was produced, to the effect that permanent water supply was secured in respect of the proposed building sites, that its quantity amounted to 200 gallons per day for each building site and information was given about its bacteriological quality.

On the 3rd of April, 1970 the Director of the Water Development Department, informed the appellants by letter (*exhibit* 4) that as their property was outside the greater Nicosia Water Supply Area, the supply of water to them was impossible.

The grounds of law upon which this appeal has been argued, are the following:-

(a) That the said contract was *void ab initio* on the ground that it was impossible to perform as it was outside the greater Nicosia supply area where the contract was signed;

(b) that the contract was void as its performance became impossible after the first unsuccessful efforts were made by the appellants to secure the division of the property;

(c) that all renewals were void or unenforceable being an undertaking to do an act impossible in itself and in any event they did not contain a renewal of clause 4, but only of the obligation to transfer and register the property in the event the division was possible, and

(d) that the respondent was not entitled to any damages and in any event, the damages should be calculated on the basis of £1000.- per donum, the price of land in the area undivided and without water in 1970.

The trial Court found that the performance of the agreement had become impossible through no fault of the appellants and went on to consider the question whether clause 4 of the contract, formed a special provision in the agreement contracting out impossibility as a defence, and

relied on the statement of the law, as appearing in McElroy's Impossibility of Performance, 1941 Edition, p. 59 which reads:-

> "The parties to a contract may, of course, contract out of the above four principles, so making their contract absolute in the literal sense of the word. Or, of course, they may add to them by making express provision for certain contingencies. But the courts seem on some occasions to have been a little slow to hold that the specific wording of the contract operated to restrict or extend the ordinary exceptions recognized by Law".

It then concluded that the contract in question, in view of the clear and unambiguous provision of clause 4 thereof fell within the so-called class of "absolute contracts" or "contracts of strict liability", as the reasonable construction to be given to clause 4 was that the defendants expressly undertook that in case they should not obtain the approval for the sub-division of the land, they would still be liable in damages.

The first three grounds of appeal hereinabove set out may conveniently be taken together. The relevant provision of our Law, is to be found in section 56 of the Contract Law, Cap. 149, which, in so far as material, reads:-

> "56(1) An agreement to do an act impossible in itself is void.
>
> (2) A contract to do an act which, after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent unlawful, becomes void when the act becomes impossible or unlawful.
>
> (3) ....."

The result of the first sub-section is the same as in England. As pointed out in Pollock and Mulla Indian Contract and Specific Relief Acts, 9th Ed. p. 394:-

> "In the Common Law we may say that parties who purport to agree for the doing of something obviously impossible must be deemed not to be serious, or not to understand what they are doing; also (but less

aptly) that the law cannot regard a promise to do something obviously impossible as of any value, and such a promise is therefore no consideration. 'Impossible in itself' seems to mean impossible in the nature of things".

The aforesaid proposition is also borne out from the following passage from Chitty on Contracts, General Principles, 23rd Ed., para. 1261—"The doctrine (of frustration) is not concerned with initial impossibility which may render a contract *void ab initio* as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement".

Looking at the contract in question which related to property situated outside the Greater Nicosia Water Supply Area, it cannot be said that it was *void ab initio* being impossible to perform "according to existing scientific knowledge and achievement".

There is nothing in our law that prevents parties to a contract from effectively providing that a specific supervening event shall not frustrate the contract or expressly provide that the risk of supervening events shall be borne by one of them and not by the other. (See *Budgett & Co. v. Binnington & Co.* [1891] 1 Q.B., 35). The exception to this rule does not concern us, as it has not been claimed that the supervening event amounts to illegality. What is, however, important in such cases, is that a clause of such nature should be narrowly construed. (See *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. 119).

In the present case considering the wording of term 4 and comparing same with that of term 5, we see that the parties made provision for two eventualities. The first one under term 4 was that the responsibility of the owners would not cease to exist and they should be obliged to pay to the buyer the purchase price and also legal damages in case the sub-division of the field into building sites was for any reason not approved by the appropriate Authority, and there is no limitation to this provision, however narrow a construction is given to it. It certainly includes the case where on account of not receiving adequate water supply, the sub-division of the property could not be ap-

proved; it was a term by which the purchaser was safeguarded against the non-transfer to him of a building site, because of the non-approval of the division of the land; the purchaser was giving his money, thus preventing himself from acquiring a building site from other sources, apparently, having in mind the steady increase in prices of building sites and expecting to be compensated for the loss of the opportunity to acquire at that moment with his £200.- a building site elsewhere. At the same time, the applicants with full knowledge of the prevailing circumstances, were prepared to make use of the respondent's money by receiving it in advance and taking the risk that in case the sub-division of their property for any reason could not be approved by the appropriate Authority, they would pay compensation and so put the purchaser in the same position as money could make it, as he would have been, had he not been deprived of the opportunity through the contract in question from buying a building site at £200.- from other sellers. In the circumstances, therefore, we find that the parties had made clear provision as to the rights and obligations of the parties in case this eventuality of the non-approval by the appropriate Authority of the sub-division of the field into building sites would occur. The second eventuality arising under term 5, does not concern us in this case.

It remains now to consider the question of damages. The trial Court in determining this question proceeded on the basis that the appropriate and only measure of damages in the case, was the difference between the sale price and the market price of a building site in the area at the time fixed by the parties for the completion of the contract; the value of such a site, according to the evidence of Mr. Mavroudhis, which the trial Court accepted, was at the end of 1968, £3,500.-. That this was the test, was also borne out by the fact that the price of £200.- was within the range of prevailing prices for sites at the time the contract was signed and this might well explain the inclusion of clause 4 which rendered the appellants liable to the same consequences as in the case of a refusal to perform a transfer after division permit was obtained.

It has been argued on behalf of the appellants that if the purchaser was entitled to any damages, same should be calculated on the basis of £1,000.- per donum, the

value of undivided land without water. We do not agree with this proposition, as the measure of damages is the difference between the purchase price and the market price that an approved comparable building site fetches at the time of the breach and the existence of an approved building site presupposes, among other things provided by law, adequate water supply.

No doubt, the breach took place at the end of 1968, 12 years after the contract was entered into, and this, inevitably, enhanced the damages; this was the result of the repeated extensions agreed upon by the appellants with the obvious intention of keeping the whole contract of sale alive, for which they ultimately had to bear the consequences.

For all the above reasons the present appeal is dismissed with costs.

Appeal dismissed with costs.